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**AN ABSENCE OF FAIRNESS...  
RESTRICTIONS ON INDUSTRIAL ACTION AND PROTEST IN THE TRADE  
UNION BILL 2015**

Michael Ford QC and Tonia Novitz\*

**Mr Barry Sheerman (Huddersfield) (Lab/Co-op):** If this is such a fair and reasonable Bill, why does the right hon. Gentleman's predecessor, Vince Cable, say that it is both "vindictive" and "unnecessary"?

**Sajid Javid:** There is a new Business Secretary in this Government and he is the one presenting this Bill.

14 September 2015, House of Commons Hansard, col. 761

**Abstract**

In July 2015, a Trade Union Bill was introduced by the incoming Conservative Government which seeks to place significant restrictions on UK trade union activity, probably in anticipation of deep budgetary cuts affecting the public sector which are likely to generate protest. The assertion has been made that this legislative proposal is fair and balanced. We contest that claim with reference to the likely effect of the measures on industrial action, pickets and protests. The consultative process was incomplete and the substantive provisions unfairly target union-organised strikes

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\* Professors, University of Bristol Law School. We are grateful to Shae McCrystal and other participants in the 'Comparative Strike Ballots workshop' hosted by the Labour Law and Relations Group at Sydney Law School in August 2015; to members of the Institute of Employment Rights who have also commented on the Bill; to Richard Arthur (at Thompsons) for information and advice; and European colleagues who are assisting us in a comparative European project on aspects of the legislation. All errors and omissions are our own.

and protests. The proposals are open to challenge on grounds of insufficient justification, impracticability of compliance and violation of fundamental civil liberties. They entail probable breach of UK obligations in respect of International Labour Organisation (ILO) standards and rights arising under the European Convention on Human Rights (ECHR) and European Social Charter (ESC). By further restricting the scope of lawful industrial action and pickets, the proposed legislation risks provoking other kinds of protest.

## 1. INTRODUCTION

In 1998, one year after their election, an incoming Labour Government offered their vision of industrial relations in a White Paper: *Fairness at Work*.<sup>1</sup> Their vision ran only to 47 pages, but offered a unified picture of ‘partnership’ in the workplace carefully managed through extensive consultation with the social partners, particularly as regards settlement on a trade union recognition procedure.<sup>2</sup> The principles were endorsed by some as emblematic of a new mode of regulation of work,<sup>3</sup> while others pointed to their potential problematic effects.<sup>4</sup> In 2015, as a (non-coalition) Conservative Government comes to power for the first time since 1997, major industrial reform is again proposed. Now the impression is less one of planning, consultation and principle, but of opportunism. The concerns are those of a Government determined to execute £12 billion in spending cuts, largely from a

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<sup>1</sup> Cm3968 (London: TSO, 1998).

<sup>2</sup> See Lord Wedderburn, ‘Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition’ (2000) 29 *Industrial Law Journal* (ILJ) 1 at 2; and B. Simpson, ‘Trade Union Recognition and the Law – A New Approach’ (2000) 29(3) *ILJ* 193.

<sup>3</sup> H. Collins, ‘Regulating the Employment Relation for Competitiveness’ (2001) 30(1) *ILJ* 17.

<sup>4</sup> Cf. P. Smith and G. Morton, ‘Nine Years of New Labour: Neoliberalism and Workers’ Rights’ (2006) 44(3) *British Journal of Industrial Relations* 401; A. Bogg, ‘New Labour, Trade Unions, and the Liberal State’ (2009) 20 *King’s Law Journal* 403; and T. Novitz and P. Skidmore, *Fairness at Work: A Critical Analysis of the Employment Relations Act 1999 and its Treatment of Collective Rights* (Oxford: Hart, 2001).

public sector where trade unions are most active.<sup>5</sup> In the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 the Coalition Government had sought to place constraints on trade union political activity and management of membership records in ways that could affect industrial action ballots. Now the Trade Union Bill 2015 ('the Bill'), the accompanying secondary legislation, and linked proposals in the consultation set out a host of provisions designed radically to diminish the right to strike, to place unique restrictions on protests organised by trade unions, and generally to reduce trade union influence.

The measures in the Bill include changes to the balloting requirements and notice provisions in Part V of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA);<sup>6</sup> further restrictions on peaceful picketing;<sup>7</sup> new rules on the political activity of trade unions, traditionally channelled through the Labour Party, requiring members to 'opt in' to a political fund;<sup>8</sup> restrictions on trade unions' facility time in the public sector (with check off also in the Government's sights);<sup>9</sup> and greater controls on trade unions by an increasingly politicised Certification Officer (CO) with new powers.<sup>10</sup> At the same time, the Government has published draft regulations to allow employers to hire agency workers to replace striking

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<sup>5</sup> Trade union membership in the private sector sits today at approximately 14% and in the public sector lies around 54%. See Department for Business Innovation and Skills (BIS), *Trade Union Membership 2014: Statistical Bulletin* (June 2015), at 5-6. For planned spending cuts, see discussion at <http://uk.reuters.com/article/2015/06/20/uk-britain-economy-cuts-idUKKBN0P00VH20150620>.

<sup>6</sup> Bill 2015, clauses 2 - 8.

<sup>7</sup> *Ibid.*, clause 9.

<sup>8</sup> *Ibid.*, clauses 11-12.

<sup>9</sup> *Ibid.*, clauses 12-13. Abolition of public sector check-off was not announced in the Bill as initially published, but in a press release issued by the Government 6.08.15: See <https://www.gov.uk/government/news/new-steps-to-tackle-taxpayer-funded-support-to-trade-unions>.

<sup>10</sup> Bill 2015, clauses 14-17.

workers,<sup>11</sup> and proposes further restrictions on protests organised by trade unions not involving traditional industrial action at the workplace but which are not (yet) in the Bill.<sup>12</sup>

Accompanying the publication of the Bill on 15 July 2015 were three different Consultation Papers: *Ballot Thresholds in Important Public Services, Hiring Agency Staff During Strike Action* and *Tackling Intimidation of Non-Striking Workers*.<sup>13</sup> The Consultation Papers were only partial in coverage. They did not invite comment on all measures, giving a sense of inevitability about measures such as changes to ballot paper requirements, additional strike notice provisions and limitation on the duration of a ballot mandate. The Online Survey forms, with carefully directed questions and limited space given in boxes for responses, did not allow much scope for expression of broader concerns or criticism of the proposals.<sup>14</sup> In some cases the Consultation Papers appeared to be trying to gather evidence to support the case for legislation, exemplified by *Tackling Intimidation of Non-Striking Workers* which asked consultees to provide evidence of intimidatory behaviour.<sup>15</sup> Nor did the Consultation Papers offer any holistic vision of the justification for change, instead making inconsistent references to a menu of assorted reasons.

Each Consultation Paper was accompanied by an individual Impact Assessment,<sup>16</sup> although these too were incomplete in their coverage.<sup>17</sup> The Government also

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<sup>11</sup> The draft regulations are annexed to the Consultation Paper, *Hiring Agency Staff During Strike Action* BIS/15/416 (2015).

<sup>12</sup> These proposals are in the Consultation Paper, *Tackling Intimidation of Non-Striking Workers* BIS/15/415 (2015), but not in clauses in the Bill.

<sup>13</sup> <https://www.gov.uk/government/collections/trade-union-bill>.

<sup>14</sup> See the frustration expressed in this respect in *Ballot Thresholds in Important Public Services: Unison submission – September 2015* ('Unison submission') (2015), at 1. Available at: [https://www.unison.org.uk/search/?tax=post\\_tag&term=2015-trade-union-bill](https://www.unison.org.uk/search/?tax=post_tag&term=2015-trade-union-bill).

<sup>15</sup> BIS/15/415, at 15.

<sup>16</sup> <https://www.gov.uk/government/collections/trade-union-bill>.

<sup>17</sup> See the discussion on Picketing and Protest below.

presented a brief *Trade Union Bill: European Convention on Human Rights (ECHR) Memorandum* which accepted that some of the measures proposed (although not all were considered) will engage a number of key human rights (in particular, Articles 6, 11, and 14 and Article 1 of Protocol 1), but denying breach in each case on the basis that the measures are justified and proportionate.<sup>18</sup> The Government relied on a wide margin of appreciation being given to the UK under Article 11, but ignored Article 10 and much relevant case-law, and failed to deal comprehensively with all the potential effects of the Bill. In this respect Liberty has commented that:

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.<sup>19</sup>

Most notably of all, compliance with ILO or ESC standards is not mentioned once in the Memorandum or the Consultation Papers.<sup>20</sup> The UK has been a member of the ILO since its establishment in 1919 and was the very first State to ratify ILO Convention No 87 on Freedom of Association and the Right to Organise (in 1949) and Convention No. 98 on the Right to Organise and Collective Bargaining (in 1950). Further, the UK ratified another key instrument adopted in the Council of Europe, the ESC of 1961, and agreed to be bound by Article 5 (the right to organise) and Article 6 (the right to bargain collectively, including in Article 6(4) the right to strike)

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<sup>18</sup> See BIS/15/466 (2015), Available at: <https://www.gov.uk/government/publications/trade-union-bill-european-convention-on-human-rights-echr>.

<sup>19</sup> Liberty's briefing on the Trade Union Bill for Second Reading in the House of Commons, cited in House of Commons Hansard, 14.09.15, col. 828.

<sup>20</sup> The potential breach of UK obligations in this regard was raised by Angela Eagle at the second reading debate: see HC Hansard, 14.09.15, col. 779.

without reservation.<sup>21</sup> The relevant supervisory body, the European Committee of Social Rights (ECSR), has recently, through the collective complaints procedure, referred to established ILO supervisory jurisprudence<sup>22</sup> and reiterated the significance of ‘the right of workers and trade unions to engage in collective action for the protection of economic and social interests of the workers’.<sup>23</sup> In January 2015 the ECSR, through its basic reporting procedure, issued recommendations relating to UK law on the right to strike, which it considers unsatisfactory as it stands.<sup>24</sup> ILO Conventions Nos. 87 and 98 (and others), the findings of ILO supervisory bodies and the ESC and ECSR decisions are all highly relevant to the application of Article 11 of the ECHR.<sup>25</sup>

Serious concerns have been raised about the lack of evidence in the Consultation Papers and Impact Assessments, leading the Regulatory Policy Committee (RPC) to declare all three Impact Assessments ‘not fit for purpose’. For example, it said that the Impact Assessment on *Ballot Thresholds in Important Public Services* ‘does not explain

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<sup>21</sup> For ratification as at 1962 and subsequent declarations under Article 20 and in respect of other provisions, see

<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=035&CM=1&DF=&CL=ENG&VL=1>.

<sup>22</sup> *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden*, Complaint No. 85/2012, Decision on admissibility and on the merits, 3.07.13, para. 9. The Committee upheld the complaint that legislative reform undertaken in Sweden in response to Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767 was non-compliant with Article 6(4) the European Social Charter. See for discussion T. Novitz, ‘The Internationally Recognized Right to Strike: A Past, Present, and Future Basis upon Which to Evaluate Remedies for Unlawful Collective Action?’ (2014) 30(3) *The International Journal of Comparative Labour Law and Industrial Relations* 357 at 370-1.

<sup>23</sup> Complaint No. 85/2012, para. 120. Not that the UK is not a party to the Revised Social Charter of 1996 or the Collective Complaints Protocol of 1995, but remains bound by the core obligations undertaken in respect of the European Social Charter 1961.

<sup>24</sup> Jan 2015 Conclusions of the European Committee of Social Rights (ECSR) XX-3 (2014) at 21 – 24.

<sup>25</sup> See *Demir and Baykara v Turkey* Appn 34503/97, 12.11.08 [2009] IRLR 766 at para. 85; also text accompanying n.63 below.

and present the rationale for the proposals in a straightforward and logical way', and fails to provide 'a clear enough basis for consultation' or sufficient evidence.<sup>26</sup> The extremely brief, essentially one page, discussion in the Consultation Paper on hiring agency staff discusses strikes in public services when the measures extend to all sectors.<sup>27</sup> The central assumption in the accompanying Impact Assessment, that about 22% of the days lost to industrial action in the UK could be covered by agency workers, was based on insufficient data according to the RPC.<sup>28</sup> The *Consultation on Tackling Intimidation of Non-Striking Workers* makes extensive reference to 'evidence' presented to the Carr Review<sup>29</sup> yet only records in a footnote that these were allegations, not findings.<sup>30</sup> It fails to mention the Carr Review identified 'the lack of a significant enough body of evidence to support any recommendations for change'.<sup>31</sup>

The Bill is notable for the width of criticism directed at it, not only from trade unions, Liberty, the British Institute of Human Rights, and Amnesty International,<sup>32</sup> but also from unexpected quarters. The CIPD, the professional body for human resources and people development, stated that the proposed changes are outdated in their ideological orientation, may interfere with what are currently constructive

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<sup>26</sup> RPC15-BIS-2402, 18.09.15.

<sup>27</sup> See BIS/15/416 (2015), 7.

<sup>28</sup> See BIS/14/420 IA, especially at paras 1, 26-8, 64 and Annex 1 and RPC15-BIS-2403, 1.10.15.

<sup>29</sup> *The Carr Report: The Report of the Independent Review of the Law Governing Industrial Disputes* (15.10.14) available at: <https://www.gov.uk/government/publications/carr-review-of-the-law-on-industrial-disputes>.

<sup>30</sup> See BIS/15/415 at 4, footnote 1.

<sup>31</sup> *The Carr Report* n.29 above, 1. A concerned shared in RPC15-BIS-2404, *Tackling Intimidation of Non-Striking Workers*, 18.08.15.

<sup>32</sup> See Joint Statement, available at: <https://www.liberty-human-rights.org.uk/news/press-releases-and-statements/trade-union-bill-represents-major-attack-civil-liberties-uk>.



relations between employers and unions and harden attitudes, producing various unintended consequences.<sup>33</sup>

In this article we consider the key aspects of the proposed reforms designed to control or prevent strikes, pickets and other forms of union-organised protest, including those on which the public was not invited to submit comments in the consultation prior to the Bill's passage through Parliament. The highly significant reforms relating to political funding and the role of the CO have been the subject of critical comment elsewhere.<sup>34</sup> Since records began in December 1931, the highest working days lost in industrial action was 32.2 million for the year preceding April 1980; the lowest was 143,000 for the 12 months to March 2011.<sup>35</sup> On this basis, the Government's estimate of an annual 675,000 working days lost to industrial action<sup>36</sup> seems excessive, but is perhaps in anticipation of further resistance to public sector cuts. We seek to identify practical problems with the proposals, and where they may breach ECHR, ESC and ILO obligations. But perhaps the strongest indictment of the measures is their clear potential to undermine further the relationship between workers (and their unions) with employers, with the potential for:

greater disruption and use of leverage campaigns, such as withdrawal of good will, work-to-rule, protests, demonstrations and unofficial action. Paradoxically, the Bill might result in more working days lost to industrial action ...<sup>37</sup>

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<sup>33</sup> Available at:

<http://www.cipd.co.uk/pm/peoplemanagement/b/weblog/archive/2015/09/09/trade-union-reforms-are-outdated-response-warns-cipd.aspx>.

<sup>34</sup> See K.D. Ewing and J. Hendy, *Kill the Bill* (Liverpool: Institute of Employment Rights, 2015) at 12–15.

<sup>35</sup> <http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/april-2015/statistical-bulletin.html#tab-7--Labour-Disputes--not-seasonally-adjusted->.

<sup>36</sup> *Impact Assessment: Hiring Agency Staff During Strike Action: reforming regulation* (2015) BIS/15/420 at 14.

<sup>37</sup> HC Hansard, 14.09.15, col. 801 per Iain Wright (Lab).

## 2. RESTRICTION OF ACCESS TO (AND THE EFFECTS) OF STRIKES AND OTHER INDUSTRIAL ACTION

Through a multitude of measures the Bill aims to restrict the ability of unions and workers to take industrial action, especially where it may affect the delivery of public services. New balloting thresholds, more detail on ballot papers, longer periods of notice, a reduced ballot mandate period and new powers to use agency workers as strike-breakers are the chosen methods.

### *New rules on balloting thresholds*

Like earlier Conservative legislation,<sup>38</sup> one of the main targets of the Bill are the rules on industrial action ballots, compliance with each of which is a pre-condition of trade union immunity from liability for calling industrial action.<sup>39</sup> In addition to the existing requirement in s.226(2) of a majority voting in favour of the strike, Clause 2 adds the requirement that at least '50% of those who were entitled to vote in the ballot did so': in other words, at least half of the ballot constituency must actually vote. Under Clause 3, a further '40% support requirement', is imposed in respect of 'important public services' and 'ancillary' services, so that at least 40% of those entitled to vote in the ballot must have given their approval.

Future regulations under Clause 3 will specify what falls within such 'important public' and 'ancillary' services listed in Clause 3(2E) as:

- (a) health services;
- (b) education of those aged under 17;

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<sup>38</sup> For discussion see P. Davies and M. Freedland, *Labour Legislation and Public Policy* (Oxford: Clarendon Press, 1993) at ch. 9; S. Fredman, 'The New Rights: Labour Law and Ideology in the Thatcher Years' (1992) 12 *Oxford Journal of Legal Studies* 24.

<sup>39</sup> See TULRCA, s. 219(4) and s.226. The detailed provisions are outlined in *RMT v SERCO; ASLEF v London & Birmingham Railway Ltd* [2011] ICR 848, paras 15 – 30.

- (c) fire services;
- (d) transport services;
- (e) decommissioning of nuclear installations and management of radioactive waste and spent fuel;
- (f) border security.

The initial list of functions in the Consultation Paper is very wide, and includes local and London bus services, all rail operating staff, and Underground workers.<sup>40</sup> Ancillary staff are said to include ‘managers, administrators or cleaners: any role that supports others to deliver important public services’ whose absence would have an adverse impact on the delivery of the service.<sup>41</sup> In both cases the detail of the particular roles and functions will be in future secondary legislation which has not yet been published in draft form, with the risk that the time for proper debate on this critical issue is short.

That these balloting requirements are placed foremost in the legislation is unsurprising, since these two provisions are likely to have a serious impact on industrial action. Ralph Darlington and John Dobson have observed that, on information gathered in respect of turnouts for past industrial action between 2002 and 2014, only 85 out of 158 strike ballots would have met the 50% threshold, and that it is much more difficult to secure the threshold in larger strikes reaching across a sector. Of the 158 strike ballots analysed, only 440,000 workers achieved a turnout rate over 50%, while 3.3 million workers would have been debarred from taking lawful action.<sup>42</sup> The effect of the 40% threshold in important public services, however, ‘would have very little *further effect*’ (their emphasis),<sup>43</sup> particularly in fire service and transport (where the FBU and the RMT tend to obtain large turn outs

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<sup>40</sup> BIS/15/418 at 10-11.

<sup>41</sup> *Ibid.*, paras 19-20.

<sup>42</sup> R. Darlington and J. Dobson, *The Conservative Government’s Proposed Strike Ballot Thresholds: The Challenge to Trade Unions* (Liverpool: Institute of Employment Rights, 2015) at 24-28.

<sup>43</sup> *Ibid.*, at 31.

and overwhelming majorities).<sup>44</sup> Despite this potentially serious impact, the Consultation Paper and the Impact Assessment focus exclusively on the 40% support threshold and ignore the 50% turnout threshold.<sup>45</sup> The result is that the Government has completely ignored the practical difficulties unions face in contacting its members by post in some industries, especially those with a fragmented workforce.<sup>46</sup>

The *Consultation on Ballot Thresholds in Important Public Services* gives three justifications for the thresholds: that disruptive action on the basis of low ballot turnouts is ‘undemocratic’ (the first and last mention of ‘democracy’);<sup>47</sup> ‘to ensure that industrial action is only used as a measure of last resort’;<sup>48</sup> and the far-reaching effects of strikes in public services. No evidence is offered to explain which unions or workers use strikes other than as a weapon of last resort. Postal ballots are already very expensive, and the risks to the workforce and their union of strike action are significant (such as deductions from wages, risk of dismissal, and very costly interim injunction applications). Unexplained is why more stringent voting requirements should apply to unions than in fact are obtained in national or even European democratic elections in which turnouts are notoriously low.<sup>49</sup> The third justification only relates to action taken in ‘important public services’, with important slippage

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<sup>44</sup> *Ibid.*, at 29-30.

<sup>45</sup> BIS/15/418; BIS/15/418 IA.

<sup>46</sup> See, for example, *Balfour Beatty v Unite* [2012] ICR 822, where Eady J listed the extensive steps taken by Unite to contact its members (para. 31) and accepted the impossibility of determining whether they had been successful (para. 41).

<sup>47</sup> See para. 3 - though curiously the term reappears in BIS/15/416, para. 18.

<sup>48</sup> BIS/15/418 at para. 1.

<sup>49</sup> *Ibid.*, paras 2 and 3. See Darlington and Dobson n.42 above at 11 who note that turnout for the European Parliament elections in 2014 was just over 34.2%; in the 2012 London Mayoral election it was 38.1%; and for the May 2015 general election only 37% of voters and less than 25% of the eligible electorate supported the elected Conservative party.

from the language of ‘essential public services’ in the Queen’s speech.<sup>50</sup> It cannot apply to the 50% threshold.

*Special provision for ‘important public services’ or essential services*

There is no precedent for the term ‘important public services’ in either international or UK law. The measures proposed do not accord with the UK’s treaty obligations under the ILO Constitution or Conventions (to which the UK is a party) and are inconsistent with the established ILO jurisprudence regarding treatment of ‘essential services’. The ILO Committee on Freedom of Association (CFA) has long held that: ‘The right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests.’<sup>51</sup> Consequently, the right may only be restricted where the impact of strike action is so extreme that special measures need be taken. The CFA has found that this should only be the case in respect of:

- An acute national emergency;<sup>52</sup>
- ‘Essential services’ whose interruption would endanger the life, personal safety or health of the whole or part of the population;<sup>53</sup> and/or
- ‘Public servants exercising authority in the name of the State’.<sup>54</sup>

It is clear that some workers in the fire, health, border and nuclear decommissioning services might have the capacity to endanger the life, personal safety or health of others, and that their access to industrial action can be restricted accordingly.<sup>55</sup> But if

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<sup>50</sup> The Queen’s Speech (May 2015) referred to protection of ‘essential public services against strikes’. See <https://www.gov.uk/government/speeches/queens-speech-2015>. We are indebted to Ruth Dukes for highlighting this discrepancy.

<sup>51</sup> ILO Committee on Freedom of Association (CFA) *Digest of Decisions*, 5<sup>th</sup> ed., (Geneva: ILO, 2006), para. 522.

<sup>52</sup> *Ibid.*, paras 570-1.

<sup>53</sup> *Ibid.*, para. 585.

<sup>54</sup> *Ibid.*, paras 578-9.

<sup>55</sup> *Ibid.*, paras 578 – 585. See too the existing offence in TULRCA s.240.

the aim is to prevent such serious harm, it is unclear that this should be done through restrictive balloting requirements (such as the 40% support threshold). In some core 'essential' services, such as fire, the threshold is likely to be met; in other, less essential ones, it may not be. Instead, a minimum service, which as the Consultation Paper notes<sup>56</sup> is already utilised in the event of action in the fire service, makes more sense in ensuring that the public service continues to be delivered, and is a mechanism endorsed by the ILO. This is also a method endorsed in such extreme cases by the ECSR.<sup>57</sup>

Education is not regarded as an 'essential service' by the ILO CFA because temporary interruption of schooling does not endanger 'life, personal safety or health'.<sup>58</sup> Teachers retain the right to strike without interference, despite some inconvenience and financial burdens for parents (and their employers). Nor, more generally, does the broader economic impact of industrial action render a service 'essential'.<sup>59</sup> The CFA states clearly that: 'The possible long-term consequences of strikes in the teaching sector do not justify their prohibition.'<sup>60</sup> Similarly, transport is not usually regarded as an 'essential service' for, although 'it is recognized that a stoppage in services or undertakings such as transport companies, railways... [etc] might disturb the normal life of the community, it can hardly be admitted that the stoppage of such services could cause an acute national emergency.'<sup>61</sup> The key exception would be air traffic control, in respect of which a minimum service or 'compensatory guarantee' of compulsory arbitration could be appropriate.<sup>62</sup> The Bill's treatment of schools and general transport as 'important public services' may therefore infringe Article 11 of the European Convention on Human Rights (ECHR),

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<sup>56</sup> BIS/15/418, at 6.

<sup>57</sup> *Digest of the Case Law of The European Committee of Social Rights* (2008) at 56.

<sup>58</sup> ILO CFA Digest, n.51, para. 589

<sup>59</sup> *Ibid.*, paras 592-3.

<sup>60</sup> *Ibid.*, para. 590.

<sup>61</sup> *Ibid.*, para. 637.

<sup>62</sup> *Ibid.*, paras 585 - 586.

as a disproportionate constraint on the right to strike in these sectors.<sup>63</sup> There may also be an infringement of the Article 11 rights of ‘ancillary’ workers whose role may not be critical to delivery of the public service.<sup>64</sup>

The Government proposes that when a majority of workers in the ballot constituency are subject to a 40% threshold the *entire ballot* should be subjected to that threshold (as well as to the 50% turn out requirement).<sup>65</sup> The Consultation Paper acknowledges that this may be ‘administratively difficult’ for unions to calculate, but provides no compensating measures.<sup>66</sup> A union’s records of job categories may not be up-to-date, and its records of its members’ jobs may not correspond exactly to the functions and roles (and ancillary functions) to be listed in the forthcoming regulations.<sup>67</sup> If it holds separate workplace ballots in a strike,<sup>68</sup> it will need to try and perform this calculation for each workplace;<sup>69</sup> if the ballot is an aggregate one held under s.228A of TULRCA the union must perform the calculation across many workplaces and for what may be hundreds of different categories. The real effect of this proposal (without cooperation from an employer and without e-balloting or secure workplace ballots) is to make it prohibitively difficult to call large-scale strikes across the public sector, because it potentially extends the reach of the 40%

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<sup>63</sup> *Enerji Yapi-Yol Sen v Turkey*. Appn No 68959/01, 21 April 2009; *Demir v Turkey* at n.25 above (and see discussion by K. D. Ewing and J. Hendy, ‘The Dramatic Implications of *Demir and Baykara*’ (2010) 39 *ILJ* 2). More recently for a finding of a disproportionate restriction, see *Hrvatski Liječnicki Sindikat v Croatia*, Appln No. 36701/09, 27 November 2014. The Canadian Supreme Court has recently found that governments should not have discretion as to whether staff are designated ‘essential workers’ in ways which unfairly deny them the right to strike protected under the Canadian Charter of Rights and Freedoms: *Saskatchewan Federation of Labour v Saskatchewan* 2015 SCC4.

<sup>64</sup> BIS/15/418, paras. 19-21 at 11-12.

<sup>65</sup> *Ibid.*, paras. 27 – 28.

<sup>66</sup> *Ibid.*, para. 28.

<sup>67</sup> See by analogy *Westminster City Council v UNISON* [2001] ICR 1046: sufficient to identify workers as assessment and advice workers for purpose of “categories” in s.226A.

<sup>68</sup> TULRCA, s.228.

<sup>69</sup> TULRCA s.226(3).

threshold far beyond the ‘important public services’ used to justify its imposition. Unions may be forced to hold the ballot in accordance with the 40% threshold rule, knowing that if they do not do so it may be impracticable for them to demonstrate that more than half the workers in the ballot constituency were not in what the government defines as ‘important public services’. That this problem may lead to injunction applications is envisaged by the Consultation, but is not a cause for concern.<sup>70</sup>

*Breach of ILO, ESC and ECHR standards in respect of ballot turnout and support thresholds*

The ILO CFA has determined that pre-strike ballots are permissible in certain circumstances but only if they are ‘reasonable’ and do not place a ‘substantial limitation’ on the means of action open to trade unions.<sup>71</sup> These principles were applied in Case 2698 (Australia). In Australia, as in the UK, protected industrial action is dependent on a ballot being held. Section 451(9) of the Australian Fair Work Act 2009 (like proposed Clause 2 of the UK Bill) requires at least 50% of the employees on the roll of voters for the ballot to vote in the ballot. The CFA found this requirement alone to be ‘excessive’ and likely to hinder the right to strike particularly for large enterprises; which chimes with Darlington and Dobson’s findings as to strikes in the UK.<sup>72</sup>

This CFA decision (and others like it)<sup>73</sup> is not wholly determinative of whether there is a breach of the ESC or Article 11 of the ECHR, but should be highly influential. Certainly, the ECSR has expressed considerable concern already regarding the ‘excessive’ and disproportionate ballot and notice requirements already in place

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<sup>70</sup> BIS/15/418, para. 28.

<sup>71</sup> B. Gernigon, A. Odero and H. Guido, *ILO Principles Concerning the Right to Strike* (Geneva, 2000), 25.

<sup>72</sup> See n.42 above.

<sup>73</sup> See also Case No. 2896 (El Salvador) discussed in A. Bogg, ‘Case No. 2896 El Salvador CFA Complaint’ (2015) 1 *International Labor Rights Case-Law*, forthcoming.



under TULRCA.<sup>74</sup> In interpreting Article 11, the Grand Chamber of the European Court of Human Rights (ECtHR) has said that it ‘can and must take into account elements of international law other than the Convention’ as well as ‘the interpretation of such elements by competent organs’.<sup>75</sup> It is on this basis the ECtHR has interpreted Article 11 in the light of ILO (and ESC) jurisprudence.<sup>76</sup> The margin of appreciation for Contracting States is wide when a measure is ‘not the core but a secondary or accessory aspect of trade union activity’, so that the negative assessments of the ILO monitoring bodies and the ECSR of the UK’s ban on secondary action were not ‘of such persuasive weight’ to lead to a breach of Article 11 on the particular facts of *RMT v United Kingdom*.<sup>77</sup> But the 50% ballot thresholds affect all strikes and the 40% applies to a very wide range of public sector strikes. Their effect is not restricted to a ‘secondary aspect’ of Article 11 but extends to preventing the primary action which the ECtHR in *RMT* saw as part of the ‘very substance’ of trade union freedom in Article 11.<sup>78</sup>

While we are entering uncharted territory, several factors point to the potential incompatibility of the ballot thresholds with Article 11(2): their inconsistency with

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<sup>74</sup> Jan 2015 Conclusions of the European Committee of Social Rights (ECSR) XX-3 (2014) at 22.

<sup>75</sup> *Demir and Baykara* n.25 above at para. 85, a case relating to treatment of workers in ‘public’ services. For discussion see V. Mantouvalou, ‘Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation’ (2013) 13 *Human Rights Law Review* 529; and K. Lörcher, ‘The New Social Dimension in the Jurisprudence of the European Court of Human Rights (ECtHR): The *Demir and Baykara* Judgment, its Methodology and Follow-up’ in F. Dorssemont, K. Lörcher and I. Schömann (eds), *The European Convention in Human Rights and the Employment Relation* (Oxford: Hart, 2013) at 6-10 and 16 – 18.

<sup>76</sup> *Ibid.*, especially at paras 101-2, and 122.

<sup>77</sup> *The National Union of Rail, Maritime and Transport Workers (RMT) v the UK* Appn 31045/10, 8.04.14 [2014] IRLR 467 paras 87-99. See too A. Bogg and K.D. Ewing, ‘The Implications of the RMT Case’ (2014) 43(3) *ILJ* 221 and criticism of the Court’s judgment subsequently in the ‘Concurring Opinion’ of Judge Pinto de Albuquerque in the *Croatia* case n.64 above at para 8 and footnote 34, where notably breach of Article 11 was found regardless of the margin of appreciation applicable in cases relating to a right to strike.

<sup>78</sup> *RMT v the UK* n.77 above, para. 98.

the ILO (and ESC) decisions; the high levels of the thresholds compared with other elections; the *de facto* serious effects of 50% turnout threshold (let alone the 40% support threshold) on the taking of primary action, striking at the very substance of Article 11; the findings of the RPC which call into question whether there is sufficient evidence to justify the amendments; the extension of the 40% threshold to any strike in which a majority of the workers are in important public services (and the administrative difficulties of calculating when it applies); the weak correlation between the aims of avoiding disruption to the public and the 40% threshold; and, last, the decision of the Government not to allow strike ballots to be held in ways which would generate broader participation than voting by post. The last factor shows clearly why, on a proportionality test, the same aims could be met in a less restrictive manner; we turn to it next.

*A lack of opportunity for e-ballots and workplace ballots*

While Australia was held to breach ILO standards by utilising a 50% turnout requirement, at least that country took active steps to respond to technological developments, enabling online balloting. In particular, where trade unions are willing to pay the costs of balloting themselves, they may secure participation of their members by this means.<sup>79</sup> The refusal to allow electronic balloting has been the subject of concern by the TUC, with Frances O'Grady asking for legislative support for such ballots in relation to industrial action.<sup>80</sup> Unison's response to the consultation notes that, while the Government has indicated that trade union action

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<sup>79</sup> See sections 450 and 455 of the Fair Work Act 2009 (Australia) which contemplate electronic balloting, although by trade unions independently and not under the ballots held by the Australian Electoral Commission. We are grateful to Shae McCrystal for carefully explaining to us the dynamics of this process; see also <http://employment.gov.au/fair-work-act-review>.

<sup>80</sup> See Frances O'Grady, Trades Union Congress (TUC) General Secretary, on electronic balloting at <http://www.bbc.co.uk/news/business-29072893>; also <http://webrootsdemocracy.org/2015/03/03/report-online-voting-could-boost-turnout-by-9-million/>.

has been ‘undemocratic’, there are no proposals to enable secure electronic and online workplace balloting, which ‘runs counter to the government’s pursuit of electronic participation in every other area of its work’.<sup>81</sup> Unite’s submission is similar, noting that: ‘Postal voting is out dated, in particular as the only option for voting... This Government needs to allow secured workplace ballots and e- ballots, alongside postal ballots.’<sup>82</sup> Regulations could be adopted under existing powers of the Secretary of State to make an order setting out the ‘permissible means’ of balloting in addition to postal ballots,<sup>83</sup> subject only to the requirement that: ‘(a) those entitled to vote have an opportunity to do so; (b) votes cast are secret; and (c) the risk of any unfairness or malpractice is minimised.’<sup>84</sup>

The failure to exercise this power is in tension with the apparent enthusiasm of the Consultation Paper for democracy. So much was noted by Caroline Lucas (Green MP) on the second reading of the Bill: ‘If it is really about democracy and opening things up, why is he not lifting the ban on unions balloting online and in the workplace, which would be precisely the way to make a modern democracy work?’<sup>85</sup> The response of the Secretary of State for Business, Innovation and Skills and President of the Board of Trade, Sajid Javid, was that such balloting could lead (in albeit unspecified ways) to fraud, and he had no answer to the more general call for workplace ballots conducted by an independent scrutineer.<sup>86</sup> We await a fuller exploration of this issue as the Bill receives better scrutiny at later stages.

#### *Other ballot, notice and mandate measures*

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<sup>81</sup> *Unison submission* n.14 above, at 4.

<sup>82</sup> *Unite response to BIS consultation: Ballot thresholds in important public services*, 9 September 2015, at 1. Available at: <https://www.politicshome.com/organisation/page/unite/unite-responses-consultations>.

<sup>83</sup> Employment Relations Act 2004, s. 54.

<sup>84</sup> *Ibid.*

<sup>85</sup> HC Hansard, 14.09.15, col. 761.

<sup>86</sup> HC Hansard, 14.09.15, col. 767.

Various other measures are proposed in clauses 4-8 of the Bill, which have not been subject to consultation, despite their potentially significant effects. By clause 5, following introduction of the new ballot turnout and support requirements in Clauses 2 and 3, the information to members and the employer under ss 231-231A of TULRCA about the result of the ballot must include information regarding these thresholds. Clause 6 requires that details of industrial action are to be included in the union's annual return to the CO, including details of each ballot result. The suspicion is that this requirement is a further step transforming the CO into a person increasingly concerned to investigate unions, their membership records and their balloting practices<sup>87</sup> – a function which sits uneasily with the CO's quasi-judicial role of adjudicating on intra-union disputes.

A further troubling proposal for reform is the new 'information to be included on voting paper' in Clause 4, adding to the already detailed information which must be provided in a ballot paper by virtue of s.229 to include:

- 'a reasonably detailed indication of the matter or matters in issue in the trade dispute to which the proposed industrial action relates'
- If there is a question relating to action short of a strike 'the type or types of industrial action must be specified (either in the question itself or elsewhere on the balloting paper)'; and
- 'the balloting paper must indicate the period or periods within which the industrial action or, as the case may be, each type of industrial action is expected to take place'.

The first of these requirements, specification of the precise nature of the trade dispute, potentially opens up the action to scrutiny under the current 'golden formula' set out in TULRCA.<sup>88</sup> Any hint that the dispute is in any way 'political',

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<sup>87</sup> See n.10 above.

<sup>88</sup> TULRCA, s. 244.

‘secondary’, or connected to terms and conditions of future employees could bring a claim for injunctive relief by an employer.<sup>89</sup> In addition, employers will probably argue that the description of the dispute is insufficiently detailed, does not in fact capture all the issues in dispute, or includes matters which at the time of the ballot were no longer in dispute. As was observed in the second reading debate, ‘if a failure to provide such information is to be a basis for legal action by employers against workers taking industrial action, it is crucial that the House should be informed in advance of how “reasonably detailed” is to be defined’.<sup>90</sup>

Clause 7 requires that two weeks’ notice is to be given of industrial action, double the seven days applicable at the present time. In Australia, by way of comparison, three working days’ notice is required or such longer period of notice as specified in the protected industrial action ballot order. The notice period may be extended only in ‘exceptional circumstances’ up to seven working days.<sup>91</sup> By any comparative standards, the UK period of notice already seems harsh, especially when combined with the newfound ability of an employer to hire agency workers to avoid the action having any effect.<sup>92</sup> Moreover, Unison raise the more practical objection that a 14-day notice period ‘will also significantly raise the risk and likelihood of victimisation of trade union members, placing them under great pressure with implications for their well-being, damage to industrial relations and further potential litigation’.<sup>93</sup>

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<sup>89</sup> See TULRCA ss 244, 244 and, for example, *Mercury Communications Ltd v Scott-Garner* [1983] IRLR 494 and *University College London Hospital NHS Trust v Unison* [1999] IRLR 31. Note the concerns expressed regarding the too ready availability of injunctive relief in the Direct Request of ILO-CEACR concerning the UK (2012 – Freedom of Association and Protection of the Right to Organise Convention, (No. 87)) also referred to in Jan 2015 Conclusions of the European Committee of Social Rights (ECSR) XX-3 (2014) at 22; in respect of which SERCO n.39 offered some guidance but has not alleviated the problem.

<sup>90</sup> HC Hansard, 14.09.15, col. 812 per Alex Cunningham (Labour).

<sup>91</sup> Fair Work Act 2009 (Australia), s.414(2).

<sup>92</sup> See n.11.

<sup>93</sup> *Unison submission* n.14 above, at 5.

A new provision in Clause 8 will lead to expiry of mandate for industrial action four months after the date of the ballot. At present TULRCA provides that industrial action which has the support of a ballot has no time limit if initial action is taken four weeks from the date of the ballot (or up to eight weeks if the parties so agree, giving time for negotiation).<sup>94</sup> This new provision enables the employer to stall, delay or prolong negotiations, knowing that if the four-month deadline passes the union will face the expense and inconvenience of a further ballot if it wishes to retain the ability to take industrial action, even though the same dispute continues. This provision, as the TUC has noted, in concerns expressed to the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), 'introduces a new layer of procedural burden on unions (fresh notices ... and so on) and it adds significantly to the costs of a trade union in a system in which the ballot would again have to be a fully postal ballot at the union's expense. This is not a case of refreshing a mandate so much as a case of disrupting by administrative burdens lawful and legitimate action.'<sup>95</sup>

#### *Use of agency workers as replacement labour*

Regulation 7 of the Conduct of Employment Agencies and Employment Business Regulations 2003<sup>96</sup> (the 'Conduct Regulations'), made under s. 5 of the Employment Agencies Act 1973, prohibits an employment business<sup>97</sup> from providing an agency worker<sup>98</sup> to perform the duties normally performed by a worker taking part in a strike or other industrial action. A failure to comply with this regulation is an offence and is

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<sup>94</sup> TULRCA, s. 234.

<sup>95</sup> See <https://www.tuc.org.uk/union-issues/trade-union-bill/trade-union-bill-tuc-submission-ilo-committee-experts>. Note prepared for the TUC by Professor Keith Ewing, August 2015.

<sup>96</sup> SI 2003/3319.

<sup>97</sup> Defined in s.13(3) of the Employment Agencies Act 1973: see the Conduct Regulations n. 97 above, Reg. 2.

<sup>98</sup> Named a 'work-seeker' but in an agency worker in everyday language: Conduct Regulations n.97 above, Reg. 2.

actionable insofar as it causes damage.<sup>99</sup> Such provisions are common in other European countries, such as France and Spain, and apply in the UK to workers employed by gangmasters.<sup>100</sup> They protect both the right to strike and the workers, who may be in a precarious category, who are used to replace the strikers. In its manifesto the Conservative party said it would repeal this ‘nonsensical’ restriction.<sup>101</sup> The short Consultation Paper devoted to agency work claimed that repealing Regulation 7 will help employers to limit the impact of strike action, but giving only examples of strikes which affect the public.<sup>102</sup>

The ILO expert bodies have said that requisitioning of workers to cover legal strikes should be limited to cases involving public services, essential services ‘in the strict sense of the term’ and cases of acute national or local crisis.<sup>103</sup> This type of practice, according to the CEACR, can seriously impair the right to strike.<sup>104</sup> The compatibility of the proposed repeal of Regulation 7 with ILO Conventions to which the UK is a signatory, and which are relevant to Article 11, is once again ignored in the Consultation and in the *ECHR Memorandum* accompanying the Bill.<sup>105</sup> What the Consultation does mention is the Government’s commitment ‘to ensuring that strikes only ever happen as the result of a clear, democratic decision’,<sup>106</sup> as reflected in the

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<sup>99</sup> See s.5 of the 1973 Act and Conduct Regulations n.97 above, Reg. 30.

<sup>100</sup> L1242-6 of the French Labour Code; and Article 8 of the Law 14/1994 on Temporary Work Agencies Regulation (Spain); see also Gangmasters (Licensing Conditions) Rules 2009, SI 2009 No.307, Reg. 10.

<sup>101</sup> *Conservative Party Manifesto* (2015), 19.

<sup>102</sup> BIS/15/416, at para. 18.

<sup>103</sup> See the report of the ILO CEACR, *General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalisation, 2008 (Report III (Part 1B))* International Labour Conference, 101<sup>st</sup> Session, 2012, at para. 151.

<sup>104</sup> See *Freedom of Association and Collective Bargaining: General Survey on the Reports on the Freedom of Association and Protection of the Right to Organise Convention etc, (Report III (Part 4B))*, International Labour Conference, 81<sup>st</sup> Session, 1994, at para. 175.

<sup>105</sup> See n.18 above.

<sup>106</sup> BIS/15/416, para. 18.

new ballot thresholds. Even where a strike has democratic legitimacy, however, the government still wants to increase employers' powers to resist it, by allowing the replacement of strikers by agency workers in all businesses, and not simply the public services referred to in the Consultation.

### 3. PICKETING AND PROTEST

In its manifesto, the Conservative party said that it would 'tackle intimidation of non-striking workers'.<sup>107</sup> The relevant Consultation Paper set out two sets of proposals for 'modernising' the rules relating to picketing and protests. The first, by Clause 9 of the Bill, adds a new s.220A to TULRCA, so that picketing organised or encouraged by a trade union, will not benefit from the lawfulness shield for peaceful picketing in s.220 unless the union appoints a 'picket supervisor' and meets further conditions as to that person's qualifications and duties. The second set of proposals goes beyond the manifesto commitment but seems based on untested evidence to the Carr Review of what the government describes as 'unacceptable' conduct in new forms of protest which take place away from the workplace, usually called 'leverage' action.<sup>108</sup> These latter proposals are wide-ranging but have not (yet) led to the drafting of any clauses in the Bill.

#### *New restrictions on lawful picketing*

TULRCA s.220(1) currently makes it 'lawful' for a person (i) in contemplation or furtherance of a trade dispute (ii) to attend at or near his own place of work for the purpose of 'peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working'. Other provisions allow a

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<sup>107</sup> *Conservative Party Manifesto* (2015), 19.

<sup>108</sup> BIS/15/415, 4-5 refers to evidence from the Association of Chief Police Officers. Other evidence to the Carr Review was more circumspect: see the House of Commons Briefing Paper, *Trade Union Bill* (7.09.15), by Doug Pyper, at 45.



trade union official to attend such a picket if the official is accompanying a member<sup>109</sup> and permit workers dismissed in connection with a trade dispute to attend at their former workplace.<sup>110</sup>

The narrow interpretations the judiciary gave to earlier incarnations of s.220 are well-known<sup>111</sup> and the width of the section was significantly reduced by the Employment Act 1980, restricting protection to a worker attending ‘at or near his own place of work’.<sup>112</sup> But even after being shrunk by Parliament and wrung by the judiciary, the section remains important because, first, it circumscribes a reasonably clear sphere of ‘lawful’ action which protects *both* the individual pickets and the trade union. It protects, for example, peaceful picketing which occurs after a union has repudiated industrial action. Second, its concept of deemed lawfulness provides, to a degree, a mobile shield against the judicial creation of new torts.<sup>113</sup> Third, it is a useful location for arguments that ‘lawful’ in s.220 should be read in order to ensure that picketing which would be protected by Articles 10 and 11 ECHR is immunised against domestic legal challenges.<sup>114</sup> Fourth, it offers the unique substantive protection to the intricate prohibition of secondary action in s.224 of TULRCA.<sup>115</sup> It does not, of course, permit workers in dispute with employer A to picket the premises of employer B;<sup>116</sup> but it may permit workers of A, while assembling outside their own place of work, to induce other workers, not employed by A, not to attend work. Such action would, but for the

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<sup>109</sup> See TULRCA, s.220(1)(b).

<sup>110</sup> See TULRCA, s.220(3). As derived from the Molestation of Workmen Act of 1859, and s.2 of the Trade Disputes Act 1906.

<sup>111</sup> See, especially, *Broome v DPP* [1974] AC 587, and *Thomas v NUM* [1985] ICR 887.

<sup>112</sup> See where an employer shut its premises and transferred work to a new site: *News Group v SOGAT No.2* [1987] ICR 187.

<sup>113</sup> Picketing is expressly not exempted from tort liability in a trade dispute unless it is lawful under TULRCA, s.220: see TULRCA, s.219(3).

<sup>114</sup> Arguments based on Article 11 have taken increased prominence in cases such as *Gate Gourmet v TGWU* [2005] IRLR 881 and *ISS Mediclean v GMB* [2015] IRLR 96.

<sup>115</sup> TULRCA, s.224(1).

<sup>116</sup> In that case the picketing would not be at their own place of work.

exception for lawful picketing in s.224(1), amount to unlawful secondary action under s.224(2).<sup>117</sup> In the *RMT* case, the UK government emphasised the importance of s.220 in support of its arguments that the law of the UK on secondary action did not unduly infringe the right to strike.<sup>118</sup>

The Bill now seeks to introduce a proposed new s.220A, which will remove the protection of s.220 from 'any picketing which a trade union organises or encourages its members to take part in' unless it meets seven conditions. 'Picketing' remains defined in terms of attendance 'at or near a place of work' in contemplation or furtherance of a trade dispute and for the purposes listed in s.220. Other forms of picketing are untouched: the provision is unique to union-organised or encouraged peaceful picketing.

The seven conditions which such picketing must meet to benefit from the protective shield of s.220 are the following. First, the union must appoint a person to 'supervise the picketing'.<sup>119</sup> Second, the person must be a union official or person who is 'familiar' with the Code of Practice on picketing.<sup>120</sup> Third, the union or supervisor must take reasonable steps to tell the police the supervisor's name, the picket location and how to contact the supervisor.<sup>121</sup> Fourth, the supervisor must have a letter of authorisation from the union.<sup>122</sup> The fifth, remarkable, condition requires the supervisor to show the letter not just to any constable but also to 'any other person who reasonably asks to see it'.<sup>123</sup> Sixth, the supervisor is plainly a dedicated person, for he or she must be present at the picket at all times or be 'readily contactable' by the union or the police

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<sup>117</sup> That is, because any inducement of breach of contract would relate to the contracts of employment of those who were not employed by A, the party to the dispute.

<sup>118</sup> See n.77 above, at paras 36 and 60.

<sup>119</sup> See the proposed s.220A(2).

<sup>120</sup> S.220A(3).

<sup>121</sup> S.220A(4).

<sup>122</sup> S.220A(5).

<sup>123</sup> S.220A(6).

and able to attend at short notice.<sup>124</sup> And, seventh, the supervisor must wear a badge or other armband identifying his or her status.<sup>125</sup> If the *union* cannot comply with the provisions it is not only it which will lose the benefit of the protective shield of s.220; so will the *individual* pickets.

The origin of these provisions is the Code of Practice on Picketing<sup>126</sup> which, the Consultation Paper cheerily notes, unions mostly observe already, so that the requirements will have ‘little impact on responsible picketing’ but will encourage more responsible picketing among the unregenerate.<sup>127</sup> Yet the claim that most unions already appoint a duly qualified picket supervisor in accordance with the seven conditions in s.220A at every picket line has no empirical basis.<sup>128</sup> At the very least it is questionable; at most it is cynical. Take a strike on the London Underground, the railways, at a nationwide chain-store or at schools - each ticket office, each station, each shop, each school (and many more locations besides) is a workplace, at which workers are entitled to attend for lawful picketing. Where strikes in such industries are organised or encouraged by a union, it will need to train and find duly qualified supervisors who are willing to be attend what may be hundreds of sites (or try to restrict its members’ right to picket at their workplaces). Data from recent strikes confirm this.<sup>129</sup>

No union could meet such a need by full-time officials: it will have to try and rely on volunteers. Yet these volunteers must be trained and qualified. They must be prepared to advertise their trade union membership to their employer and the world by their

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<sup>124</sup> S.220A(7).

<sup>125</sup> S.220A(8).

<sup>126</sup> See BIS/15/415, 8-9. The Code (1992) was introduced under s.3 of the Employment Act 1982, now TULRCA s.203.

<sup>127</sup> BIS/15/415, para. 18, at 9.

<sup>128</sup> Though an Impact Assessment was published on proposals to require unions to publish plans of industrial action (see below), none has been issued for the changes in picket supervision.

<sup>129</sup> An RMT strike in the railways in May 2015 listed 1,127 workplaces in the ballot notice and a strike in the London Underground in 2013 listed 454. Source: Thompsons Solicitors.

badge or armband, and to have their name and contact details given to the police. Trade union membership is an aspect of private life and consequently is 'sensitive personal data' under section 2 of the Data Protection Act 1998 as well as being protected under the Employment Act 1999 (Blacklisting) Regulations 2010. There are often good reasons for an individual keeping it secret from employers and the police, illustrated by the blacklisting scandal in the construction industry currently pending before the courts. Liberty has drawn attention to this potential infringement of the civil liberties, but it has been ignored.<sup>130</sup> This background threat will, of course, only add to the difficulty of recruiting volunteers.

Finding supervisors is not the only problem. For example, to trigger the duty it is probably sufficient that a union organises or encourages the picketing in general, based on common law agency principles where officials are involved,<sup>131</sup> rather than organising the particular picket line in question. Once the section is engaged, however, the union must take reasonable steps to inform the police 'where' each picket will take place - something of which it may have little knowledge.<sup>132</sup> In addition, the supervisor must show the appointment letter to anyone who 'reasonably asks to see it',<sup>133</sup> a provision which is likely to exacerbate conflict on any picket line where requests are made by the employer or, for example, security guards engaged by it..

A breach of any *one* of the seven conditions,<sup>134</sup> likely to be a fresh source of forensic disputes in injunctions, will result in the loss of the shield against the employer, even

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<sup>130</sup> See n.19 above and cf. the BIS/15/466, at 7, which blandly states that the measures are 'wholly proportionate'.

<sup>131</sup> See *Heatons Transport v TGWU* [1972] ICR 308.

<sup>132</sup> The duty is to take 'reasonable steps' to inform the police; but there is no qualification of reasonable practicability as to the information which must be provided (cf. ss. 226A(2D) and s.234A(3D) on pre-ballot notices and notices of industrial action).

<sup>133</sup> See proposed s.22A(6).

<sup>134</sup> There is no equivalent for 'small accidental failures' cf. TULRCA, s.232B. Nor are the duties apparently based on what is reasonably practicable or the reasonable belief of the union (cf. s.226A(1) and s.227, on pre-ballot notices and balloting).

if it suffers no prejudice as a result,<sup>135</sup> and give rise to other, potentially very serious legal consequences. If the Bill's provisions are enacted, a peaceful picket of six members, not accompanied by a picket supervisor, will engage in unlawful secondary action if they induce other workers employed by a third party not to cross the picket line. The tort of inducement of breach of contract can be committed by the 'presence alone' of pickets, even without active persuasion.<sup>136</sup> The union will probably be liable for this tort on the basis it 'encouraged' the picketing even if it had no knowledge of the particular picket or no practical ability to appoint a qualified supervisor there. The individual pickets will lose the protective shield of s.220 even though they had no power to appoint a supervisor. So long as the union is held to have 'induced' the acts of the pickets, the pickets' industrial action will not be 'protected industrial action' within the meaning of s.238A, because the union's action will not be covered by the immunity in s.219.<sup>137</sup>

These consequences for a peaceful picket have nothing to do with the stated aim of the Bill, to tackle the kinds of intimidation of non-strikers referred to in the consultation, such as threats and assaults.<sup>138</sup> Existing criminal provisions protect against intimidation on the picket line, some of which are listed in the Consultation.<sup>139</sup> It is notable that in its submission to the Carr Review, the Association of Chief Police Officers (ACPO) said that the current legal framework was generally effective and did not ask for more powers, only better guidance for the police.<sup>140</sup> The kinds of behaviour listed in the Consultation and upon which the Government relies to justify the new section would already fall outside s.220, as well as probably amounting to torts such as public nuisance.<sup>141</sup> The new s.220A targets indiscriminately unions and workers

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<sup>135</sup> See *Metrobus v Unite* [2010] ICR 173.

<sup>136</sup> See *Union Traffic Ltd v TGWU* [1989] IRLR 127 per Bingham LJ at para. 26.

<sup>137</sup> See s.219(3), as amended by the Bill at clause 9, and s.224.

<sup>138</sup> BIS/15/415, para. 1.

<sup>139</sup> BIS/15/415, 6-7. See especially TULRCA, s.241.

<sup>140</sup> See Carr Review, n.29 above, at 92-94.

<sup>141</sup> See *SOGAT No.2*, n.112, above.

who picket peacefully, as well as those who do not. No other membership organisation which encourages a peaceful demonstration is required to police it as well or face potentially serious civil sanctions if it fails to do so (even when it is not possible or practicable for it to do so). These effects betray the Bill's true purpose: to penalise union-organised industrial action *tout court*.

The right to picketing is an aspect of freedom of assembly in Article 11 ECHR, which is one of the foundations of a democratic society, so that only 'convincing and compelling reasons' can justify any interference with it, including administrative rules on giving notices and the like.<sup>142</sup> The glib answer to the proportionality question in the *ECHR Memorandum* is that the new supervisor requirements are 'wholly proportionate and already reflect current practice'.<sup>143</sup> An adverb is often a sign of a weak contention, and this one is no exception: current practice is not to have a duly qualified picket supervisor with a letter of authorisation at every workplace where a picket may occur, whose name is provided to the police in advance, and who shows the letter to the police and any busybody when asked. In the absence of that assumption, no convincing or compelling reasons for the new section are made out.

The Bill's provisions also bring into sharp focus the difference in treatment of picketing and other forms of peaceful assembly and protest, both of which are protected under Article 11. TULRCA seeks to circumscribe "picketing", expressly defined for the first time in the new s.220A(9) by its link to the workers' place of work, but the boundary between a picket and a protest is hazy.<sup>144</sup> Huddled around a brazier near the workplace in a dispute about wages, the strikers are pickets; if they march down the road, they magically transform themselves into protesters. Many workers do not normally work from a single premises, something recognised by their right in s.220(3) to attend at "any premises of [their] employer from which [they] work" or

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<sup>142</sup> *Kuznetsov v Russia* Appn 10877/04, 23.01.09, esp. paras 39-49.

<sup>143</sup> BIS/15/466 at 7.

<sup>144</sup> *SOGAT No.2*, n.112, above.

their work is administered.<sup>145</sup> The provisions of new s.220A will further deepen the legal division between two categories that dissolve into each other outside the court room.<sup>146</sup>

It is little wonder that, faced with the potential legal labyrinth of Part V TULRCA, unions have increasingly resorted to ‘leverage action’. Adding to those provisions only increases the pressure to abandon traditional forms of organised picketing and engage in other forms of protest, whose shape and forms are less predictable.<sup>147</sup>

### *Restrictions on Protest Generally*

While the legal restrictions on traditional industrial action provide an incentive to use other forms of protest, the government has no qualms about trying to restrict this too. Further proposals in the Consultation Paper on *Intimidation* seek to regulate protests away from the workplace, or ‘leverage’ action. In support of these proposals, the Consultation refers to evidence relating to demonstrations, internet usage, protests at private residences and third party premises, all submitted by the ACPO to the Carr Review.<sup>148</sup> But the examples were mostly minor, such as ‘playing loud music, which was interrupted by loud speaker announcements’ and displaying an inflatable rat.<sup>149</sup> Probably in recognition of the shaky evidential foundation, the Consultation asked responders to provide examples of intimidatory behaviour<sup>150</sup> - hardly a signal of fair consultation, and a move criticised by the RPC.<sup>151</sup>

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<sup>145</sup> See s.220(3).

<sup>146</sup> This problem was raised in the ACPO submission to the Carr Review: see n.29 above at 103.

<sup>147</sup> L. McLuskey, ‘Can Unions Stay Within the Law Any Longer?’ (2015) 44(3) *ILJ* 439.

<sup>148</sup> BIS/15/415, 4-5. While the INEOS dispute at Grangemouth is cited as a particular example, it is notable that the Carr Review (n.29 above) dealt with this at 26-32, based on evidence from Ineos and not Unite.

<sup>149</sup> Carr Review, n.29 above, at 96.

<sup>150</sup> BIS/15/415, 6.

<sup>151</sup> See RPC15-BIS-2404 at n.31 above.

Untroubled by a weak evidential basis, the government makes various proposals, including a possible new criminal offence of intimidation on the picket line; requiring unions to publish details of their pickets and protests to employers, the police and the CO, who is to be given an enhanced role in enforcement action;<sup>152</sup> and annual reporting on picketing, protests and action taken by employers in response.<sup>153</sup> It also proposes to up-date the Code of Practice to cover, for example social media and the rights of non-striking workers, the public and businesses.<sup>154</sup>

As the Consultation Paper acknowledges, there already exist a number of civil penalties and criminal offences which apply to protests.<sup>155</sup> This is not the place to deal with the detail of the bewildering array of criminal offences regulating public protest in the UK, save to note that a wide range of behaviour is caught and that they often overlap.<sup>156</sup> Buttressing these offences are various provisions which give police officers wide powers to give directions to protestors and others, and to arrest those who fail to comply.<sup>157</sup> Nor is the civil law silent. So long as workers are not in breach of their contracts of employment, the traditional economic torts, such as inducing breach of contract, are less easily engaged. For instance, in an early example of ‘leverage’ action, *TGWU v Middlebrook Mushrooms*,<sup>158</sup> 89 mushroom pickers dismissed for striking over a pay cut distributed leaflets outside a supermarket and in other public places, urging customers not to buy their ex-employers’ mushrooms. The Court of Appeal held there

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<sup>152</sup> BIS/15/415, paras 24-29.

<sup>153</sup> *Ibid.*, paras 30-32.

<sup>154</sup> *Ibid.*, paras 33-38.

<sup>155</sup> *Ibid.*, para. 7. See for example the Protection from Harassment Act 1997 which has both criminal and civil dimensions.

<sup>156</sup> For example, see: the Public Order Act 1986, especially ss. 4A and 5; s.137 of the Highways Act; s.68 of the Criminal Justice and Public Order Act 1994; and s.241 of TULRCA including an offence of watching or besetting ‘the house or other place where a person resides, works, carries on business or happens to be’.

<sup>157</sup> These include Public Order Act 1986, s.12; the Criminal Justice and Police Act 2001, s.42; and Part 3 of the Anti-Social Behaviour, Crime and Policing Act 2014.

<sup>158</sup> [1993] IRLR 232.



were no unlawful means for the purpose of an economic tort, making an early reference to Article 10.<sup>159</sup> But private nuisance will apply where there is undue interference with a person's enjoyment of his or her property,<sup>160</sup> and other torts, such as assault, apply to serious intimidation.

Especially since the Human Rights Act 1998 came into force, the courts have been engaged in the delicate process of interpreting these criminal offences and civil torts in order to ensure due respect for the rights to freedom of expression of assembly in Articles 10 and 11 ECHR respectively. This, according to the Consultation Paper, is one 'key problem': the difficulty of effective enforcement where the police are under a duty to 'facilitate lawful protests'.<sup>161</sup> A linked problem is that civil actions by employers can be 'time-consuming, and potentially expensive and slow'.<sup>162</sup> But in fact where an employer has a good claim it can obtain an interim injunction forthwith and recover its legal costs from the union: the route is no different from traditional strike injunctions which employers frequently deploy to good effect to stop strikes. The real problem lies elsewhere: that for the most part the courts have subjected injunction applications which seek to restrain protests to careful scrutiny, not simply applying the 'balance of convenience' *American Cyanamid* test, in order to ensure injunctions do not interfere unduly with freedom of protest or expression.<sup>163</sup> It is not the adequacy of the civil framework which causes the problem: it is the right to freedom of protest.

The Government's solution to this problem is to impose further burdens on one membership organisation alone: trade unions. The proposals are vague at the moment,

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<sup>159</sup> See per Neill LJ at para. 25.

<sup>160</sup> *Hunter v Canary Wharf Ltd* [1997] AC 655 (cf. the illegitimate extension of the tort to control pickets in *Thomas v NUM* [1985] ICR 886).

<sup>161</sup> BIS/15/415, para. 8.

<sup>162</sup> *Ibid.*

<sup>163</sup> See Human Rights Act 1998, s.12, *Cream Holdings v Banerjee* [2005] 1 AC 253 and, for example, *Norvartis Pharmaceuticals v Stop Huntingdon Animal Cruelty* [2009] EWHC 2716 and *Eli Lilly v Stop Huntingdon Animal Cruelty* [2011] EWHC 3527 at para. 13.

and on some there is almost no detail (such as controls on the use of social media). The most developed are those which will require a union to give 14 days' advance notice to the employer, the police and the CO of when it is to hold a protest, where it would be, how many people will be involved, whether there will be loudspeakers, whether social media will be used and so on.<sup>164</sup> The genesis seems to have been a suggestion made to the Carr Review from two organisations, including a medium-sized firm of commercial solicitors.<sup>165</sup>

Despite the very large questions these proposals pose about civil liberties, police powers, their interaction with the existing criminal and civil law, and the detail of legislation, in the absence of any draft clauses the time for consultation will be short. By the same token, there are serious issues about their compatibility with human rights law because the margin of appreciation disappears to almost vanishing point where the individual demonstrators are peaceful.<sup>166</sup> The ECtHR has held that duties to give prior notice of peaceful demonstrations to public authorities are permissible for reasons of public order and national security, but they must not be hidden obstacles to freedom of peaceful assembly and must allow for spontaneous protests.<sup>167</sup> The existing requirements in TULRCA to give 14 days' notice of ballots and industrial action have been strongly criticised as unduly burdensome by the ILO and ESC expert bodies.<sup>168</sup> The proposals have at best a weak connection with preserving public order; they require notice to employers, not only public bodies; if they are enacted unions

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<sup>164</sup> BIS/15/415, paras 25-29. Together with a duty on unions to provide details of their industrial action in an annual report, these proposals were the focus of the Impact Assessment on *Intimidation* BIS/15/419 IA.

<sup>165</sup> See Carr Report n.29, 103-4.

<sup>166</sup> See *Ezelin v France* (1991) 14 EHRR 362 at para. 53.

<sup>167</sup> See *Aldemir v Turkey* Appn 32124/02 and others, 2.06.08 at paras 42-3; and *Gün et Autres v Turquie* Appn No. 8029/07, 18.06.13, at paras 77 and 83 (not available in English). See too the guidelines of the OSCE/ODIHR Panel of Experts, *Guidelines on Freedom of Peaceful Assembly* (Warsaw/Strasbourg: 2010), at 63-96, available at <http://www.osce.org/baku/105947>.

<sup>168</sup> See *RMT v United Kingdom*, n. 77 above, at paras 28-29 and 35, dealing with s.226A and s.235A TULRCA.

will be deprived of the right to organise spontaneous demonstrations; the 14-day period of notice goes beyond the time needed for the state authorities to prepare;<sup>169</sup> and it is unclear why only protests organised by unions should face such bureaucratic obstacles.

The provisions also illustrate the basic unfairness in singling out union-backed protests for regulation. Let's return to a historical example of a leverage protest - *Middlebrook Mushrooms* - and assume the proposals were law. The union (then the TGWU) of the 89 dismissed mushroom pickers could not organise any form of protest at the time the workers were summarily dismissed, as it tried to do in the case itself. It would need to give 14 days' notice of the planned peaceful protests outside supermarkets and in shopping precincts to the employer, the police and the CO, both reducing the impact of the protest and giving the employer time to plan its campaign or go into hiding. If the plans were not published in time to any of these bodies, the CO could issue a declaration, an enforcement order, or even a financial penalty of up to £20,000.<sup>170</sup> Though this would not be a 'civil offence' [sic] in its own right it would apparently assist the employer in obtaining an interim injunction.<sup>171</sup> No doubt in the first place the employer would make an application to the CO, an office in future to be funded by employers' associations and trade unions under other proposals in the Bill,<sup>172</sup> to obtain what would be in effect a form of cost-free order against the union, backed with hefty financial penalties for non-compliance.

If the sacked mushroom pickers were lucky enough to have sufficient service to bring claims of unfair dismissal, they would need to pay a substantial fee to bring a tribunal

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<sup>169</sup> The OSCE/ODIHR Guidelines recommend no more than a few days: see n.167 above, para. 116. In *Aldemir* (n.167 above) the period was 72 hours.

<sup>170</sup> See Bill, clause 16, inserting a new s.256D into TULRCA.

<sup>171</sup> BIS/15/415, para. 28.

<sup>172</sup> Clause 17, inserting a new s.257A into TULRCA.

claim.<sup>173</sup> If they won, they would receive compensation capped at one year's salary which they could try to recover in a system for enforcing tribunal awards which has been shown to be woefully inadequate.<sup>174</sup> The need for collective protest is all the greater where the legal regime provides little practical protection for worker protest in the form of strike, but the Government nonetheless proposes to restrict this outlet too.

#### 4. CONCLUSION

In the second reading in Parliament, Sajid Javid stated that the Bill was not a 'declaration of war on the trade union movement' and was not an attempt to ban industrial action.<sup>175</sup> Instead, it was the latest stage in a 'long journey of modernisation' which would put power in the hands of the union membership, bring 'sunlight to the dark corners of the movement', and protect the rights of the public who are affected by strikes.<sup>176</sup> The detailed procedures in TULRCA Part V, probably still 'the most restrictive union laws in the Western world'<sup>177</sup>, already ensure that strikes only take place with membership approval in a secret postal ballot, under the bright light of independent scrutiny. If the real concern of the Government were greater democracy within trade unions, the obvious step would be to allow forms of voting other than postal ballots, especially in an era when most post is junk mail, often discarded without being read.

Turnout and voting thresholds are blunt tools with which to achieve the third aim, of

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<sup>173</sup> See for a review of the impact of tribunal fees: D. Pyper and F. McGuinness, *Employment Tribunal Fees* (House of Commons Briefing Paper No.7081, 15 September 2015) and the TUC Report at [https://www.tuc.org.uk/sites/default/files/TUC\\_Report\\_At\\_what\\_price\\_justice.pdf](https://www.tuc.org.uk/sites/default/files/TUC_Report_At_what_price_justice.pdf).

<sup>174</sup> BIS, Payment of Tribunal Awards: 2013 Study (2013) BIS/13/1270.

<sup>175</sup> HC Hansard, 14.09.15, col 761.

<sup>176</sup> Ibid.

<sup>177</sup> See Tony Blair's statement to an interview in the Sun cited again in the Guardian (2001): <http://www.theguardian.com/politics/1997/apr/27/election2001.uk1>.

protecting the 'rights' of those affected by strikes. In some essential public services both thresholds will usually be met; in other industries where members are hard to contact by post or do not return ballot papers, the 50% requirement may operate as a bar on taking industrial action, even if there is no significant effect on third parties beyond the employer. Even where the thresholds are met, still the Government wants to introduce additional restrictions. Relying on inadequate information and assumptions, it aims to give employers greater freedom to replace strikers and wants to squeeze union-organised peaceful picketing and protest into an ever tighter legal straitjacket. The Government backs its proposals with little empirical research and skates over issues of compliance with international and European human rights standards to which the UK is a signatory. Any disruption to the public or private sphere by unions' collective action is, on this view, unacceptable or is outweighed by the interests of third parties; if this is not a war, it is odd that only unions are targeted for regulation.

Early in the second reading Javid explained how his father was helped by trade unions in the cotton mills and when a 'whites-only' policy threatened to prevent him from working as a bus driver.<sup>178</sup> He drew no connection between this assistance and the right to take effective collective action. But without the practical ability to strike or protest, the union's appeals on behalf of his father might well have fallen on deaf ears; future generations of exploited workers may be less fortunate, or may be forced to take action outside the remit of an unduly restrictive legal regime.

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<sup>178</sup> See HC Hansard, 14.09.15, col. 760.