

# THOMPSONS TRADE UNION LAW GROUP

CERTIFICATION OFFICER DRAFT GUIDANCE ON EXERCISE  
OF FURTHER POWERS UNDER THE TRADE UNION ACT 2016  
COMMENTS SOUGHT BY 11 MARCH 2022



## Introduction

The Certification Officer ('CO') has published draft guidance on how she intends to exercise powers given to her under regulations that will on 1 April 2022 bring into force powers in the Trade Union Act 2016.

The CO seeks comments on the draft guidance by 11 March 2022.

We have produced a separate briefing on the CO's new powers.

## New powers covered by the CO's draft Guidance

The draft guidance deals with the following new powers of the CO:

- The CO's levy;
- Consideration of possible breaches of statutory responsibilities without receiving a complaint from a member or eligible person;
- Investigation of allegations of breaches of statutory responsibilities – by requiring the production of specific documents, or through the appointment of inspectors;
- Imposition of financial penalties; and
- Enforcement.

### 1. The CO's levy

The CO says that she intends to produce further guidance on the levy early in 2022, including as to the amount she is likely to charge each organisation in the first levy period, from 1 April 2022.

For the time being, the CO describes key dates as follows:

- The first levy period will run from 1 April 2022 to 31 March 2023;
- In November 2022 (and subsequent years), the CO will issue an estimate of the likely levy charge for the first (and subsequent) levy period(s);
- In March 2023, the CO will formally determine the levy and issue levy notices; and
- The charge for the first levy period will be payable by 31 May 2023.

The CO will publish details of all her costs, including relevant expenses, in her annual report.

The CO says that, in calculating the levy, she will take into account that 'the majority of her costs are incurred in providing services to non-federated trade unions'. This will no doubt influence the CO's apportionment of relevant expenses between the 'basic amount', which will be payable by all organisations, and the 'categorised additional amount' likely to be applicable to non-federated trade unions.

This statement needs to be set in the context of a government response of November 2021 following 'Further Government Engagement on the Certification Officer's Levy' that the CO spends approximately 50% of her time on functions relating to all organisations, and the remaining 50% of her time on functions relevant to non-federated unions only.

The CO will use the 'total income' figure quoted on a union's most recent annual return when determining the application of the 2.5% threshold.

On receipt of levy notices, unions will have the opportunity to dispute the amount payable.

The CO's costs which may be included in the levy, and those which may not, are described in our briefing on the CO's new powers.

## **2. Considering breaches without application, and investigatory powers**

The CO will have powers to investigate whether there have been breaches of statutory requirements without having received a complaint from an eligible person, to require the production of specific documents and/or to appoint an inspector:

### **Complaint received from member or other eligible person**

The CO will continue to handle complaints from eligible persons (members, or, for example, other candidates in statutory elections) 'as previously'. A three stage checking process is described: time limits, jurisdiction, and, interestingly, 'whether the relevant provision can have been breached'. If these tests are met, the CO then seeks a response from the union and, if she considers the complaint, she can then issue a declaration and, where appropriate, an enforcement order.

At all stages, the complainant remains responsible for compiling the evidence and arguments to support the allegations of breach.

In this situation, the CO says that she will not 'routinely appoint an inspector to investigate the allegations that are brought to her by a complainant, even where she has the power to do so'. The CO will also not 'routinely' engage her powers to act where a complainant withdraws their complaint. That said, there may be circumstances in which 'an alleged breach is so significant that she believes it necessary to act'.

### **Powers to act without application**

From April 2022, the CO will, without receiving a complaint from an eligible person, be able to consider whether a trade union has breached any of the following statutory duties:

- That certain positions are not held by offenders;
- The restrictions that exist on use of funds for political objects;
- Political fund and political fund ballot rules;
- Requirements for amalgamations or transfers; or
- Statutory elections.

Where no complaint is received, the CO says that there will be no need for a 'tribunal style hearing' and that the process to be adopted will be 'closer to those used in regulatory proceedings'. The process will be:

1. CO's team reviews the information to ensure that it relates to a matter within her jurisdiction and has occurred on or after 1 April 2022. They will also review the 'credibility' of the information and consider whether a provision of TULRCA 'can' have been breached as suggested;
2. If the CO's team find there is a case to answer, they will put the case to the union;
3. Once the union's response has been received, an 'initial assessment' of the case will be produced for the CO, 'including a recommendation on how she might decide to proceed';
4. If the CO considers there is no case to answer, she will write to the union and inform them;
5. If the CO 'believes the union may have breached the relevant provision of TULRCA, she may meet representatives of the union to explain her opinion and invite their response before coming to a decision on the matter';
6. The union may bring legal representation to any meeting, but this will not be a 'formal' hearing;
7. If the CO decides there has been a breach, she may consider making an enforcement order; and
8. Whilst a union could appeal a decision unfavourable to it to the Employment Appeal Tribunal, no other party could do so.

### **Investigatory powers**

If the CO has not been able to form an opinion, based on the information presented to her, she may direct the union to provide her with 'specific documentation', or authorise another person to act in this way on her behalf. The CO will only do this where she 'has good reason to do so' and where she has reason to believe that 'the specific documentation exists'.

The CO may also appoint an inspector, but only if she has reasonable grounds to believe that a union has failed to comply with a relevant statutory obligation. The CO recognises that she will also have to consider whether it is proportionate to appoint an inspector.

When the CO appoints an inspector, they must make a final written report to her, which she will then share with the union and invite their comments on before making a decision.

The inspector may be a member of the CO's team, or may be an external appointment. The CO says that an external inspector will be used 'where a specific area of expertise is required' or where the volume of work associated with undertaking an investigation would have 'a detrimental effect on the delivery of other work in the CO's office'.

### 3. Financial penalties

The maximum financial penalties which may be imposed, according to type of obligation breached and size of union, are set out in our briefing on the implementation of the new CO powers.

The CO takes the view that she will have the power to impose a financial penalty not only where there she finds that there has been an actual breach of a statutory provision, but also where there has been a threatened breach.

The CO will only impose a financial penalty where she considers it proportionate to do so. Where she does she will adopt the following procedure:

1. The CO will send the proposals concerning a financial penalty order to both parties with the decision on breach, including the grounds for making an order;
2. The union (or employer's association) will be invited to make written representations. In 'certain circumstances', the CO may also invite the complainant to make representations;
3. The CO will consider the representations, together with any request by the trade union or employers' organisation for an oral hearing; and
4. After any oral hearing, the CO will decide whether to make a financial penalty, and, if so, the amount.

The CO may make a conditional financial penalty order. The examples she gives of when a conditional financial penalty order may be appropriate are:

- Where she has ordered there to be a fresh ballot for statutory elections; and
- Where she has made an order to permit inspections of accounting records.

The CO may reduce the penalty in the conditional financial penalty order if it appears that the required actions have to some extent been carried out, or have been carried out but not by the required date.

The CO lists a number of possible aggravating factors - significant impact; similar past breaches; wilful non-compliance; deliberate malpractice/maladministration; and that 'a member's complaint had not been dealt with appropriately'.

Possible mitigating factors are also listed: - genuine error and prompt acknowledgment; early admissions and prompt attempt to rectify; evidence that first instance of such a breach; steps taken to reduce impact; steps taken to reduce likelihood of recurrence; and promptly and effectively addressing a member's complaint.

The CO says that she may 'maximise the deterrent effect of the penalty to others by setting a penalty near to the highest level appropriate for the breach'.

There is a right of appeal against a financial penalty to the Employment Appeal Tribunal.

#### 4. Enforcement powers

The CO will have the power to enforce orders she makes in relation to:

- Maintenance of a register of members' names and aspects of administration;
- Access to accounting records;
- Duty to ensure positions not held by certain offenders;
- Duty to hold elections;
- Use of funds for political objects;
- Duty to comply with political fund ballot rules;
- Breach of the defined categories of trade union rules over which the CO has jurisdiction; and
- Financial penalty orders.

The CO says that she will seek to ensure that 'every relevant order she makes has been complied with in a timely manner; making enquiries with the relevant organisation and asking them to provide evidence of compliance'.

The CO may seek to enforce such orders through the courts.

Thompsons Trade Union Law Group  
February 2022