The Bar Council

**Bar Council response to the Department for Business and Trade Consultation on right of trade unions to access workplaces**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Department for Business and Trade Consultation on right of trade unions to access workplaces.[1]

2. The Bar Council is the voice of the barrister profession in England and Wales. Our nearly 18,000 members – self-employed and employed barristers – make up a united Bar that aims to be strong, inclusive, independent and influential. As well as championing the rule of law and access to justice, we lead, represent and support the Bar in the public interest through:

- Providing advice, guidance, services, training and events for our members to support career development and help maintain the highest standards of ethics and conduct
- Inspiring and supporting the next generation of barristers from all backgrounds
- Working to enhance diversity and inclusion at the Bar
- Encouraging a positive culture where wellbeing is prioritised and people can thrive in their careers
- Drawing on our members' expertise to influence policy and legislation that relates to the justice system and the rule of law
- Sharing barristers' vital contributions to society with the public, media and policymakers
- Developing career and business opportunities for barristers at home and abroad through promoting the Bar of England and Wales
- Engaging with national Bars and international Bar associations to facilitate the exchange of knowledge and the development of legal links and legal business overseas

3. To ensure joined-up support, we work within the wider ecosystem of the Bar alongside the Inns, circuits and specialist Bar associations, as well as with the Institute of Barristers' Clerks and the Legal Practice Management Association.

4. As the General Council of the Bar, we are the approved regulator for all practising barristers in England and Wales. We delegate our statutory regulatory functions to the

[1] Make Work Pay: trade union right of access - GOV.UK

operationally independent Bar Standards Board (BSB) as required by the Legal Services Act 2007.

5. In what follows, the Bar Council underlines their response on the yes/no questions. The questions are in bold and the responses are in ordinary text.

**Section 1 - Requesting and negotiating an access agreement**
**Section 1A: How to apply for access and respond to a request for access**

**1) Form and manner of access requests and responses Proposal**

**Question 1 – Do you agree access requests and responses should be made in writing**

6. Yes - This is consistent with the statutory recognition procedure in Schedule A1.

**Question 2 – Do you agree access requests and responses should be provided directly via email or letter**

7. Yes.

**Question 3 – Do you agree access requests and responses should be made through a standardised template provided by the government**

8. Yes.

**2) Information contained within access requests from the trade union**

**Question 4 – Do you agree with the proposed information to be included in a trade union's request for access?**

9. No - The first six items on the list of prescribed information appears sensible. But it seems excessive to require details of the notice to be given before a visit, both on first time and on subsequent visits (especially because the information will include already include the requested date of the first access). Nor is it clear what purpose is served by the union needing to specify the "frequency" of access, a requirement which is inapt if the access request is for communication with workers and can at best only apply to physical visits. Finally, it is not clear why the union is required to specify how many members it has within the workplace or the employer. Union membership is sensitive personal data; members may not want the fact of membership to be disclosed to an employer even if their name is not; disclosing membership levels may prompt responses or threats from a hostile employer; and the employer does not need to know membership levels for the purpose of responding to the access request. The inclusion of this information may detract from the purpose of these provisions, which is to assist unions to recruit members and union membership to increase in order that unions are better able to exercise their core functions (Consultation, p 5).

**3) Information contained within access responses from the employer**

**Question 5 – Do you agree with the proposed information to be included in an employer's response to a trade union's access request?**

10. Yes.

**4) Notifying the CAC that access has been agreed Proposal**

**Question 6 – Do you agree with the proposal on how the parties should notify the CAC that an access agreement has been reached?**

11. Yes.

**5) Form and manner of joint notifications to the CAC of a variation or revocation of an access agreement**

**Question 6 – Do you agree with the proposal on how joint notifications to the CAC of a variation of revocation of an access agreement are made?**

12. Yes.

**Section 1B: Response, negotiation, and referral to the CAC periods**

**1) Response period for employers**

**Question 7 – Do you agree with the proposed time period of 5 working days for the employer to respond to the trade union's request for access?**

13. Yes - Although five working days is short, there may be pressing circumstances where access is needed quickly – for example, to represent a member or disputes over threatened redundancies or changes to terms and conditions.

**2) Negotiation period**

**Question 8 – Do you agree with the proposed time period of 15 working days for the employer and trade union to negotiate the terms of an access agreement?**

14. We make no response to this question because we does not have sufficient expertise on industrial relations and the sort of timescales which are necessary or desirable.

**3) Period for CAC referral**

**Question 9 – Do you agree that there should be a limit of 25 working days for a party to request that the CAC make a decision on access following an access request being submitted?**

15. We make no response to this question because we does not have sufficient expertise on industrial relations and the sort of timescales which are necessary or desirable.

**Section 2 – Central Arbitration Committee (CAC) determinations**
**Section 2A: Circumstances where access must not be granted**

**1) Size of the employer**

**Question 1 - Do you agree that employers with fewer than 21 workers should be exempt from the right of access policy?**

16. While it is correct that the statutory recognition procedure in Schedule A1 excludes employers with fewer than 21 workers, those provisions concern an on-going relationship of collective bargaining where there may be a case for exempting small employers. By contrast, the right of access has a much more individual focus: it may be linked to meeting or representing individual workers who are experiencing problems at work, which applies just as much to large as small employers – see new s.70ZA(6)(a) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") inserted by clause 56 of the Bill. The effect of a 21-worker limit will have the effect of excluding some sectors altogether (see the evidence in ***Unite v United Kingdom*** [2017] IRLR 438 at §29, relating to agriculture), which may be inconsistent with the objective of the legislation. In the context of provisions about access to individual members, it is much harder to justify a blanket limit of 21 workers; the better option may be to allow the CAC, as a quasi-expert body with experience of industrial relations entrusted by Parliament in this field, to take the employer's size into account (Option 3 on the consultation).

**2) Initial notice period**

**Question 2 - Do you agree that the CAC should refuse access unless the access agreement specifies that there will be a minimum of 5 working days between when the terms of the initial access agreement are finalised and when access takes place for the first time?**

17. We have insufficient expertise on industrial relations to respond to this question, though it can envisage circumstances arising where it could be justified to allow access in a shorter period – for example, mass redundancies in insolvency. It may be better to have guidance on this rather than a fixed rule.

**3) Access agreement expiry dates**

**Question 3 – Do you agree that access agreements should expire two years after they come into force?**

**18.** No **– there should be no requirement for access agreements to have an expiry date:** According to the Government, the two-year date should ensure that "access agreements remain relevant and those that have become dormant expire", noting that this will add to the

CAC's workload because the agreements are revisited every two years (Consultation p 24). We consider that duration is best left to the discretion of the CAC. It makes little sense, for example, to impose a two-year limit where the parties themselves want a longer period. Nor is it sensible where the access agreement is determined by the CAC in the context of a heated dispute between the parties, only to see this arise again every two years. The better course is to leave this to the discretion of the CAC.

**Question 4 – In general, are there other circumstances under which you think that the CAC must refuse access? (This question refers to section 2A generally).**

19. None that we are aware of.

**Section 2B: Circumstances where it is reasonable for access not to be granted**

**1) Presence of a recognised union**

**Question 5 – Do you agree that the presence of a recognised union representing the group of workers to which the union is seeking access be considered a reasonable basis for the CAC to refuse access to another union?**

20. The starting is that a request for access to workers should never be capable of being blocked because of a non-independent but recognised union. Only independent unions can engage in genuine collective bargaining and properly represent their members in their relationship with the employer. The litigation in ***Boots*** shows how a non-independent union, with very limited collective bargaining rights, can easily be used as a device to evade legislation designed to promote free collective bargaining: ***R (Boots) v Central Arbitration Committee*** [2017] IRLR 355. It is no answer to the problem to include a mechanism for derecognition of non-independent union in the context of legislation designed to give quick access to unions, as again shown by the litigation in ***Boots***. The legislation will limit the scope for blocking in the circumstances of ***Boots*** where voluntary recognition has been introduced to obstruct a statutory application, and this is a welcome change. The same approach should also be taken in respect of access arrangements and non-independent unions.

21. As for whether an independent recognised union should be capable of blocking access, we have little to suggest. However, it should be recalled that access is for a wider set of purposes than facilitating collective bargaining. There may be circumstances where particular groups of workers would prefer to be represented as individuals on specific issues by a different trade union. This must be balanced against the desirability of avoiding fragmented union representation and the costs and logistics of facilitating access for multiple unions.

**2) Ensuring employers are not obligated to allocate more resource than is required to fulfil the terms of the access agreement**

**Question 6 – Do you agree that an access application that would require an employer to allocate more resources than is necessary to fulfil the agreement (e.g., constructing new meeting places or implementing new IT systems) should be regarded as a reasonable basis for the CAC to refuse access?**

22. Yes.

**3) 'Model' agreements**

**Question 7 – Do you agree that weekly access (physical, digital, or both) be included as a 'model' term in access agreements, to help support regular engagement between trade unions and workers??**

23. We have insufficient industrial relations expertise to answer this question.

**Question 8 – Please describe any other terms that you think should be regarded as 'model' terms.**

24. -

**Question 9 – Do you agree that access agreements include a commitment from the union to provide at least two working days' notice to the employer before access takes place?**

25. Yes.

**4) Further matters for the CAC to have regard to**

**Question 10 – Are there any further matters to which you think the CAC must have regard when making determinations on access? If so, what are they? For example, you might want to suggest practical, legal, or workplace-specific considerations that haven't already been covered.**

26. There are no further matters other than the size and resources of an employer in facilitating reasonable access, referred to in question 1 above.

**Section 3 – Maximum value of fines and how the value of fines for breaches are determined**

**1) Maximum value of the fine**

**Question 1 – Which of the following options do you consider most appropriate for setting the maximum value of the fine?**

27. We have insufficient industrial relations expertise to answer this question. It will be important to ensure that any penalty is sufficiently dissuasive to have deterrent effects. There may therefore be a case for linking the fixed maximum fine to a metric like firm size or annual turnover. Conversely, a fixed maximum fine of £75,000 may be excessive for smaller firms,

where compliance with complex legislation can be more challenging than for larger firms with legal and HRM support.

**2) Matters the CAC must consider when deciding value of fines**

**Question 2 – Do you agree with the proposed matters the CAC must consider when determining fines?**

**28.** Yes.

**Bar Council**

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For further information please contact:

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