Making Work Pay

Consultation on creating a modern framework for industrial relations

Introduction

This response is made by Unite the Union. Unite is the UK's strongest trade union, representing over one million members across all sectors of the economy including manufacturing, financial services, transport, food and agriculture, construction, energy and utilities, information technology, service industries, hospitality, health, local government and the not-for-profit sector. Unite also organises in the community, enabling those who are not in employment to be part of our union.

Executive Summary

Unite welcomes this government consultation. Unite is of the view that UK trade union and employment law requires a major overall to achieve a rebalancing of power within the workplace and to build an industrial relations system which meets the needs of working people and supports economic growth and increased productivity. The government's Employment Rights Bill represents a significant step in the right direction in achieving these goals. However, the Government needs to go further if it is to succeed in its goal of creating a modern framework for industrial relations for the 21st century. Unite calls on the government to amend the Employment Rights Bill to ensure it creates watertight rights which deliver change for working people.

In particular, the Bill should be amended to:

- Outlaw fire and rehire
- Promote and facilitate the extension of collective bargaining including by:
    - Empowering Ministers to introduce sectoral collective bargaining, beginning with the re-establishment of the Agriculture Wages Board in England.
    - Strengthening and streamlining the statutory recognition scheme by

        - creating simpler routes to automatic recognition; i
          introducing robust rules on unfair practices banning practices seen at Amazon and beyond and
          creating rights of access for union officials from day one of a union recognition application

- Overhauling the TUPE regulations, including by protecting transferred trade union recognition rights
- Creating a new free-standing right for all workers to be able to access unions in their workplace
- Repealing all elements of the Trade Union Act 2016
- Reforming industrial action law more widely including by reducing the excessive penalties introduced by the last government and simplifying the information which must be included in the industrial action notices
- Banning all zero hours contracts
- Responding to changes in the labour market, by regulating the use of new technologies in the workplace, including by creating new rights for unions to be consulted on and to agree the use of surveillance technologies, AI systems and automation at work.
- Providing effective enforcement mechanisms and robust sanctions which create a genuine incentive for employers to comply with their legal obligations. This should include the effective resourcing of the Employment Tribunal system and the Fair Work Agency.

Responses to consultation questions

A Principles Based Approach

Question 1:

Do you agree or disagree that these principles should underpin a modern industrial relations framework built around collaboration, proportionality, accountability and balancing the interests of worker, businesses and the wider public? Is there anything else that needs consideration in the design of this framework?

Question 2:

How can we ensure that the new framework balances interests of workers, business and public?

Unite welcomes the commitment to build a modern, positive framework for industrial relations in the UK.

But we would take a different starting point than proposed in the consultation.

Unite believes that it is essential that a modern framework for industrial relations is rooted in international standards and fundamental rights which are recognised and protected by ILO Conventions, the European Social Charter and the European Convention on Human Rights. The UK government has signed up to these standards and is required to comply with them.

Unite acknowledges the proposed principles, but only to the extent that they involve justified and necessary restrictions on the rights and freedoms of workers and their trade unions.

As Thompsons have stated:

> "Just as 'Labour's Plan to Make Work Pay' foreshadows the end of 'one-sided flexibility' on the part of workers, so must a modern industrial relations framework end 'one-sided' 'collaboration', 'proportionality' and 'accountability', and the 'balancing of interest' always in one direction."

Unite would also add another principle to those listed in the consultation which is the promotion and extension of collective bargaining through good faith negotiation, as protected by ILO Convention 98 and Article 6 of the European Social Charter.

Collective bargaining can and should play a central role in the Government's growth mission. As Labour's Plan to Make Work Pay: Delivering a New Deal for Working People acknowledged "Economists across the board also recognise the vital role that workers' voices and unions have in delivering a strong economy and rising living standards."

The OECD has acknowledged that collective bargaining is the only tried and tested method for improving driving up and working conditions and tackling inequality at work. Collective bargaining also brings significant benefits for workers, employers and the economy alike by delivering improved living standards, increasing innovation, reduced staff turnover, investment in training and increased productivity.

The Employment Rights Bill will create the Fair Pay Agreement in adult social care and the re-establishment the school support staff negotiating body. These measures represent a significant step in the right direction, although Unite would support improvements to the mechanisms which are more akin to collective bargaining. The Bill will also reinstate and strengthening of the two-tier workforce agreement in public services.

Government policy should go further, including commitments to:

- provide powers for the introduction of sectoral bargaining other sectors;
- replace the Pay Review Body with free collective bargaining in the NHS; and
- strengthen and streamline the statutory recognition scheme as outlined below.

Strengthening and streamlining the statutory recognition scheme.

Unite believes the statutory recognition scheme should be reformed. It has been in place for almost 25 years. However, the procedure has not succeeded in securing an expansion in trade union recognition or collective bargaining, with most successful recognition applications being found in small or medium-sized enterprises.

The Employment Rights Bill includes limited but welcome changes to the statutory recognition scheme including changes to:

- the admissibility test, removing the requirement for unions to demonstrate a majority of workers in a bargaining unit are likely to support recognition for collective bargaining; and
- rules for recognition ballots, removing the requirement that 40% of the workers in a bargaining unit must vote for a union to be recognised.

As welcome as the government's proposals may be, the current statutory recognition scheme is heavily weighted in favour of employers, who can delay the process, exclude trade unions from workplaces and to resource campaigns designed to prevent workers from winning collective bargaining.

Unite therefore calls on the government to introduce further reforms of the recognition scheme to ensure that the anti-union abuses seen at Amazon and beyond are prevented and to ensure workers have a genuine right to secure collective bargaining in their workplace where a majority support it.

In particular, the statutory recognition scheme should be revised in the following ways:

a) Automatic union recognition should be awarded where:
   - a majority of workers in the bargaining unit are members of the union or
   - where there is evidence that a majority of workers in the bargaining unit support recognition, e.g. having signed a petition in support of recognition for the purposes of collective bargaining
b) Rights for unions to access a workplace should apply throughout the entire recognition process, not just from the point when the CAC decides that a ballot should be held. There should a maximum 7-day period to reach a voluntary access

arrangement. Where agreement is not reached default access arrangements should apply.

c) The default rights to access should mirror the employers' plans to meet with workers to discuss recognition and must include a right for officials to meet workers to explain to workers the benefits of collective bargaining in their workplace during breaks from work, e.g. in staff canteens. Workers should be paid during periods of access.
d) The default access arrangements should also provide for digital access for unions to meet with unions and details on the frequency of meetings. Employers should also be required to disclose to unions their usual communication methods and timetables, and to circulate digitally union campaign materials.
e) The restrictions on the use of unfair labour practices should apply throughout the entire recognition process. The list of prohibited practice should be expanded to include bans on employers from:
    - hiring union busting consultants
    - encouraging workers to resign their union membership, e.g. by displaying QR codes
    - creating a hostile environment towards trade unions.

Key recommendations

This section sets out Unite's recommendations for reform of the statutory recognition scheme in more detail. The proposals are set out in accordance with the structure of Schedule A1, not necessarily in order of priority.

(i) Reforming the worker definition

There is a need to update the definition of 'worker' for the statutory recognition scheme, following the Supreme Court's decision in the *Deliveroo* case.

The UK Supreme Court concluded that Deliveroo riders were not workers as defined in TULRCA 1992, s 296 because their contracts included a power to appoint a substitute to perform their work. The Court decided the union could not apply for recognition of Deliveroo riders even though the power to engage a substitute was rarely used by some and never used by most. This judgment means that workers employed in the so-called gig economy are prevented from applying for statutory rights. Unite believes that workers should not need to wait for the delayed single status review to secure rights to collective bargaining.

(ii) Three-year moratorium for recognition applications

The moratorium which prevents unions from making a new application for recognition after an unsuccessful application should be removed. The three-year rule is particularly harsh in cases such as the recent claim against Amazon where the union failed despite polling 49.9% in the ballot. Failing its total repeal, we would propose that a six-month waiting period would be more appropriate.

(iii) Rights of access during the recognition process

The current statutory recognition procedure provides very limited access rights for unions. Access rights currently only apply during the ballot and proposals contained in the government consultation will not change this.

Rights to access are also seriously restricted and in no way mirror employers' rights to access workers and influence or intimidate them into voting against recognition. Employers are also able to draw out discussions and limit union access.

Unite therefore calls on the government to strengthen and extend the access arrangements set out in Schedule A1 as follows:

a) As proposed above, rights for unions to access the workplace should apply throughout the entire recognition process, namely the period between the acceptance by the CAC of an application and the conclusion of a collective agreement (or the imposition by the CAC of the statutory procedure in the event of a failure of the parties to agree their own procedure).

b) Trade union officials should have a right of access to premises and meet with workers for the following purposes:

- To explain the role of the trade union
- To explain to workers the benefits of trade union recognition and collective bargaining

Trade union officials should also have a right of access to premises to meet shop stewards and other workplace representatives, and to discuss with them matters of trade union business

c) As proposed above, there should be a maximum 7-day calendar window to reach a voluntary access arrangement. Where agreement is not reached then default access arrangements for officials of independent trade unions should apply. The default rights to access should mirror the employers' plans to meet with workers to discuss recognition and must include:

- A right for officials of independent trade unions to meet workers in their workplace at reasonable times during any period when a worker is employed to work or engaged in work in the workplace. That is:

(a) at a time agreed with the employer; or
(b) any other time when workers are entitled to be on the premises but not required to be at work, ie breaks from work under the Working Time Regulations, under the workers' contract of employment or custom and practice. Workers should be paid during periods of access.

- Arrangements should also be provided for digital access for unions to meet with dispersed workers and those who work from home or on a hybrid basis.

- Officials should have a right of access in any room or area where the workers in relation to whom access is sought normally take meal or other breaks and meet workers to explain the role of the trade union. If there is no staff canteen or break rooms or areas, the employer would be required to provide a room or other suitable space. Workers should be paid during periods of access.

- The default arrangements and accompanying Code should provide details on the frequency of meetings, which should be set at a significantly higher and more regular basis than in the existing Code (that is, one meeting of 30 minutes duration for every 10 days of the access period).

- Employers should also be required to disclose to unions their usual communication methods and timetables as soon as an application for recognition is accepted.

- Employers should also be required to disclose details about work rosters and the numbers of workers who work away from the premises which impact on the right to access

(iv) Paid time off for union reps during a recognition campaign

Currently, no provision is made for paid time off for union workplace representatives during a recognition campaign period. Existing rights to time off work for trade union duties (TULRCA 1992, s 168) and activities (TULRCA 1992, s 170) apply only where the union is recognised. This limits the ability of unions to engage with workers and organise for recognition.

Trade union representatives in the workplace should have a right to paid time off work for any purposes related to the application for recognition. The proposed new right to time off would apply where the union is seeking to be recognised (as in the case of TULRCA 1992, s 145B).

The purposes for which an additional right to reasonable time off is permitted should include but not be limited to:

(a) meetings with employees at the workplace,

(b) meetings with union officials at or outside the workplace,

(c) meetings at the offices (national, regional, or local) of the trade union, and

(d) meetings with the employer.

(v) Revise the rules for deciding bargaining units

The current rules for determining bargaining units are significantly weighted in favour of employers (Sch A1, Para 19B). There are two main concerns:

- When deciding the bargaining unit, the CAC is required to consider 'compatibility with effective management'. There is no requirement to consider the desirability of promoting worker representation.
- The CAC is directed to consider all bargaining units proposed by employers, and not to give preference to the union's proposed bargaining unit. This follows amendments to Sch A1, para 19B, overturning the Court of Appeal decision in the *Kwikfit* case.

TULRCA 1992, Sch A1 should be revised to ensure that when determining a bargaining unit, the CAC is required to give at least equivalent consideration to the importance of promoting worker representation alongside issues of compatibility with effective management.

For example, para 19B(2) should read:

'(2) The CAC must take these matters into account—

(a) the desirability of promoting worker representation;

(b) the desirability of the unit being compatible with effective management; and

(c) the matters listed in sub-paragraph (3), so far as they do not conflict with (a) and (b) above.

The matters referred to in para 19B(3) and to be considered in assessing the appropriateness of the bargaining unit should be amended to include (f) 'the organisation and structure of the trade union or trade unions'.

Para 19B(4) should also be repealed to ensure that preference is not given to bargaining units proposed by the employer and to restore the law to its status following the Court of Appeal's decision in the *Kwikfit* case brought by the TGWU.

(vi) Automatic recognition where a majority of workers in a bargaining unit are union members or have demonstrated support union recognition

The current recognition procedure is cumbersome. A trade union first must navigate the admissibility stage and then resolve any disputes about the bargaining unit. Then there are two routes to recognition. First, the CAC may issue a declaration of recognition where the union has majority membership. However, the CAC has a discretion to require a ballot to be held in such cases, on one of three grounds set out in the legislation. Secondly, where the union does not have majority membership in the bargaining unit, the CAC will order a ballot to be held (assuming that the application has been accepted, is admissible, and the bargaining unit has been resolved).

These requirements present a serious barrier to workers securing recognition, even though a clear majority of workers support collective bargaining.

Unite believes the procedures Schedule A1 should be streamlined to ensure that workers' views and requests for recognition are respected. The CAC should be required to award recognition without the need for a ballot where a union is able to show evidence of 10% membership and where:

- a majority of workers in a bargaining unit are union members **or**
- where there is evidence that a majority of workers support union recognition, for example, having signed a petition.

This approach would be consistent with the position in Australia where the trade union can apply for a *majority support determination* under the Fair Work Act 2009 to kick-start negotiations for an enterprise agreement under the statutory enterprise bargaining procedure (which is a close equivalent to TULRCA, Sch A1).

A ballot would still be required where a union can show evidence of 10% membership but not majority support. Where a ballot is held, recognition should be awarded where a simple majority of those voting support it. It should not be necessary that at least 40% of those eligible to vote, vote to support recognition.

(vii) Strengthening the law on unfair labour practices

TULRCA 1992, Sch A1 currently makes provision for unfair practices. However, the rules:

- Only apply during the balloting period and not throughout the recognition campaign period;
- Create a false symmetry between trade unions and employers. Unfair labour practices rules should not apply to trade unions.
- Only prohibit limited forms of conduct, where it is undertaken 'with a view to influencing the result of the ballot'.

As seen in the recent Amazon case, these protections are inadequate and do not prevent employers from intimidating workers and seeking to block union recognition

So Unite proposes the following changes:

1. The law - not simply the Code of Practice - on unfair practices must apply from the date a recognition application is accepted by the CAC.

2. The rules regulating employer conduct need to be more robust. It should be an unfair practice for an employer to take any decision or engage in any conduct where the purpose, in whole or in part (to any extent), is to influence the outcome of a trade union recognition application, including the result of a ballot where a ballot is held.

3. The existing provisions of para 29A(2)(a)-(f) should be supplemented by three additional examples of prohibited conduct. It should be unlawful for an employer to:

- *Facilitate or encourage workers to resign their membership of the trade union which has made the recognition application,*

This would deal with the allegations made in the recent Amazon case where it was alleged that the use of 'one-click-to-quit QR codes', posted throughout the workplace and was designed to encourage union members to cancel their union membership.

- *engage professional services for the purpose of influencing the outcome of a trade union recognition application, or*

This would deal with the deployment of union busting consultants.

- *create, promote, encourage, or facilitate others to create or promote an environment of hostility towards the trade union, its officials, or its members*.

This is designed to ensure employers take a neutral stance towards recognition applications. It is not uncommon for employers to create a hostile environment to deter workers from supporting or voting for union recognition, as is their right. The current law, which provides it is an unfair practice for an employer to use or attempt to use 'undue influence on a worker entitled to vote in the ballot' does not address this problem adequately.

The remedies which apply in the event of an unfair practice should also be strengthened. Where the CAC decides that an unfair practice has been committed:

- The award of automatic recognition should be the standard remedy; and
- Every worker in the bargaining unit should have a right to compensation based on TULRCA 1992, s 145F, (currently £5,584).

In addition to being an unfair practice, it should never be acceptable for an employer to facilitate or encourage workers to resign their membership of a trade union. To this end, TULRCA 1992, sections 145A – 145F should be amended to prohibit such conduct, with

the remedy being the same as in cases where the employer has made an unlawful inducement to workers in relation to trade union membership. Workers should be entitled to compensation as under TULRCA, s 145F which should be payable whether or not the workers to whom any employer conduct was directed had or had not resigned from the union.

(viii) Prohibit the use of non-independent trade unions to block recognition applications by independent trade unions.

Currently, an application for recognition by an independent trade union can be blocked where an employer has recognised a non-independent trade union. In such cases, an independent trade union can apply for recognition only after the concerned union has applied successfully for the non-independent union to be de-recognised. This is a formidable obligation, not without risk to the workers initiating such a move. It is also very time-consuming.

The law should be amended to provide recognition of a non-independent union will no longer block a recognition application by an independent union. There will be no need formally to derecognise the non-independent union in advance.

(ix) Expanding the subjects for collective bargaining purposes

The law currently limits the subjects for which recognition can be secured to pay, hours and holidays. This means that there is no incentive for employers negotiating voluntary agreements in the shadow of the procedure to agree to negotiate on wider issues and the CAC has no power to order anything more when making a declaration of recognition.

There is no justification for this restriction, and no reason why the bargaining purposes under TULRCA 1992, Sched A1 should not be aligned with the definition of a collective agreement in TULRCA 1992, s 178. This applies to 'any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to one or more of the matters specified in TULRCA 1992, s 178(2). These are:

> (a) terms and conditions of employment, or the physical conditions in which any workers are required to work;
>
> (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
>
> (c) allocation of work or the duties of employment between workers or groups of workers;
>
> (d) matters of discipline;
>
> (e) a worker's membership or non-membership of a trade union;
>
> (f) facilities for officials of trade unions; and

(g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.

In recent years there has been a significant increase in the use of AI technology within the workplace. Such technologies can discriminate against workers, including women, BAEM, LGBT+ and disabled workers. The subject matters for negotiation should be extended to include the use of data.

Question 3:

Do you agree or disagree with the proposal to extend the Code of Practice on access and unfair practices during recognition and derecognition ballots to cover the entire recognition process from the point when the Central Arbitration Committee (CAC) accepts the union's application for statutory recognition? Please explain your reasoning and provide any evidence on cases that support your view.

Unite agrees with the general principle of this proposal. However, further reforms are required.

Firstly, it is not sufficient to apply the Code of Practice on access and unfair practices to cover the entire recognition process. The related legislation also needs to apply from the point when the Central Arbitration Committee (CAC) accepts the union's application for statutory recognition. Paragraphs 26(1) to (4B) of Schedule A1 and Paragraph 27A relating to unfair practices should be amended accordingly.

Secondly, paragraph 27A currently applies bilateral duties on both the employer and the trade union. Unite does not agree that the influence of unions and employers is symmetrical. In our opinion, the unfair practice provisions should only apply to employers.

Thirdly, please see above Unite's wider recommendations for reform of the law on unfair practices, including proposals to extend the range of prohibited conduct by employers, which are designed to address the abuses experienced in the recent Amazon campaign.

Fourthly, Unite strongly believes that rights of access for trade union officials, not just provisions on unfair practice, should apply from the point when the CAC accepts the union's application for statutory recognition. Please see above Unite's wider recommendations on access above.

Question 4:

Do you agree or disagree with the proposal to introduce a requirement that, at the point the union submits its formal application for recognition to the Central Arbitration Committee (CAC), the union must provide the employer with a copy of its application? Please explain your reasoning.

Unite does not agree with this proposal. Employers already receive the relevant information in the initial approach letter from the union. However, if the proposal was implemented, employers should be required to supply the numbers of workers in the bargaining unit to the applicant trade union.

An issue of greater concern is the ability of employers to enter into an agreement with a non-independent trade union at this stage with a view to blocking the recognition application. As set out above, Unite believes that recognition of a non-independent union should not block the application for recognition by an independent trade union.

Question 5:

Do you agree or disagree that the employer should then have 10 working days from that date to submit the number of workers in the proposed bargaining unit to the Central Arbitration Committee (CAC) which could not then be increased for the purpose of the recognition process? Please explain your reasoning

Unite agrees that restrictions should be placed on the ability of employers to increase the number of workers in the proposed bargaining unit. It is commonplace for employers to seek to flood a bargaining unit with additional non-union workers. This proposal would help to prevent an employer from recruiting temporary staff to dilute union support in the later stages of the recognition process.

However, this would not prevent an employer from using the 10-day window to recruit additional temporary staff to either seek to block the CAC's acceptance of a union application or to make it harder for the union to secure automatic recognition or to win a recognition ballot.

If the proposal is to be adopted, it should apply from the date when the union first applies for recognition.

Question 6:

Can you provide any examples where there has been mass recruitment into a bargaining unit to thwart a trade union recognition claim?

Please provide as much detail as you can.

There was evidence of this practice during the recent Amazon campaign. In Unite's experience, it is a widely used employer tactic.

Question 7:

Are there any alternative mechanisms that you consider would prevent mass recruitment into a bargaining unit for the purpose of thwarting union recognition applications? Please provide as much detail as you can.

Please see the responses including the answer to question 5.

Question 8:

Do you have any views on a possible alternative to place a new obligation on employers not to recruit into a proposed bargaining unit for the purpose of seeking to prevent a union from being recognised? How would this alternative work in practice?

Please see the response to question 5.

Question 9:

Do you agree or disagree with the proposal to introduce a 20-working day window to reach a voluntary access agreement from the point when the Central Arbitration Committee (CAC) has notified the parties of its decision to hold a trade union recognition ballot?

Unite agrees that there should be a maximum period for negotiations on access agreements. Employers are currently able to drag out these discussions for weeks if not months. This only has the effect of delaying the ballot and providing more time for employers to organise and resource anti-union campaigns.

We consider that a 20-period is far too long. This should be reduced to 7 days. Any fixed period for negotiations should apply from the day when an application is admitted by the CAC.

Unite also takes the view that this and other proposals on access during the recognition process are insufficient and will not do enough to rebalance the interests of workers and employers.

Please see above Unite's detailed recommendations for access during the recognition process, including the proposal that rights of access should apply from the point when the CAC accepts an application for recognition.

Question 10:

If no agreement has been reached after 20 working days, should the Central Arbitration Committee (CAC) be required to adjudicate and set out access terms by Order? If yes, how long should CAC be given to adjudicate?

Please see above Unite's detailed recommendations for access during the recognition process including the proposal that where agreement is not reached between employers and unions, then default arrangements for access should apply.

The default rights to access should mirror the employers' plans to meet with workers to discuss recognition and must include a right for officials to meet workers to explain to them the benefits of collective bargaining in their workplace during breaks from work, e.g. in staff canteens. The default arrangements should also provide for digital access for unions to meet with unions and details on the frequency of meetings. Employers should also be required to disclose to unions their usual communication methods and timetables. See above for more detail.

The CAC should be required to enforce the default arrangements.

Question 11:

Once 20 working days have expired, should the Central Arbitration Committee (CAC) be allowed to delay its adjudication in instances where both parties agree to the delay? Should this delay be capped to a maximum of 10 working days?

Unite cannot foresee any circumstances where it may be justified for the CAC to delay its adjudication on access arrangements.

Please see above Unite's detailed recommendations for access during the recognition process including the proposal that where agreement is not reached between employers and unions, then default arrangements for access should apply.

The default arrangements should apply automatically at the end of 7-day period.

Question 12:

Which (if any) of the options provided do you agree with in terms of the tests set for making an unfair practice claim? Please explain your reasoning.

Unite agrees with option one, which removes the requirement for the CAC to be satisfied that the use of an unfair practice changed or was likely to change a voter's intention.

Since the provisions were introduced in 2004 there have no, or virtually no, successful claims by unions against employers' unfair practices. This is largely due to the difficulties unions face in proving that an employer's action influences decisions on whether or how to vote in a recognition ballot.

Question 13:

Should the Government extend the time a complaint can be made in relation to an unfair practice to within 3 months of the date the alleged unfair practice occurred?

The time limit should be extended in such a way as to enable a trade union to bring a complaint within three months of becoming aware that an unfair labour practice has taken place.

The government should review the appropriate remedy in circumstances where the CAC concludes that a complaint for unfair practices is well-founded. In our opinion, where an employer is found to have committed a prohibited practice, the union should be awarded automatic recognition.

Political Funds

Question 14:

Do you agree or disagree with the proposal to remove the 10-year requirement for unions to ballot their members on the maintenance of a political fund? Please provide your reasoning.

Agree.

Unite supports proposals in the Employment Rights Bill removing the additional restrictions imposed on union expenditure from political funds and requirements for new members actively to opt in to contributing to the political fund.

These measures were designed to make it harder for working people, through their unions, to have our say on the political decisions that affect workers and our communities.

We also agree that the requirement on unions to re-ballot members every 10 years on the requirement to reballot members on the maintenance of political funds.

Since 1984, Unite and our legacy unions have been required to ballot members every 10 years on whether political funds should be retained. On each occasion, a very large majority voted in favour of maintaining a political fund. Nevertheless, the requirement to run a postal ballot every 10 years costs the union millions in members' money. The bureaucratic burden and costs imposed on unions means that the requirement to re-ballot cannot be justified, given the outcome has never proved in doubt.

If members ever collectively took the view that the union should not retain a political funds, amendments could be brought to the union's rules conference.

Question 15:

Should trade union members continue to be reminded on a 10-year basis that they can opt out of the political fund? Please provide your reasoning.

Following our response to question 14, Unite does not consider it necessary to remind members every 10 years of their right to opt out of political fund contributions. Union members are already notified of the right to opt out when joining the union.

However, if the government decides to require some form of reminder, we consider a notice on the union website should suffice.

Question 16:

Regulations on political fund ballot requirements are applicable across Great Britain and offices in Northern Ireland belonging to trade unions with a head or main office in Great Britain. Do you foresee any implications of removing the 10-year requirement for unions to ballot their members on the maintenance of a political fund across this territorial extent?

We do not foresee any implications of removing the 10-year requirement for unions to ballot members on the maintenance of political funds in Great Britain and Northern Ireland.

Simplifying Industrial Action Ballots

Question 17:

How should Government ensure that our modern framework for industrial relations successfully delivers trade unions a meaningful mandate to support negotiation and dispute resolution?

Unite fully supports the repeal of the 2016 Trade Union Act and the requirements for a 50% turnout and a 40% support vote in important public services for industrial action to be lawful. We would be strongly opposed to any reintroduction of thresholds and would consider this to be a breach of manifesto commitments to working people.

The thresholds have done absolutely nothing to improve industrial relations or to resolve employment disputes. In fact, the thresholds are likely to have had the opposite effect. Prior to any industrial action, union officials are required to dedicate significant time and resources to ensuring that the ballot thresholds are met. This is time which could more effectively be focused on seeking a resolution to the dispute.

The ballot thresholds can also have the effect of prolonging disputes in two key respects. Firstly, unions will tend to only go to ballot once they are confident that the thresholds will be easily surpassed. This can take time and delay the process, when earlier action by union members might have led to a swifter resolution of the disputes. Secondly, the effort required to ensure that ballot thresholds are met can have the effect of entrenching disputes. Members can see the level of support for a dispute and are therefore more likely to want to continue industrial action until they achieve all their objectives.

The requirement for a 40% yes vote is inherently undemocratic as it means that abstentions are treated as no votes – even though the members may not take that view.

The removal of the ballot thresholds would not mean that unions will not continue to seek high turnouts in industrial action ballots. Unions are inherently democratic and accountable bodies. We will always listen to the views of members. It would also be counterproductive for unions to seek to organise industrial action which is not supported by the majority of members. To do so would weaken union's bargaining position with employers. If members do not support industrial action, they will continue to go to work.

Question 18:

Do you agree or disagree with the proposed changes to section 226A of the 1992 Act to simplify the information that unions are required to provide employers in the notice of ballot? Please explain your reasoning.

The UK's requirements relating to the information which must be provided by unions to employers in industrial action and ballot notices has been repeatedly criticised by international human rights agencies. The European Committee of Social Rights which is responsible for supervising government's compliance with the European Social Charter has consistently found that the requirement for a notice of ballot amounts to an excessive restraint on the right to take industrial action, given that the union must also

give notice before actually taking industrial action. Therefore, the European Committee on Social Rights has concluded that UK law does not conform with Article 6 of the European Social Charter 1961.

For this reason, Unite would call for the requirement for a s226A notice to be repealed.

Unite also agrees that the information which unions should be required to provide in industrial action notices should be substantially simplified. Reforms should be underpinned by the following purposes. The legislation should:

a) protect the right of trade unions and their members to organise and take part in collective action;
b) should not being weighted in favour of employers' interests and
c) be proportionate.

These purposes should be spelt out in the legislation.

Otherwise Unite generally supports the proposals for members who do not use check off arrangements to pay their membership subscriptions.

However, we cannot see any justification for proposals to remove the ability of unions to rely on the existing rules relating to members who pay via 'check-off'. Where check off arrangements are in place, unions should continue to be required to provide such information as would enable the employer readily to deduce the information that would have been contained in the lists of categories and workplaces.

Question 19:

Do you have any views on the level of specificity section 226A of the 1992 Act should contain on the categories of worker to be balloted?

Unite accepts that unions should be required to provide information in notices relating to categories of workers, however, it is essential that the legislation makes clear that:

1) the union is permitted to list 'categories' which are the usually used by the members themselves;
2) unions should only be required to provide 'general job categories';
3) there are different ways in which that can be done – for example by profession, trade, occupation, grade or pay band. All of these should be treated as acceptable;
4) Unions should only be required to provide information which is in their possession (as currently defined)

5) just because a union may possess more specific information as to categories of worker, it should not be required to provide, so long as it provides general information.

In relation to 2) above, we propose that the legislation should follow the formula adopted by the Court of Appeal in *RMT v Serco*[1] and add that 'general job categories will not reflect the more sophisticated job breakdown used in pay negotiations'.

It is also important that any new information and notification provisions are designed to protect the right to strike.

Where members pay their subscriptions by check-off, then the current 'alternative formulation' should be retained, with the requirement to give numbers in each category and at each workplace removed.

Question 20 – What are your views on the proposal to amend the requirement that unions should provide information on the results of the ballot to those entitled to vote and their employers 'as soon as reasonably practicable'?

We agree that a specific timeframe should be set out in legislation – provided it is sufficiently long.

Question 21

What do you consider is a reasonable time requirement for unions to inform members and their employers of the outcome of the ballot?

We think that three working days after the close of the ballot should be the minimum period. Unions should be able to provide inform members and employers by making a posting on the union website.

Question 22

What do you consider are suitable methods to inform employers and members of the ballot outcome? Should a specific mechanism be specified?

It should be sufficient for unions to notify the results of a ballot by placing it in a prominent position on the union's website. If a union wants to use some other mechanism, then it would be permitted to do so.

[1] *National Union of Rail Maritime and Transport Workers v Serco Ltd* [2011] IRLR 399, at paragraph 9.

Failure to comply with the requirement to notify the result within a particular timeframe should have the effect of invalidating the ballot. That is a disproportionate sanction and the law should be reformed.

Question 23

Do you agree or disagree with the proposal to simplify the amount of information that unions must provide employers in the industrial action notice? Please explain your reasoning.

In our answers to Questions 17 and 18 above.

Question 24

What are your views on the degree of specificity section 234A of the 1992 Act should contain on the categories of worker?

Please see our answer to Question 19.

Question 25:

Do you agree or disagree with the proposal to extend the expiration date of a trade union's legal mandate for industrial action from 6 to 12 months? Please explain your reasoning and provide any information to support your position.

Unite was surprised that section 234 of the 1992 Act had been retained by the Employment Rights Bill. We do not agree that a ballot mandate should expire after a certain period of time.

Unite takes the views that such restrictions are unnecessary, and their main purpose is to impose cost and administrative burdens on unions. Re-running industrial action ballots can cost unions £10,000s - £100,000s depending on the numbers of members involved in a dispute.

Unions are inherently democratic and accountable organisations and we listen to our members. If union members no longer support industrial action, they will also choose to cross picket lines and return to work. If union members are still taking industrial action after 6 months, this suggests that a dispute has not been resolved and employers need to return urgently to the bargaining table to find a solution to workers' concerns.

Question 26:

What time period for notice of industrial action is appropriate?
Please explain your reasoning.

Unite takes the view that a maximum of 7 days' notice is appropriate for industrial action.

It is important to remember that the notice of action is given after a lengthy preparation period for industrial action – including the union giving employers 7 days' notice of a ballot, followed by the ballot period, followed by notice of industrial action. Any employer will be all too aware that industrial action is planned.

Updating the Law on Repudiation of Industrial Action

Question 27:

Which (if any) of the options provided do you agree with in terms of modifying the law on repudiation? Please explain your reasoning

Unite believes that the requirement for unions to repudiate action taken by members should be repealed in its entirety.

These requirements were introduced in the 1980s, to seek to create a division between unions and their membership. Such requirements are unnecessary and unjustified.

Question 28:

Currently the notice by the union is prescribed by legislation. Do you think that prescription of the notice should remain unchanged? If not, what changes do you propose?

Question 29:

Do you agree or disagree that the current legislation on repudiation should be left unchanged? Please explain your reasoning

Unite takes the view that the expectation for unions to repudiate action taken by members should be repealed in its entirety. Such requirements are unnecessary and unjustified.

Clarifying the Law on Prior Call

Question 30:

Do you agree or disagree with the Government's proposal to amend the law on 'prior call' to allow unions to ballot for official protected action where a 'prior call' has taken place in an emergency situation? Please explain your reasoning.

The rules relating to prior call should be repealed. It is our view that, a 'prior call' should not invalidate a subsequent ballot. The current rules are another example of how legislation is framed to prevent the union from taking industrial action. The current law is disproportionate and does not reflect the imbalance of power between trade unions, workers and employers. There is no good reason why a subsequent ballot should not be effective.

While the proposal set out in the consultation is a step in the right direction, we are concerned that they are too narrow and do not go far enough. The current restrictions should be removed.

Question 31:

What are your views on what should be meant by an "emergency situation"?

As stated above, Unite believes that the current restrictions relating to a prior call should be removed.

If the government decides to persist with its current proposal, we would suggest the appropriate threshold for an 'emergency situation' should be 'circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety' (see section 44(1)(c) Employment Rights Act 1996).

Question 32:

Are there any risks to the proposed approach? For example, increased incidences of unofficial action or of official action which does not have the support of a ballot and is taken without the usual notice to employers?

Please explain your reasoning and provide any information to support your position.

We do not foresee any risks with the removal of the current requirements relating to prior call.

Right of Access

Too few workers in the UK have the opportunity to meet with a union official in their workplace. This means that many workers miss out on effective representation at work, access to quality legal services and most importantly on a right to say over the pay, terms and conditions through collective bargaining.

Unite had hoped that proposals on rights for workers to access and meet with trade unions in their workforce would be transformative. Creating a simple and effective right to access could contribute to the improved enforcement of employment rights and standards, improved pay and conditions and an increase in worker voice across the UK.

Unite was therefore severely disappointed by the approach to access taken in the Employment Rights Bill. In our opinion, these provisions do not make good on the government's commitment to create "rights for trade unions to access workplaces, in a regulated and responsible manner, for recruitment and organising purposes."[2]

Proposals for a free-standing right of access have been replaced with a mechanism to seek to facilitate agreements between employers and trade unions for access arrangements. Unite considers that the proposals are weak, uncertain and are unlikely to deliver for working people.

We are not convinced the mechanisms will prove effective in relation to employers who are hostile to unions. Employers can be inadvertently hostile to unions because they are simply unfamiliar with what a union is. Equally employers, including large corporations are often determined to keep trade unions out of their workplace so that they retain their full prerogative over workers' pay and conditions and that their exploitative employment practices, including poor health and safety standards, will be not exposed to scrutiny and challenge.

Under the proposed arrangements, employers will be able to prolong discussions over access so as to keep the union at bay. This could prevent workers from having early access to unions where they face serious issues in the workplace, including harassment, bullying or health and safety concerns.

It is also not clear when or how the CAC would make an order requirement access to take place. The enforcement mechanisms are also likely to prove cumbersome and ineffective.

The proposed remedies are also unlikely to provide an effective deterrent for employers who are opposed to unions accessing their workplace and providing representation to workers. Larger firms, including multinationals, are likely to be willing to pay limited fines or compensation – seeing it as the price for keeping unions out. It is therefore welcome that the government is consulting on enforcement mechanisms for access rights.

Unite calls on the government to take a different approach to access rights.

[2] Labour's Plan to Make Work Pay: Delivering a New Deal for Working People p 13

Trade union officials should have a right of access to workplaces to:

(a) meet workers to explain the role of the trade union and to recruit workers who wish to join the trade union.
(b) meet shop stewards and other workplace representatives
(c) meet members of the trade union
(d) meet and interview a worker or workers about grievances or disciplinary concerns; and
(e) accompany or represent a worker or workers in grievance or disciplinary procedures, including for the purposes of the Employment Relations Act 1999, section 10.
(f) meet workers with a view to monitor compliance with contractual and statutory obligations owed by the employer to its workers; and
(g) meet workers with a view to investigate complaints of a failure by the employer to comply with contractual and statutory obligations owed by the employer to its workers.

Unions would be expected to give employers written notice before from seeking to exercise a right of access. The notice should specify the purpose for which entry is sought and the workers or categories of workers the authorised official intends to meet. It should also specify the name of the authorised official and the proposed date when the union proposes to visit the workplace.

Union officials should be able to meet workers in their workplace at reasonable times during any period when a worker is employed to work or engaged in work in the workplace. That is (a) at a time agreed with the employer; or (b) any other time when workers are entitled to be on the premises but not required to be at work, ie breaks from work under the Working Time Regulations, under the workers' contract of employment or custom and practice.

Officials should have a right to meet with workers in any room or area where workers normally take meal or other breaks to explain the role of the trade union. If there is no staff canteen or break rooms or areas, the employer would be required to provide a room or other suitable space. Workers should be paid during periods of access.

Employers should be under a duty to co-operate with the right of access and should not take steps to discourage workers from joining a trade union or monitor, record or use surveillance of any meetings between workers and the union.

Unites calls on the government to introduce arrangements based on this type of approach.

If the government decides to proceed with its current approach significant changes would need to be made if the proposed access arrangements are to be meaningful and facilitate workers' ability to meet with unions in their workplace.

The changes would need to include:

- The rights to access should be limited to independent trade unions. This would prevent their use by a) consultants who seek to charge workers for services and b) far right political groups which have sought to infiltrate workplaces in recent years. These groups have no experience of worker representation or collective bargaining.
- Employers must be prevented from prolonging discussions with a view to blocking access arrangements.
- A finite period of for example 7 calendar days should be provided for access discussions. Where agreement is not reached in that period then default statutory access rights should apply.
- The default statutory access rights should provide as a minimum for:
    - A right for officials of independent trade unions to meet workers in their workplace at reasonable times during any period when a worker is employed to work or engaged in work in the workplace. That is (a) at a time agreed with the employer; or (b) any other time when workers are entitled to be on the premises but not required to be at work, i.e. breaks from work under the Working Time Regulations, under the workers' contract of employment or custom and practice.
    - Officials should have a right of access in any room or area where the workers in relation to whom access is sought normally take meal or other breaks and meet workers to explain the role of the trade union. If there is no staff canteen or break rooms or areas, the employer would be required to provide a room or other suitable space.
    - Provision should be made for digital access for unions to meet with dispersed workers and those who work from home or on a hybrid basis.
    - The default arrangements should be accompanied by a Code of Practice which should set out details on the frequency of meetings.
    - Employers should be expected to disclose details about the numbers of people working at the workplace. work rosters and the numbers of workers who work away from the premises which impact on the right to access.
- The purposes for which access can be sought should be expanded. See above for a full list of proposed purposes. The current proposal to exclude the organisation of industrial action from the list of permitted purposes should be reversed.

- The enforcement mechanisms for access arrangements should be substantially strengthened as outlined in the following responses.
- To avoid a backlog in claims, the CAC would need to be adequately resourced to deal with the additional caseload.
- To avoid delays in access applications, the CAC should have up to 28 days to determine application for access or to determine if the employer has not complied with the default access arrangements or an access agreement.

Question 33:

Do you agree or disagree with the proposed approach for the CAC to enforce access agreements? Please explain your reasoning.

Unite accepts that the CAC would be an appropriate body to supervise access arrangements. Although it will be essential for the CAC to be properly resourced to respond to the likely increase in case work

However, we question the proposed approach to enforcement and in particular the proposal for a two-stage enforcement process. This is likely to prove cumbersome and would enable the employer to drag out the process and avoid access rights. There should be only stage in the enforcement, as follows.

- where the CAC finds a complaint that an employer has failed to comply with the default access arrangements or with access agreements is well-founded, it should be required to issue a declaration to that effect and to make an order requiring the person in default to take the steps specified in the order to ensure that access takes place in accordance with the agreement, 'unless the CAC considers that to do so would be inappropriate'
- that declaration or order made by the CAC at the conclusion of the single-stage enforcement procedure should then be capable of enforcement as if it were a declaration or order of the court;
- on the determination of a complaint, the CAC or EAT should also have power to impose a penalty, or a conditional penalty providing that, unless the required steps are taken, a financial penalty will be payable; and
- before the CAC makes an order for a penalty, or a conditional penalty, the defaulting party should be given the opportunity to make representations to the CAC.

Question 34:

Do you have any initial views on how the penalty fine system should work in practice? For example, do you have any views on how different levels of penalty fines could be set?

As outlined above, the penalty fine system should form part of a one-stage enforcement process. A declaration or order made by the CAC should be capable of enforcement as if it were a declaration or order of the court.

It is important that penalties are set at a level which incentivises employers to facilitate access arrangements. We propose that penalties should be linked to the turnover of the business, in line with the approach adopted in the UK GDPR and DPA, which provide for maximum fines of £17,500,000 or 4% of annual turnover, whichever is the higher.

Benchmarking awards against turnover would create a significant deterrent effect for employers, would mean that compensation was proportionate to the size of a business and would ensure that large multinationals are not able to leverage their financial strength to avoid legal obligations

Alongside powers to impose financial penalties, the CAC should have the power to apply conditional penalties, which will be applied unless the conditions are met. Conditional penalties could create an incentive for employers to comply with the legislation and to facilitate access arrangements.

Question 35:

Do you think the proposal for a penalty fine system is proportionate or not, and would it be effective? Please explain why.

Unite believes that benchmarking awards against turnover would be proportionate as awards would reflect the size of a business and would ensure that large multinationals are not able to leverage their financial strength to avoid legal obligations

Unite is concerned that the government may be considering applying (minimal) awards which would be paid to the state, in line with the approach adopted in the Information and Consultation Regulations. This penalty system has proved completely ineffective and has resulted in regulations rarely being applied in workplaces.

Question 36:

Do you consider there to be any alternative enforcement approaches the government should consider? For example, should a Central Arbitration

Committee (CAC) order requiring specific steps to be taken (Step 2 above) be able to be relied upon as if it were a court order? What other approaches would be suitable?

As outlined above, Unite proposes that:

- where an employer and unions fail to reach agreement on access arrangements, default arrangements should apply. The CAC should be required to adjudicate on complaints relating to the default access arrangements.
- The government's proposals should be adjusted to allow for a single-stage enforcement process
- The CAC should have the power to impose financial penalties and conditional financial penalties, dependent on compliance with specific steps.

Going Further and Next Steps

Question 37:

Are there any wider modernising reforms relating to trade union legislation that you would like to see brought forward by the government? If yes, please state these and why.

Unite appreciates the willingness of the government to consult on wider trade unions reforms.

We recognise that the Employment Rights Bill includes a range of important changes to the trade union law, including the repeal of the Strikes (Minimum Service Levels) Act.

However, Unite calls on the government to amend, strengthen and extend several provisions, to ensure the Bill creates watertight legislation, prevents avoidance tactics by employers and delivers real change for working people. The Bill should be amended in the following ways.

Compliance with international standards

Firstly, Unite would call on the Government to use the opportunities presented by the Employment Rights Bill to review and revise UK trade union legislation so that it complies with international standards and the fundamental freedoms of workers, as

recognised and protected the ILO Conventions 87 and 98, the European Social Charter, Articles 5 & 6 and Article 11 of the European Convention on Human Rights.

Fire and rehire

The Bill should be amended to outlaw fire and rehire. Under the current provisions, there is a serious risk that the most egregious examples of fire and rehire by employers will continue to be lawful. Fire and rehire dismissals should be automatically unfair.

Unite is also seriously concerned that there is nothing in the Bill to prevent employers from sacking staff in the first place. We would call on the government to introduce alternative interim relief arrangements which would enable unions to apply to employment tribunals for an order preventing dismissals from take place until the employer has engaged in genuine consultation and negotiations. Provision should also be made for the appointment of experts to scrutinise the company's accounts to establish if variations to contracts are justified, as provided for within European Works Councils.

Promotion and extension of collective bargaining

Collective bargaining is the only tried and tested route to drive up living standards, tackle inequality and promote innovation, training and productivity in the workplace. Unite believes that the promotion of collective bargaining should form a core element of the government's growth mission. We therefore call on the government to promote and facilitate the extension of collective bargaining. A first step would be to amend the Employment Rights Bill to:

- Provide Ministers with powers to introduce sectoral bargaining in sectors beyond adult social care
- Strengthen and streamline the statutory recognition scheme as outlined above by creating simpler routes to automatic recognition; introduce robust rules unfair practices banning practices seen at Amazon and beyond and creating rights of access for union officials from day one of a union recognition application
- Respond to changes in the labour market, by regulating the use of new technologies in the workplace, including by creating new rights for unions to be consulted on and to agree the use of surveillance technologies, AI systems and automation at work.

Right to access workplace

Too few workers in the UK have the opportunity to meet with a union official in their workplace. This means that many workers are missout on effective representation at work, access to quality legal services and most importantly on a right to say over the pay, terms and conditions through collective bargaining.

In line with commitments set out in Labour's Plan to Make Work Pay, Unite calls on the government to amend the Employment Rights Bill to introduce a freestanding right for unions to be able to access workplaces and to meet with workers to explain the benefits of trade union membership – in line with the proposals outlined above.

TUPE Reform

- There is a need for wide-ranging reform of the TUPE Regulations to ensure that outsourcing does not result in a race to the bottom for terms and conditions of employment. The changes should include:
    - TUPE consultation arrangements should be revised to mirror those conducted during redundancy processes. Consultation should start earlier, there should a requirement for the transferor to provide unions with additional information and there should be a broad duty on the transferor and the transferee to consult with trade unions.
    - The ETO exemptions should be removed to simplify the regulations for both workers and businesses.
    - The regulations should be protected to protect pension contributions to the same standard as other contractual terms.
    - The current system for transfer of trade union recognition is completely inadequate. The 'organised grouping test' means it is too easy for the transferee employer to restructure the workforce to avoid recognising a union and the requirement to engage in collective bargaining.
        - The 'organised grouping test' should be removed and union recognition should transfer automatically to the new employer.
        - The regulations should be amended to provide the ability for the Employment Tribunal to issue a declaration as to the existence of recognition
        - Where the new employer fails to engage in collective bargaining after a transfer, the employer should be penalised. Trade unions and affected workers should be entitled to protective awards, at least equivalent to those which apply where an employer fails to consult on collective redundancies.
        - The bargaining unit should also be revised after a period of time to include existing employees who are employed on similar terms and conditions as the transferred employees.

Reform of industrial action law:

Unite strongly welcomes measures in the Employment Rights Bill which reform industrial action law, including:

- The repeal of the Strikes (Minimum Service Levels) Act
- The removal of the 12 week limit on unfair dismissal protection for those participating in lawful industrial action

- The repeal of most aspects of the Trade Union Act 2016 and
- The introduction of protections from detriment for workers participating in industrial action.

However, we would call on the Government to use the opportunities presented by the Employment Rights Bill to do the following:

- To repeal the Trade Union Act 2016 in full, in line with manifesto commitments
- To implement the Supreme Court's decision in the *Mercer* case in full and in a manner which is consistent with Article 11 of the European Convention on Human Rights.
- To simplify the requirements relating to industrial action and ballot notices.
- To extend the 'small accidental failures' saving (s232B TULRCA 1992) to all parts of the ballot process, including in particular, the ballot and action notices.
- To repeal the provisions on repudiation of industrial action in full.
- To remove the restrictions on unions re-balloting in cases of a prior call.
- To review the Code of Practice for Picketing including removing the recommended maximum number of pickets as 6.
- To reverse the increases in the maximum amount of damages which can be awarded against trade unions in industrial action cases.
- Reverse the excessive penalties introduced by the last government and simplifying the information which must be included in the industrial action notices

In the longer term, Unite would also calls on the government to consider wider reform of trade union law including:

- The introduction of a positive right to strike. Unions should be required to organise industrial action within the parameters of narrow immunities from liabilities.
- The broadening of the definition for a trade dispute
- Modernising the rules on secondary action to reflect changes in the labour market, including the outsourcing service delivery.