

Trade Union Act 2016: Consultation on the Certification Officer's levy

Thompsons Solicitors' response

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Thompsons is the largest and most experienced personal injury, employment and trade union law firm in the UK. We are specialists in industrial action work, on which we advise most of the major trade unions in the UK through our specialist Trade Union Law Group. We have represented trade unions in most of the leading decisions relating to industrial action.

Foreword

We strongly oppose the Certification Officer reforms contained in the Trade Union Act 2016. Our criticisms are set out in detail in an article written by two of our members in the Industrial Law Journal¹.

We strongly oppose the principle which underpins this consultation – namely that a levy should be raised at all.

Section 257A(1) of the Trade Union and Labour Relations Act 1992, referred to at section 20 of the Trade Union Act 2016, provides that the Secretary of State '*may by regulations make provision for the Certification Officer to require trade unions to require trade unions and employer's associations...to pay a levy to the [Certification Officer]*'. There is certainly no requirement for the Secretary of State to do so. We believe that it follows from the optional nature of the provisions that the Secretary of State should not take the step without legitimate justification, and following proper consultation.

We see no good reason why the levy should be introduced. Further, we consider it entirely inappropriate, and potentially unlawful, for the government to issue a consultation that fails to seek views the fundamental issue at stake - whether a levy should be introduced at all.

Section 20(8) of the Trade Union Act 2016 provides that: 'Before making regulations under this section the Secretary of State **must** consult relevant organisations and ACAS' (our emphasis). Reading section 257A(1) with section 257A(8), it is clear that consultation with relevant organisations, including trade unions and ACAS, as to whether there should be a levy in the first

¹ 'A discussion of the Certification Officer Reforms', Stephen Cavalier and Richard Arthur, Industrial Law Journal 2016 45(3) 363. Found at:

https://www.researchgate.net/publication/306074069_A_Discussion_of_the_Certification_Officer_Reforms

place is expected to be a prerequisite. We are not aware of any such consultation having taken place, whether with trade unions, ACAS or anyone else. And the government appears to have a closed mind on the issue given its outright rejection of 'Option 0' in the impact assessment accompanying the current consultation.

With so much of the government's attention focused on Brexit, one can't help but speculate as to why resource is being given to a measure, the outcome of which will be to infuriate trade unions and their members, and which is being done in a way that excludes the opportunity for debate as to whether there should be a levy in the first place, as envisaged by section 20 of the Trade Union Act.

The consultation says:

"At a time of ongoing financial constraint, the government believes that the taxpayer should not be required to meet the costs of regulating trade unions and employers' associations and the organisations should make a contribution towards this."

The government's use of financial constraint is a political choice usefully and cynically deployed to 'justify' another anti-trade union measure designed, in reality, to encourage vexatious complaints about trade unions and which they will be required to pay for.

Significantly, this consultation seeks to distract us from the wider picture by isolating the levy element from the other powers which the Certification Officer acquired by virtue of the Trade Union Act 2016 in addition to their existing ones.

The cumulative impact of the new powers and obligations mean that the Certification Officer is now responsible for making a complaint, investigating it, reaching a decision and fixing a punishment - acting as accuser, judge, jury and executioner - contrary to all notions of justice and best practice when determining compliance with legal rules to be conducted by the one body. Taking this approach fundamentally undermines the fair administration of justice and the rule of law.

Not only does a levy create new costs for Trade Unions, but it also heightens concerns about the constitutional role of the Certification Officer. As a quasi-judicial body, the Certification Officer should be entirely independent from the parties on which it can impose a judgment. Instead, this proposal makes it dependent on them for funding and provides an improper incentivisation structure for the Certification Officer. This significantly impairs the independence of the Certification Officer.

This erosion of the long-standing role as independent adjudicator was criticised by David Cockburn, Certification Officer 2001 - 2016:

“The regulation of the internal affairs of trade unions has hitherto been based on the premise that they are voluntary associations. Historically, the law has intervened to protect and support the position of members. Thus it is the members who have the right to complain to the Certification Officer about an alleged breach of their rights under the rules of the union or an alleged breach of statute. The Trade Union Act is based on a different premise, namely that the public has an interest in the internal affairs of trade unions given the impact of some industrial action on the public. Accordingly, the right of the Certification Officer to investigate and initiate formal complaints against trade unions has been extended. The role of the Certification Officer will change from being mainly the adjudicator of members’ complaints to become one with more general policing and enforcing responsibilities. This is not the role to which I was appointed in 2001. [...]

“My concern is that trade unions may find themselves subjected to a myriad of references to the Certification Officer by persons and/or organisations seeking to pursue them for industrial, political or other purposes and who have the motivation and money to put any given situation under a microscope. [...]

“My second concern is that, in the above circumstances, the Certification Officer will in effect be the investigator, prosecutor and adjudicator. This raises immediate issues of a fair trial, as required by Article 6 of the European Convention on Human Rights and the

Human Rights Act 1998. The extended powers of the EAT to hear appeals on both law and fact is one answer to this problem but it is a cumbersome and expensive solution.”²

We echo and share those concerns and also adopt the words of Baroness Donaghy at report stage in the House of Lords³:

“We have repeatedly asked the Minister to explain which comparable organisations are subject to a levy to pay for this sort of regulation by the state. The examples which we were given at earlier stages in the progress of the Bill, such as the Financial Conduct Authority are just not comparable. The FCA regulates profit-making organisations, many of which pose systemic risks to our economy, many of which have routinely flouted the spirit – and sometimes the letter – of the law, and some of which have been bailed out by taxpayers to the tune of billions of pounds. By contrast, trade unions are representative, democratic organisations, already tightly regulated by law, which play a critical role in our democracy.

“However, the government do not seem to see trade unions in that light. They do not see them as contributors to our democracy or as the defenders of the rights of people with less power than themselves; they see them simply as opponents of their party’s interest and as organisations to be regulated, levied and constrained. There is no other explanation for the decision to impose a levy in this way. No such levy exists for the only really comparable organisation, which is the Electoral Commission. The Conservative Party does not fund investigations by the Electoral Commission into the manner in which it operates, but the trade unions must pay for the partisan regulation that the Conservatives impose on them. It is unjustifiable.”

In addition to the unjustifiably partisan regulation, there is a grossly inequitable distribution of the proposed levies between trade unions and employer’s associations. Trade unions with an income of between £370,000 and £900,000 will have to pay £9,148, whilst those with an income of more than £900,000 will have to pay £22,269. In addition, they will have to contribute to the levies imposed on any federated trade unions in which they participate (such as the TUC). This

² Annual Report of the Certification Officer 2015-2016

³ House of Lords Hansard, 19 April 2016

is to be contrasted with the £3,493 payable by employers' associations with an income of between £140,000 and £210,000, and the £5,007 payable by employers' associations with an income of more than £210,000 (such as the EEF).

These figures are based on estimations for increased costs occasioned by the Certification Officer reforms set out in the Trade Union Act made before the relevant provisions came into force and yet, despite their being unlikely to bear scrutiny with what actually transpires, there is no provision for them to be revised (or for refunds of what turn out to be overpayments to be made). We would suggest that a more prudent and appropriate course - if this isn't to be a partisan and vindictive exercise - would be for the government to wait until the end of the first year of operation of the Certification Officer reforms before setting levels for the proposed levy.

Responses to consultation questions

1. Do you agree that the costs for the functions delivered by the Certification Officer as defined above should be recoverable in the levy? Are there any omissions?

No, for the reasons given above.

2. Do you agree with excluding the costs of external inspectors from the levy? Are there any other significantly variable costs that should be excluded and why?

Yes, but that's a concession already made by the government. We are strongly of the view that there should not be a levy in the first place. See further above.

3. Do you agree that the costs of regulating political funds and superannuation schemes should be subsumed into the levy?

No. There should be no additional costs for regulating political funds and superannuation schemes.

4. Do you agree with removal of the Certification Officer's existing fees, and for the costs of these activities to be subsumed into the levy? Does this create any unintended consequences?

No. See above.

5. Do you agree with the principle of having exemptions and a limited subsidy regime? Where should we set the affordability cap?

No. See, generally, above.

6. Do you agree that this approach meets our objectives? Are there any unintended consequences or potential risks we should consider?

No. See above.

For further information contact

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