



HOUSE OF LORDS

Revised transcript of evidence taken before

**The Select Committee on Trade Union Political Funds and Political Party
Funding**

Inquiry on

TRADE UNION POLITICAL FUNDS AND POLITICAL PARTY FUNDING

Evidence Session No. 5

Heard in Public

Questions 31 - 37

TUESDAY 9 FEBRUARY 2016

11.15 am

Witness: Mr David Cockburn

Members present

Lord Burns (Chairman)
 Lord Callanan
 Lord De Mauley
 Baroness Dean of Thornton-le-Fylde
 Baroness Drake
 Earl of Kinnoull
 Lord Richard
 Lord Robathan
 Lord Sherbourne of Didsbury
 Lord Tyler
 Lord Whitty
 Lord Wrigglesworth

Examination of Witness

Mr David Cockburn, Certification Officer

Q31 The Chairman: Good morning, Mr Cockburn. Thank you very much for coming to see us. We have had some background on your current responsibilities. Would you like to make an opening statement?

Mr David Cockburn: Simply to introduce myself, I have been the certification officer since 2001. Before that, I was a partner in a firm of solicitors that specialises in trade union law. My appointment is just for three days a week. I have had other appointments since, including being an employment judge for 13 years. My office is a very small one, and, historically, since 1975, it has been a very small one. I currently have seven staff and a budget of £560,000.

You said that you have looked at my responsibilities. They cover a broad spread of quasi-judicial, supervisory and investigatory functions. All my quasi-judicial ones are appealable to the Employment Appeal Tribunal, the Court of Appeal, et cetera, so my accountability is largely through the judicial process. One of my many responsibilities includes the political funds of trade unions. Historically, the political funds of trade unions have not occupied a great deal of the certification office's time. My statutory duties with regard to the political funds are firstly to approve political fund ballot rules at the outset and again at the 10-yearly review ballot. Secondly, I have to approve the rules of the political funds themselves. If there are complaints of breaches, the statute is framed in such a way that they come to

me as breaches of the rules, not as breaches of the statute. My other responsibility is therefore to adjudicate on complaints brought by members of the union about such breaches of the rules. I must say that there have been very few cases; two cases in the last 10 years involved complaints about breach of the political fund rules.

The other time when I have to deal with political funds is at the time of my annual report. I require unions to report to me on their political funds as a part of their annual returns, both financially and—although it is not accounting information—on the number of members, exempt members and people who do not qualify for membership of the political fund. After a union has sent me its annual return, it is under an obligation to send a statement to members within eight weeks summarising the accounting information in it. So members will get a statement that includes the total income and expenditure from the political fund. I look at all that again at the end of the year, when I do my annual report. I am sure your briefing note has summarised the information in it about the number of members in the political fund and the number of exempt members. It may have brought out that members can apply to me for draft exemption certificates. In fact, last year only five people applied to me for a draft exemption certificate, which I issued.

My last reporting year was a big year for review ballots. Thirteen took place and were reported to me. All of them voted in favour of retaining the political fund, with an average turnout, calculated over the last 10 years, of 27.5%, with fairly large majorities. That is a brief overview.

The Chairman: Thank you very much. Presumably, you have had a look at the Bill that is currently going through Parliament. How do you see your duties in respect of trade union political funds changing as a result of that Bill?

Mr David Cockburn: I take that question in respect of Clauses 10 and 11. Clause 10 is about the opt-in. Trade unions will have to have new rules in place to give effect to the opt-in. If there are new rules, I have to approve them. It is a minimal administrative thing, but I will have to approve 24 new sets of rules. A more practical impact is that, in order to have new rules, trade unions may have to go through a rules revision process in accordance with their rulebooks, which may require an annual or a special meeting. That could have an impact on the implementation date, although there is a fast-track route under Section 92 of the 1992 Act that could be used, if it is open to the particular union. That is the impact of Clause 10.

Clause 11 will cause me a great deal of work. There are a number of reasons why I say that. One is that I can see that it will cause unions quite a lot of difficulty, for very practical reasons. In essence, it all looks very straightforward, but the practical problems that I envisage are as follows. A trade union has to report on every recipient from its political fund. Trade unions give money from their political funds at not only national but regional and branch level, and there could be a big job in collating that information. There is sometimes use of a trade union room for general political purposes. Who then is the recipient? There is an issue of doubt there. Each payment has to be categorised under one of the six headings in Section 72 of the 1992 Act. A lot of those overlap, so into which category is the payment put? The report has to give the nature of the expenditure. There are issues about the degree of detail.

In my experience, uncertainty gives rise to litigation, and there are a number of issues that could give rise to uncertainty. It is not only members who can complain to me about these things. Anyone can raise them with me. Given the political nature of the subject matter, which is likely to be highly contentious, and the fact that what is reported to me is likely to be forensically examined, I can see many more issues being brought to me about what is reported.

A further issue is that, under the Bill, it will not necessarily be a complaint that is brought to me where it is member X against union Y. It may be someone raising a matter of concern with me, which I must then investigate. If there is a *prima facie* case, I will put that together and put it to the union for it to answer, so I am the prosecutor. Then, I adjudicate. The role of investigator, prosecutor and adjudicator has certain tensions, which we are trying to manage. We are trying to sort something out to make this thing workable.

Lord Sherbourne of Didsbury: Can I follow up what you have just said about Clause 11? I have two questions. First—without going into great detail, but in general—do you think that there could be a change in the reporting requirements in Clause 11 that would give the unions the opportunity to explain where their money is going, without some of the detail that is obviously bothering you as regards potential administration?

My other question is quite separate, but it also relates to Clause 11. We know that the political fund, which is what the Bill is dealing with as regards opting in, is spent on a whole range of different things. Often they include affiliation to Labour, but there are other

activities as well. Do you have any evidence of how aware members of trade unions are of where moneys from the fund are going?

Mr David Cockburn: On your first question, I think it is awfully difficult. I can see that people would want more information, but I would find it very difficult to come up with a way of expressing it that covers all the situations a trade union would wish to spend its money on. I regard the six headings in Section 72 as my Bible when I am seeing whether unions have spent money outside their political objects. It is a well-worn part of the Act, so it is something the unions may or may not collect data on already. I do not know whether they do, but I suspect not. It is an extremely difficult point, and I do not have an answer to it.

On the second point, the average trade union member may not know a great deal about what the political fund is being spent on, although there is a lot of national publicity about the trade unions funding the Labour Party and what have you. For those who care to look—if you become an anorak on the subject—there is quite a lot of information available to trade union members about how it is spent. Their starting point would be the annual return, where there is some detail. The degree of detail varies between unions. There is the statement to members, which might alert people only to the totals, not to the individual amounts to which my Lord's question is directed. If a union member is seriously concerned about this, under the 1992 Act there is the right of access to accounting records of the union. An application can be made to the union, in the first place, to see the accounting records of the political fund or aspects of the fund—unions keep the information in different ways—and if the union does not give access, there are grounds for a complaint to me. I can order the production of the accounting records. In general, the answer is, “Not much”, but if you are really interested, there are routes to get to more detailed information.

Q32 Lord Whitty: We are anxious to establish the administrative reasons for the Government's propositions. You said that you deal with a very low level of complaints. Is there something administratively difficult about the current legislation and the requirements of union rules that you think needed addressing or improving? If the answer is yes, does the Bill actually do it?

Mr David Cockburn: All rules can be improved. No one has complained to me at any time that they have been impaired in making a complaint or pursuing what they want to do. Of course, that does not mean that they do not feel that way—it is just that it has not been

reported to me. The answer to the first part of your question is that I am not sure; there is no evidence of that. What was the second part?

Lord Whitty: If there had been evidence or if you had reached that conclusion, does the Bill address it?

Mr David Cockburn: The Bill approaches it from a totally different perspective. They are not trying to tinker with what exists; they want a new model. I do not think it is fair to say that the Bill is successful or not successful in perfecting the existing model.

Lord Whitty: I have one supplementary, which relates to the accounting and the Clause 11 propositions. Of course, whereas you cannot spend the general fund on political objectives, you can spend the political fund on non-political objectives. Therefore, if you required more detail about the political funds, you would have to address not just what is in the 1992 Act—not just who the recipients were, which is what the Bill says—but the totality of expenditure that was drawn from the political fund.

Mr David Cockburn: That is a moot question. I would have to look at it more closely. My off-the-cuff response is that you have to report just on political expenditure, not on all expenditure from the political fund, but I might be wrong on that.

Lord Whitty: Would you accept that, because of the relatively wide definition of political activities, to be safe, unions have often spent money from the political fund to ensure that they were not challenged?

Mr David Cockburn: Frequently, they report to me on expenditure that is general fund expenditure. I presume that is for the avoidance of doubt, but it is unnecessary.

Q33 Lord Callanan: Are you required to police the form in which unions make the right to opt out of the political fund available to members? Do you have any information on that? It is alleged that some unions are more transparent than others in making members aware of their right to opt out.

Mr David Cockburn: The form of the exemption notice was created by the certification office many years ago. We insist in a very polite way that that form is in the political fund rules and is used by the union as the form of exemption. The nature of the exemption is quite clear. The publicity they give to it is often commented upon, and I have no evidence about that.

Lord Callanan: It is not within your remit to say that they have to write to every member to say, “You have a right to opt out”, or to include a clause on their membership form or anything like that.

Mr David Cockburn: There is a statutory obligation for them to tell members of the right to be exempted. That statutory obligation is reproduced in the model political fund rules, which become the political fund rules of the union. I would only know how and to what extent it is implemented by the union if someone brought a complaint to me about a breach of it. No one has brought a complaint to me about that.

Lord Callanan: They have to tell members that there is a right to opt out—

Mr David Cockburn: Yes.

Lord Callanan: But there is no detailed guidance about the form in which they have to tell them. They could include it in subsection 23 of paragraph 46 of the rules and say, “You have a copy of that; therefore, you have been told”.

Mr David Cockburn: They have to be given specific notice of the right to be exempted, but it does not say in which font and on what page, as you might insist when having a libel apology printed. It is a general obligation to inform the members that they have the right to be exempted. I am not an expert on union membership application forms, but sometimes it is reproduced on those. The obligation is not to send it in a letter to each member. It is a duty to communicate it in a way that is normal for trade unions to communicate “matters of general interest” to their members. That is the statutory formula that appears in four or five places in the 1992 Act.

The Chairman: Can people opt out electronically?

Mr David Cockburn: Can they send an email to the union? I think they can. You can tell from my quizzical look that it is not something I have thought about.

The Chairman: There is quite a bit of debate about opting in electronically, so I wondered about opting out.

Mr David Cockburn: I see that Clause 10 provides for opting in by post or by person. I cannot think of anything in current Section 84 on that subject.

Earl of Kinnoull: I have been looking at the annual report for the last four years—

Mr David Cockburn: I am sorry.

Earl of Kinnoull: Actually, it is very interesting. In particular, I was looking at appendix 9. I noticed that the percentage of those opting out was 24% in 2011-12 and 23% in 2012-13. In 2013-14, it dropped to 15%, and it is now down to 11%. In numbers of heads, more than 800,000 who used to opt out are no longer doing so. That is a very big swing. I wonder whether you have any information to tell us about what is going on there and what people are saying. Generally, what are your views on that?

Mr David Cockburn: I did not do those statistics myself. The only general information that I can bring to that idea is that over the past four or five years, a number of unions have been cleaning up their membership lists, partly in view of the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill, which is now enacted. It may be that, in the course of that exercise, members who were exempt have been deleted as members. I cannot be very helpful in explaining that statistic.

Q34 Baroness Drake: In answer to Lord Burns's opening question, you anticipated one of the questions that I was going to ask. I will finish it off, so to speak. It comes back to the assessment of what is required under Clause 11. You expressed the view that there is a lot of work and detail in there. Given all the debate generally in society about regulation and compliance burdens, would you like to express a view on whether a light, proportionate or heavy compliance burden is imposed by Clause 11?

Mr David Cockburn: It is certainly heavier than is the case at the moment. Time will tell how heavy. Looking at the practicalities of my office—how many staff we have and planning what we are doing—I anticipate a number of complaints in this area, which in itself will make trade unions more alert and will cause extra care and burdens. Working backwards from the impact on my office, I think the impact on the trade unions is likely to be significant.

Baroness Drake: When answering questions, you said that anyone can now raise a complaint about the information provided under Clause 11, and that your role will be to assess whether there is a *prima facie* case for that complaint and then to take it forward. That means that anyone can raise a complaint, but also that anyone can challenge both your view on whether there is a *prima facie* case and any decision that you may make on a case. Does that mean that you, as certification officer, could be subject to more legal challenge—to judicial reviews, perhaps? How do you see that affecting not just your relationship with the

trade unions but generally, as a regulator, in the extent of the challenge you will face and the legal responses you will have to embrace?

Mr David Cockburn: Quite correctly, any of my decisions is open to challenge. The problem with this area is that it is so vexed and political. I anticipate that there will be a lot of heat created and that challenges can be expected. I do not know the effect of that in the long term—whether you put more complaints through, for fear of judicial review, or whether you stick to your guns and are judicially reviewed and subject to criticism. It is one or the other. You just have to manage the situation that is before you.

Baroness Drake: Presumably, if more complaints can be raised by external participants, that could well translate into extra duties for the unions because they would also have to provide information and would be subject to querying from you, in order to address the complaint that had come in. That in itself would increase the duties—

Mr David Cockburn: I am not sure that that part would add extra work for the trade union. The judicial review would be an examination of my decision-making, on the information available to me.

Baroness Drake: What if you were pursuing a complaint that had been raised and you had decided that there was a prima facie case?

Mr David Cockburn: The judicial review assumes that I have found that there is no prima facie case. If the person wants to argue that I am wrong and perverse, the High Court will examine my decision on the basis of the facts that were before me then. I suppose my fear is that I will be doing more diligent fact-finding of the trade union before I make my decision to turn down the complaint on the basis that there is no prima facie case, so that my decision that there is no such case is unassailable on judicial review.

Lord Robathan: Maybe I did not quite understand or I was dozing when you said that last year, only five people applied for an exemption certificate. I note that paragraph 7.18 of your annual report last year also says that, yet there are over 619,000 members who do not make a political fund contribution. Could you elaborate slightly on that? It seems counterintuitive.

Mr David Cockburn: Yes. Some members of a trade union do not qualify for the political fund by reason of being retired members, apprentices or non-paying recipients of freebies, as an introductory offer. They are members of the union, but they are not entitled to membership

of the political fund. That is a large number of people. Then there are the people who claim exemption from paying the political fund of their own volition, by approaching their union and telling it. That is the vast bulk. Some may have difficulty obtaining an exemption certificate from their union. They might come to me and say, "Will you please give me one?" so I send them a draft exemption certificate.

Lord Robathan: To clarify this absolutely, we are talking about a very small number of people who have perhaps entered into some sort of heated discussion with their union. The union would not give them an exemption certificate, but you have them given one. Is that correct?

Mr David Cockburn: Yes. Wouldn't, couldn't, shouldn't—I do not know, but they needed to come to me.

Q35 Lord Richard: Your job is to look at the way in which unions behave. Is it fair to say that you are one of the experts on trade union behaviour and how they react?

Mr David Cockburn: I regard myself as the person who applies the 1992 Act. I do not hold myself out as a general expert on trade unions, although I have been around trade unions all my life and I happen to know a thing or two about them.

Lord Richard: Yes. You know how they work, what they have to do and the technicalities of their operations.

Mr David Cockburn: There are people in this room who know more.

Lord Richard: There are lots of people in this room who know less, including me. The unions are complaining bitterly about two things in the Bill. One is the length of transition for the opt-in procedure, which is three months. The second is the idea that you now have to do it all by post or by personal delivery and that you cannot use any kind of electronic mail. I am not asking you about the merits of that proposal, but, just as a matter of interest, did the Government consult you as to whether that made sense in relation to the way trade unions operate?

Mr David Cockburn: No, I was not consulted.

Lord Richard: You were not consulted at all.

Mr David Cockburn: Not before the Bill.

Q36 Lord Wrigglesworth: I was somewhat alarmed by your comments on the consequences for your office of Clause 11. Have you made any estimate of the impact on the cost to your office of carrying out those functions?

Mr David Cockburn: We have estimated to the department that the £560,000 budget will go up to perhaps nearly £2 million. There are costs of £1.5 million and some soft costs, because at the moment ACAS pays for our HR and ICT. The trade unions will pay a levy in future. We will have to see how much will be in the levy and we will have to include all those costs. The budget will go up to include all those extra soft costs, on top of the actual costs.

Lord Wrigglesworth: The number of complaints could increase very considerably. You mentioned the word “anorak”, but it is not only the anoraks out there—it may also be political activists who are antagonistic towards the trade unions doing this, and they may want to complain about all the details that will be published under the clause. What estimate have you made of the number of complaints that you may get?

Mr David Cockburn: We have not put a number on that, but you have put your finger on our fear. Apparently, you should do only a certain amount of forward planning while the legislation is at Bill stage, as you cannot move forward too quickly with public expenditure at that point. Our provisional thinking on all this is to recruit some new members of staff and then to play it by ear and recruit as we go along. The figure that I mentioned is our provisional view, but we are warning our funders, ACAS, that we may ask for more money.

Lord Wrigglesworth: You also mentioned that your role was going to change somewhat as a result of the clause. It seemed fairly obvious from the comments you made that you might end up with a conflict of interest, in that you would be carrying out so many different roles that it would be almost impossible for you to do it. How will that problem of conflict of interest be overcome?

Mr David Cockburn: I have no absolute solution firmly in my head at the moment, but the almost trite comment is that I will have to subcontract out either the adjudication role or the investigation role, so that the mind of the adjudicator is not prejudiced by the mind of the person bringing the complaint.

Lord Wrigglesworth: I am not quite sure what the term “subcontract out” means. Does it mean establishing another office, or another officer, to adjudicate or to carry out the separate functions?

Mr David Cockburn: I have within my powers the power to appoint assistant certification officers and to delegate to them any responsibilities that I care to delegate. It is not the way forward that I have decided, but we are considering appointing further assistant certification officers who will stand apart from the organisation and will be called in as adjudicators, once a case is prepared.

Lord Wrigglesworth: Are the Government aware of the consequences that you have described to us? Have you made it clear to the Government what the consequences may be if this legislation goes on to the statute book?

Mr David Cockburn: We have explained the difficulties of the investigator/prosecutor/adjudicator role. I have tried to find, and have asked for, an example of a body, such as the Financial Conduct Authority, that investigates and adjudicates, as you read in the press, to see how it does that. There is nearly always an independent body. The FCA has an independent body that makes recommendations, and the decision is made by the board. The only example we have been given is that of the groceries adjudicator, who apparently does the same thing.

Lord Wrigglesworth: Has that sort of consideration been included in your £2 million budget?

Mr David Cockburn: Yes. We will have to be fleet of foot as this develops. I do not want to employ rafts of people, only for them to be underused. I want to see what happens, and to be strategically placed to deal with the current position and able to increase numbers as appropriate.

Lord Wrigglesworth: I am slightly puzzled. You said that you had had only two complaints.

Mr David Cockburn: Yes.

Lord Wrigglesworth: Where do you think the pressure for these changes has come from?

Mr David Cockburn: I have no evidence of pressure for change.

Q37 Baroness Dean of Thornton-le-Fylde: I should declare that I am probably the only person in this room who has been subject to a complaint to the certification officer, when I was general secretary of the union. It was not on the political side; it was on general issues, and I think that the complainant fell into the category of the anorak brigade, rather than a messianic political gang. Needless to say, I was completely exonerated.

Good morning, Mr Cockburn. You talked earlier about the ballots that have been conducted in the last year. You said that there were 13.

Mr David Cockburn: Yes.

Baroness Dean of Thornton-le-Fylde: Based on your vast experience of trade union ballots, what is your view on the requirement to opt in to the political fund in writing or by hand delivery? Do you think that will impact on the Labour Party in a detrimental way, as regards numbers in the fund?

Mr David Cockburn: My office has some experience of problems with the post; some complaints have arisen from that. Our experience of electronic communication is that most union members now communicate with my office by email and download my materials from the website. Some do not; some are paper-and-pen people. By and large, I find that most of the correspondence in my office is dealt with electronically.

Baroness Dean of Thornton-le-Fylde: Would the quid pro quo be that the requirement to switch to handwritten or hand-delivered communication had a detrimental effect?

Mr David Cockburn: The immediate consequence is that any union will have to send out pre-paid envelopes to members, which will be awfully expensive to procure, to stop the member having to put a stamp on it to send it back. The union will have to bear that expense. The 1992 Act is premised on postal voting for everything. Trade union members are aware that it is premised on postal voting. The facility that trade union members have with electronic mail suggests that that would be more convenient.

Baroness Dean of Thornton-le-Fylde: Funding for the pre-paid postage would have to come out of the political fund, on this occasion.

Mr David Cockburn: Would that be an expenditure for one of the purposes in Section 72? That is debatable.

The Chairman: Thank you very much, Mr Cockburn.