

**Transparency of Lobbying Bill
etc. – A Note on Potential
Human Rights Implications**

Published September 2013

By Professor Keith Ewing



**The Institute of Employment Rights
4TH Floor
Jack Jones House
1 Islington
Liverpool
L3 8EG
0151 207 5265
www.ier.org.uk**

The Institute of Employment Rights is an independent charity. We exist to inform the debate around trade union rights and labour law by providing information, critical analysis, and policy ideas through our network of academics, researchers and lawyers.

This IER Response, kindly drafted by the expert named, reflects the authors' own work not the collective views of the Institute. The responsibility of the Institute is limited to approving its publications, briefings and responses as worthy of consideration.

Keith Ewing is President of the IER and Professor of Public Law at Kings' College London.

Carolyn Jones
Director, Institute of Employment Rights
12 September 2013
cad@ier.org.uk
07941 076245

Transparency of Lobbying etc Bill – A Note on Potential Human Rights Implications

1 The relevant human rights treaties include the following:

- ILO Convention 87 (Freedom of Association and Protection of the Right to Organise Convention, 1948)
- European Convention on Human Rights 1950 (arts 8 (right to private life, home and correspondence); 10 (freedom of expression) and 11 (freedom of association, including the right to form and join trade union)).
- European Social Charter 1961 (art 5 (right to organize)).

2 ILO Convention 87 and the European Social Charter are particularly important because they are relied upon by the European Court of Human Rights in determining the scope and content of Convention rights: *Demir and Baykara v Turkey* [2008] ECHR 1345.

Part 2

3 Part 2 of the Bill deals with the election expenses of so called third parties. In short, it introduces new registration and reporting requirements, an extended definition of 'controlled expenditure', and a new restriction on 'targeted expenditure'. So far as I can tell, it is the second and third of these measures which are most likely to have the greatest effect on the Convention rights of trade unions.

- **Controlled expenditure**

4 The main concern here is what American lawyers would refer to as the problem of overbreadth. The Bill simply sweeps up too much general activity of trade unions as well as activity directly related to an election.

5 A good example is to be found in the proposed new PPERA 2000, Sch 8A, and in particular the last item on the list that refers to 'rallies and other events, including . . .'. As drafted there is a danger that this would apply to the annual congress of the TUC in 2014, as well as to the annual conferences of all individual trade unions. This is a danger reinforced by comparison with PPERA, Sch 8, which expressly EXCLUDES annual party conferences from the list of political party campaign expenditure.

6 If this is correct, trade unions would be required to ban political discussion at their annual conferences or to cancel them altogether. They could contemplate the possibility of holding their conferences in election year behind closed doors, from which both public and press were excluded. That would clearly be both undesirable and unacceptable, and in any event the conferences in question might still fall within the definition of controlled expenditure.

7 The overbroad nature of the proposed Sch 8A clearly has implications for ECHR, art 10 (freedom of expression), and art 11 (freedom of association). That being the case it is incumbent on the government to justify these restrictions as being proportionate to the realization of Convention rights set out in art 10(2) or 11(2). No such justification has been provided.

- **Targeted expenditure**

8 The proposed new restrictions on 'targeted expenditure' are the most chilling aspect of the Bill. Even if there is legitimacy in third party spending limits, this is much too restrictive, and has been missed by most commentators so far.

9 While unions individually can spend £319,800 in England on 'controlled expenditure' generally (and smaller amounts in other parts of the United Kingdom), they can only spend £31,980 on expenditure targeted at a particular political party. In a clumsily written provision, expenditure will be targeted at a political party if it can 'reasonably be regarded' as being intended to benefit that party or any of its candidates.

10 This means that a trade union will be permitted to spend only £31,980 **IN THE YEAR** before the election on expenditure that might reasonably be regarded as being intended to benefit a particular party. The scope of this restriction is extended immeasurably in light of amendments elsewhere in the Bill. According to the Explanatory Notes to the Bill:

The definition of 'for election purposes' does not rely solely on the intent of the third party; the effect of the expenditure must also be considered. Any campaign expenditure which satisfies the definition outlined by new section 85(3) will be counted as controlled expenditure, regardless of whether those incurring the expenditure intended it (or also intended it) for another purpose (para 59).

11 The ECtHR has already struck down third party limits in British law as violating Convention rights, on the ground that the limit was too low: *Bowman v United Kingdom* (1998) 26 EHRR 1, concerning a limit of £5 supporting or opposing a single candidate in the period of 4 – 6 weeks before the election. The reasoning that applied there appears to me to apply with equal force to the new restrictions on targeted expenditure in the Bill, not least 'the fact that there were no restrictions placed upon the freedom of the press to support or oppose the election of any particular candidate' (para 47). The current proposals certainly need to be justified in the light of *Bowman*.

Part 3

12 Part 3 of the Bill contains provisions dealing with trade union membership and complement existing statutory obligations on trade unions to maintain accurate membership records (TULRCA 1992, s 24). The Bill proposes to reinforce that duty by requiring trade unions to have their membership records independently assessed, with new powers being granted to the Certification Officer to conduct inspections and investigations. Industrial action laws already require trade unions to maintain accurate

records: there is no need for the coercion proposed by the bill.

- **Convention rights of trade unions**

13 The starting point is that the government's proposals in Part 3 appear to violate the Convention rights of trade unions, as violating the principle of trade union autonomy from State interference. This principle is recognized in ILO Convention 87 (above), which states by art 3 that

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

14 It is difficult to see how the provisions of Part 3 are consistent with this latter obligation, or with ECHR, art 11, which that obligation informs. It is true that the ILO supervisory bodies have made it clear that despite its wording, Convention 87 is not a barrier to ALL regulation of trade union administration and government. But although I am unaware of any case before these bodies considering legislation quite as draconian as that proposed in part 3 (perhaps because that proposed in part 3 is unprecedented), they have made it clear that regulation has to be justified by some compelling consideration.

15 The problem with part 3 of the Bill is that it confers powers on state officials in relation to Convention protected voluntary associations that are inappropriate in a liberal democracy committed to human rights. Thus:

- Trade unions are required to appoint State approved assurers;
- The State approved assurer has a right of access at all reasonable times to the register of the names and addresses of the union's members and to all other documents which the assurer considers may be relevant;
- The assurer is entitled to require from the union's officers, **or the officers of any of its branches or sections**, such information and explanations as the assurer considers necessary for the performance of the assurer's functions;
- Trade unions must provide documents (in some cases 'immediately) to a State official (the Certification Officer – who does not hold judicial office) or his agent, where the CO 'thinks there is good reason to do so';
- The documents that must be provided include 'documents of any other description which the Certification Officer or authorised person considers may be relevant . . . ';
- The power to take documents includes the power to make copies and to require an individual to provide an explanation of them; trade union officials who refuse to supply documents may be required by the CO or his agent to say where they are;
- 'Any person' may be required to co-operate with a State appointed inspector and produce all relevant documents relating to a relevant investigation;

- The documents that must be provided include ‘documents of any other description which the inspector or inspectors consider may be relevant’;
- ‘Any person’ may be required ‘to give the inspector or inspectors all assistance in connection with the investigation which the person is reasonably able to give’;
- Enforcement proceedings may be brought against any individual who refuses to comply with these obligations, leading it seems eventually to the possibility of punishment for contempt of court;
- It is not permissible to refuse to comply with the duty to comply with these duties on the ground that to do so may be incriminating;
- Lawyers may be required to identify the names and addresses of their clients.

16 Apart from the impact of these measures on ILO Convention 87, it is strongly arguable that the proposed investigatory powers are incompatible with the right to freedom of association in ECHR, art 11. That being the case, the proposed legislation will have to be justified under art 11(2), presumably on the ground that the restrictions imposed are proportionate restrictions in order to safeguard the rights and freedoms of others. But whose rights or interests? And if the latter can be identified, what is the mischief to which these restrictions are directed? On what ground can the restrictions be justified? And for what legitimate objective can these measures possibly be said to be proportionate?

- **Convention rights of trade union members**

17 Perhaps even more serious is the impact of the Bill on the Convention rights of trade union members. The idea that State approved officials or State appointed officials should have access to the names and addresses of trade union members is an idea that requires compelling justification. Again, these measures are being proposed without persuasive explanation or convincing justification

18 The need for a persuasive explanation and convincing justification for these measures is all the greater for the fact that the proposals in question directly affect the individual’s right to private life, home and correspondence (ECHR, art 8), as well as his or her right to freedom of association (ECHR, art 11). Thus:

- the assurer (who is a State approved official) will have the right of access to sensitive personal data, which trade union officials will be required to provide, without the consent of the member;
- the CO (who is a state official) or anyone else the CO has authorized will have the right to be provided with membership lists, which trade union officials will be required to provide, without the consent of the member;
- the investigator (who is appointed by a state official) will have the right to be provided with membership lists, which trade union officials will be required to provide, without the consent of the member.

In some cases it is not only membership details that must be provided; so too must any other documents, which may include private correspondence.

19 Not only do three state approved or state officials have access to trade union membership lists without the consent of the individuals concerned, they will also have

the right to retain and use the information. So far as I can tell, there is no provision made for the length of time this data can be retained or any provision made for its destruction. Although there are provisions about confidentiality, so far as I can tell there is no duty of confidentiality by either the assurer or the inspector to the individual member, or indeed in the case of the inspector to the union. What are the consequences of a breach of the duty of confidentiality of the assessor or the inspector?

20 All of which raises fundamental questions about why the state or its agents need to have access to the names and addresses of trade union members. And why this information must be provided to State officials without the consent of members concerned. Not only is it a direct threat to ECHR, art 8, at a time when blacklisting and massive state surveillance are rife, it may well have a chilling effect on trade union membership itself. Who will want to join a trade union if they know that their membership details are to fall into the hands of State agents or their agents? Who can be confident that this information will not be misused?