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Dear Lady O'Neill,

I welcomed your comments on the Trade Union Bill and human rights at Second Reading of the Trade Union Bill and I look forward to working with you and other Noble Lords at Committee and Report stage. I undertook in my closing speech to write to you to address in greater detail the points you raised.

I am pleased to be able to report that we have today published the Government Response to the consultation on the 40% ballot threshold for important public services. In addition, we have also published an Impact Assessment for the Trade Union Bill (excluding facility time and check-off), and separate Impact Assessments covering facility time and check off. All these documents can be found on line at: https://www.gov.uk/government/collections/trade-union-bill.

As you reminded us in the House, Article 11 of the European Convention of Human Rights ("ECHR") protects the very important right to freedom of assembly and association and the right to join trade unions. As I said at Second Reading, the Bill is not about banning strikes but rather about carefully ensuring that it provides the right balance between the rights of trade unions and the rights of others. The provisions in the Bill reflect the Conservative Party manifesto on which the Government has elected. We therefore have a democratic mandate and this is a relevant consideration in assessing the conditions which the Government puts in place. In drafting the

Bill to give effect to the manifesto commitments, the Government has carefully ensured that the Bill is compatible with the ECHR.

As you acknowledged at Second Reading – it is legitimate for Government to set conditions on the exercise of Article 11. These must be set out in legislation and must be *necessary* in a democratic society. In order to satisfy this test the conditions must be in the interests of national security or public safety, they must be imposed to prevent disorder or crime, or for the protection of health or morals or for the protection of the rights and freedoms of others.

In addition they must be proportionate to the aim which they are dealing with. I agree with you when you say that any limitations cannot be for administrative convenience or efficiency. Throughout the Bill we have considered the aims being pursued and we have ensured that the provisions in the Bill are proportionate to those aims, as is required by the ECHR.

For example, we have been very clear that we are seeking to address the rights of people who are adversely affected by strike action. In Second Reading I pointed to a strike in the education sector in 2014 organised by the National Union of Teachers. It was held on the support of just 22% of their members. The strike led to the full closure of almost 3000 schools, nurseries or colleges across England. I also mentioned the strike in 2014 by NHS workers which was secured on the basis of the support of just 12% of members.

Such strikes result in widespread and severe consequences for many people trying to organise child care when schools are shut. The school system educates nearly 8 million pupils. Equally, there is great disruption for people trying to get to work when tube drivers take industrial action. In a single day there are around 4 million journeys on London's tube network alone. The NHS assists over 1 million patients in England every 36 hours. Analysis by the Department for Transport of the likely impact of the proposed Network Rail strikes in June 2015 estimated an economic cost of between £80 million and £230 million. It must be right that such action takes place only after there is a clear mandate. This is precisely what the measures on thresholds in the Bill seek to address. The thresholds are entirely proportionate. Many previous strikes such as the junior doctors' strike on 12th January, would have satisfied the threshold requirements to achieve the mandate for individual actions. We are legislating so that all strikes have a strong democratic mandate.

By way of further example, the Report of the Equality and Human Rights Commission raised concerns about whether Clause 9 on picketing is compliant with Article 11. The Government believes it is legitimate to legislate to protect the rights and freedoms of non-striking workers. Unfortunately, as

the Carr Review heard in 2014, there is concerning evidence that pickets organised by unions can and do lead to unacceptable levels of intimidation.

The appointment of a picket organiser (as required by clause 9) is not onerous. It simply reflects current practice as recommended in the Code on Picketing in the way unions carry out pickets. The requirements are designed to make it clear to the police and an employer both where a trade union sanctioned picket is taking place and whom the police or the employer should contact in the event of any problems arising. The provision is wholly proportionate to the legitimate aim.

I have taken this opportunity of this letter to address the matters raised in the Equality and Human Rights Commission's Report on the Bill (please see the attached Annex). The Government has carefully analysed the relevant provisions of the Bill and the requirements of the ILO's Conventions. We are satisfied that the Bill is fully compatible with these Conventions.

I would be happy to meet to discuss this further, if that would be helpful, at any stage of the Bill.

I am copying this letter to those Peers who spoke at Second Reading of the Trade Union Bill and placing a copy in the Library of the House.

Lucy Neville-Rolfe

BARONESS NEVILLE-ROLFE DBE CMG

ANNEX: REPONSE TO THE REPORT BY THE EQUALITY AND HUMAN RIGHTS COMMISSION ("EHRC")

International Labour Organisations ("ILO") Conventions

1. The ILO Conventions are not subject to judicial enforcement in an international court in the same way as the rights in the European Convention of Human Rights. Nor can they be directly relied upon as conferring enforceable rights in domestic proceedings in UK courts.

2. Instead, as the EHRC is aware, the ILO operates through a tripartite structure which allows government representatives, employers' organisations and workers' organisations, collectively, to formulate international labour standards by consensus.

3. The Conference Committee and the Governing Body are the competent organs of the ILO to interpret and enforce ILO conventions. They are guided by the work of two advisory bodies: the Committee of Experts ("CoE") on the Application of Conventions and Recommendations, and the Committee of Freedom of Association ("CFA"). The CoE and the CFA fulfil an informal advisory role, and are not recognised under the ILO Constitution. Often the Governing Body expresses no judgment on the criticisms expressed by these Committees, and it takes no action as a result of their reports.

4. In principle, the standards agreed by the ILO tripartite structure can contribute towards the development of international law. They may also be relied upon to identify a consensus among states, which may be relevant when considering a state's margin of appreciation when imposing restrictions on Article 11 ECHR rights.

5. In *RMT v UK*[1], the applicant sought to go further, arguing that a breach of Article 11 ECHR could be inferred from critical views expressed by ILO committees as to a State's compliance with ILO conventions. However, the Strasbourg Court acknowledged the current lack of consensus within the ILO as to the status of CoE and CFA findings and noted that their views did not have persuasive weight for determining the issues before the Court in that case.[2]

6. Whilst there has been criticism from the CoE and CFA about the UK's legislation and the TUC has used those comments in support of criticism of the Bill, crucially, the ILO Governing Body has not concluded that the UK's industrial regime is incompatible with the Conventions. The Government does

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[1] *National Union of Rail, Maritime and Transport Workers v United Kingdom* (Application No 31045/10) [2014] IRLR 467, (2014) 60 EHRR 199 – paragraph 106.

[2] Paragraph 98.

not therefore accept that the UK's trade union legislation to date, nor the provisions in the Bill, are contrary to the ILO Conventions.

Statutory regulation of unions

7. The provisions in the Bill do not infringe the principle guaranteed by Article 3 of ILO Convention 87 for unions to "*organise their administration and activities and to formulate their programmes*".

8. Article 3 is not an absolute prohibition on any form of statutory regulation of unions. It is legitimate for a state to regulate union activity, given the important role that unions play in representing the interests of workers and facilitating business activity. Regulation by the state, in the proportionate manner set out in the Bill, is entirely consistent with the ILO Conventions.

Strike ballot thresholds

9. The provisions on strike ballot thresholds in clauses 2 and 3 of the Bill are compatible with Article 3 of ILO Convention 87, which concerns the freedom of unions "*to organise their administration and activities and to formulate their programmes*" (see above).

10. The requirements in clauses 2 and 3 of the Bill complement the existing requirement in section 226 of the Trade Union and Labour Relations (Consolidation) Act 1992, that a (bare) majority of those who vote must support a strike. The existing provision is a proportionate restriction on trade unions' freedom, in order to ensure that they have a democratic mandate for any industrial action they may take. It has never been suggested that such a restriction is incompatible with Article 3 of Convention 87.

11. The turnout and voting thresholds in the Bill are also compatible with Convention 87. The requirements are not unduly onerous, and our analysis suggests that most strike ballots will meet these requirements. Such requirements are a common feature of the laws or the collective agreements of a number of countries: similar thresholds for minimum turnout or a qualified majority before strike action may be undertaken lawfully apply in 13 other European states.[3]

12. The TUC relies on views expressed by the CoE that if a Member State deems it appropriate to establish in its legislation provisions which require a vote by workers before a strike can be held, it should ensure that account is taken only of the votes cast, and that the required quorum and majority are fixed at a reasonable level. However, this view is in itself contradictory. By its very nature where a minimum turnout or quorum is required by law, which the

[3] Armenia, Azerbaijan, Bulgaria, Czech Republic, Germany, Latvia, Lithuania, Poland, Romania, Russian Federation, Slovak Republic, Turkey, Ukraine.

CoE accepts may be a legitimate requirement, then votes which are not cast will determine whether that quorum requirement has been met.

13. The Government considers that the voting requirements in clauses 2 and 3 are set at a reasonable level, which ensures that unions have a strong mandate to carry out their action.

Picketing

14. Clause 9 is also compatible with Article 3 of Convention 87. The CFA has commented that restrictions on picketing may be justified, in its view, when "*designed to protect public order or to prevent threats being made to workers who continue to work during a dispute.*"[4] The picketing provisions in clause 9 of the Bill are consistent with this.

Strike action; Notice of intention to ballot

15. The Government's view is that the extension of the notice period in Clause 7 of the Bill, from 7 days to 14 days is a proportionate step to ensure that employers are given adequate notice of the disruption caused by strike action. For the reasons given above, this provision is compatible with unions' freedom under Article 3 of Convention 87 to "*formulate their programmes*".

Political funds and political expenditure

16. The provisions in clause 10 and 11 on political funds are also consistent with Article 3 of Convention 87.

17. The provisions will allow trade unions to continue to operate freely in collecting funds for political purposes and may continue to spend those funds for the political purposes they choose. The provisions are about choice and transparency for members. Clause 10 of the Bill merely requires that union members give active consent to contribute to a union's political fund. Clause 11 requires unions to make clear what political funds are spent on, in order to ensure there is transparency in the use of funds contributed by members. These are legitimate and proportionate requirements which are entirely consistent with ILO Convention 87. Similar provisions have been in place for many years in Northern Ireland, and it has not been suggested that they are incompatible with international obligations.

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[4] B Gernigon, A Oredro and H Guido, "ILO Principles Concerning the Right to Strike" (1998) Int Lab Rev 441 citing the Digest of Decisions of the Freedom of Association Committee (1996).

Facility time

18. Article 6(1) of ILO Convention 151 provides:

"Such facilities shall be afforded to the representatives of recognised public employees' organisations as may be appropriate in order to enable them to carry out their functions promptly and efficiently, both during and outside their hours of work."

19. In addition Article 4 of ILO Convention 98, provides:

"Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote full development and utilisation of machinery for voluntary negotiation between employers or employers' negotiations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

20. Clause 12 requires public sector bodies to publish information about facility time, in order to improve transparency in relation to facility time which is funded by the public purse. This does not restrict in any way the rights in ILO Conventions 98 and 151.

21. Clause 13 contains a reserve power to cap the amount of facility time a union has. Should regulations be made in exercise of this power, they can be made subject to exceptions where necessary – for example, to ensure compliance with EU obligations. The Government is not proposing any changes under clause 13 which would prevent reasonable time off being taken for facility time. This is consistent with Article 6(2) of ILO Convention 151, which recognises that the granting of facilities should not impair the efficient operation of the employer. If the need arises to use the reserve power in clause 13, it will be done in a way that takes full account of the obligations under the relevant ILO conventions.

22. Article 4 of ILO Convention 98 does not mean that Parliament must not pass legislation which may affect collective agreements. To say otherwise would misconstrue what Convention 98 says.

The European Social Charter

23. As regards the European Social Charter, the Government is mindful of the Recommendations from the Committee of Ministers on the non-compatibility of UK legislation with the European Social Charter.

24. The Charter is a political document subject to political debate in the Committee of Ministers – it is not enforceable in any court of law. The Government does not agree with the expansive interpretation of the Charter

taken by the Committee on some occasions. The Government will continue to participate in the political debate in the Committee of Ministers on how the Charter should be applied.

Points raised in the EHRC's Report

25. The Report has said that the "regressive nature" of measures in the Bill may cause them to fall short of the UK's obligations under international treaties. In particular mention is made of the provisions on minimum ballot turnout (Clause 2), minimum ballot support requirements for important public services (Clause 3), the requirement for two weeks' notice of industrial action (Clause 7) and for limiting the duration of a ballot mandate (Clause 8), union supervision of picketing (Clause 9) and facility time (Clause 13).

26. It is legitimate for a Government to balance the rights of trade unions and those of others and impose lawful restrictions where there is a legitimate aim and the restrictions are proportionate. Article 11 is not just about enhancing trade union rights.

27. Trade unions have persistently lobbied international bodies and argued over the years that UK legislation is non-compliant. However,

28. The Governing Body of the ILO, the UK courts and the European Court of Human Rights have accepted the Government's view that UK legislation strikes the right balance between the rights of trade unions and their members on the one hand; and the legitimate interests of others affected by their actions. That is precisely what this Bill does too.

Picketing

29. The Report says that the status and responsibilities of the picket supervisor are undefined and it is unclear how a letter of authorisation (now a letter of approval) will improve behaviour on a picket line. I do not agree.

30. Since 1992, the Code on Picketing has set out how pickets should be conducted. Trade unions are well acquainted with the provisions of the Code including the requirement to appoint a picket supervisor and they are familiar with the nature of that role. The requirement for a letter of approval from the union is also well established.

31. This Bill puts these important provisions on a statutory footing to ensure that they are complied with in practice across the board. They are designed to make it clear to the police and an employer both where a trade union sanctioned picket is taking place and who the police or the employer should contact in the event of any problems arising.

32. These provisions are a proportionate step in ensuring that the rights of non-striking workers are protected. I have already pointed to the evidence in the 2014 Carr Review. Given the problems specific to pickets organised by unions it is fully justified that legislation is required for this form of protest, rather than for those arranged by other organisations. Therefore Article 14 (freedom from discrimination) is also complied with.

33. The Report raises concerns about the consequences of non-compliance with Clause 9 – a trade union may face civil liability in respect of a peaceful and otherwise lawful picket.

34. It is difficult to see how any court would seriously consider imposing an injunction to prevent lawful, peaceful picketing, unless there was evidence of serious disruption or threat of violence. In addition, it is perfectly proper that if a union fails to appoint a picket supervisor, it may face a claim for damages, in the event that its failure leads to an individual or business suffering harm or loss.

Facility Time

35. The Government does not accept that the reserve powers to impose a cap on facility time in Clause 13 of the Bill could be used to introduce disproportionate interference to freedom of association rights under Article 11.

36. If the need arises to use the reserve power in clause 13, it will be done in a way that takes full account of the obligations under the relevant ILO conventions and Convention rights.

37. The European Court of Human Rights[5] has recognised that *reasonable* facility time is necessary, so that workers' representatives enjoy appropriate facilities to enable them to perform their trade union functions. The Court did not guarantee unlimited facility time. The provisions of the Bill are entirely consistent with the Court's view that reasonable facility time should be granted.

38. To be clear, there is no suggestion that this Bill can or will be used to ban facility time. The Bill fully respects the right to reasonable trade union facility time, as would any regulations made under the power.

39. The Government does not agree that the power in Clause 13 will amount to an unjustified and disproportionate restriction on the right to respect for possessions under Article 1 Protocol 1. Any impact on existing contractual entitlements will only apply prospectively, that is, from the date when any cap regulations are brought into force. This Convention right protects existing

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[5] *Sanchez Navajas v Spain* (2001) ECHR VI-507

possessions. It does not extend to a right to be guaranteed an income in the future. Article 1 Protocol1 does not therefore apply.

40. If the reserve power is ever exercised, employers will be given ample time to work with their recognised unions and affected employees to re-structure facility time arrangements in a way that best meets the needs of all concerned at the same time as delivering value for money to the taxpayer. Therefore, any impact on existing contractual rights will be kept to a minimum.

41. It is important to ensure value for money for the tax payer where facility time is granted in the public sector, and to ensure that workers do not lose the skills they need for their job in circumstances where the majority of their time is spent working on union activities.

42. Accordingly, to the extent that the Bill treats trade union facility time differently in the public sector, this is fully justified.

43. A decision to impose a cap is capable of withstanding scrutiny under Article 14 for the same reasons as stated in relation to Article 11; to deliver value for money to the taxpayer.

The Certification Officer ("CO")

44. It is important to be clear what the powers will be. The CO will be able to investigate and determine whether there has been a breach and take enforcement action. There is then a right of appeal to an independent tribunal. This is standard for regulators and it is established that this framework is compatible with Article 6 of the ECHR. We do not accept that Article 6 is not complied with here.

45. The CO will not bring a "complaint" against a trade union. He will investigate potential breaches of legal requirements and take action where appropriate. The ability to proactively investigate is common to many regulators, such as the Charities Commission, Ofcom or the FCA.