AMICUS Submission to the Government on the Draft Code of Practice: Access and Unfair Practices for Statutory Trade Union Recognition.

Amicus welcomes the opportunity to comment on the government's proposals for the Code of Practice on Access and unfair Practices for Statutory Trade Union Recognition and recognises that the present government has brought forward improvements in trade union recognition.

Amicus agrees with the government's acknowledgement of the need to prohibit the unfair and intimidating practices adopted by some employers during recognition campaigns. The GPM sector of Amicus has in the past provided evidence of the threatening and intimidating behaviour by employers particularly within the newspaper sector.

However Amicus have found many of the government's proposals in the draft Code to be disappointing, as those proposed are unlikely to make any fundamental difference to the difficulties experienced by union members attempting to attain their basic human right to be represented by an independent trade union.

First, there is concern that employers are only to be prohibited from using unfair practices during the formal access period in recognition campaigns, leaving them free to deploy intimidating and threatening tactics during the earlier stages of the recognition campaign. Amicus takes the view that the unfair practices provisions should apply at least from the point at which the CAC admits an application for recognition. It is at this point that employer's begin their campaign of intimidation towards those employees who they believe are in favour of trade union recognition.

Secondly, Amicus has concerns over the decision to apply identical restrictions on the actions of employers and trade unions. While on the surface this approach may appear equitable and fair, the assumption underpinning the proposals, is that employers and trade unions operate on a level playing field during recognition campaigns, this we believe, is ill founded. The legislation, we believe, fails to reflect the essential imbalance in the workplace between the employer, who owns the premises and employs the workforce, and the union, which has only very limited access to the workforce.

Amicus believes the draft Code should emphasise throughout that while the legislation does not apply prior to the access period, it is good practice for employers and unions not to use unfair practices throughout recognition campaigns. The Code of Practice should also state clearly that anti-trade union campaigns are inconsistent with the purpose of the statutory recognition legislation and are likely to constitute unfair practices.

We ask the Government to keep the operation of the legislation under review and in particular to monitor whether the new unfair practices provisions create an opportunity and incentive for employers to submit spurious complaints to the CAC with a view to delaying a ballot for recognition. Such delays will necessarily disadvantage the union and its members.

Key Concerns

Amicus has four major concerns with the draft Code of Practice:

1. The focus of the Code should be on prohibited conduct rather than active employer campaigning

- The Code should set out clear advice on what constitutes unfair practice and what parties, in particular employers, are prohibited from doing.

- The draft Code of Practice places too much emphasis on active

campaigning by employers. The Code should not provide guidance for employers on how to run effective campaigns against union recognition.

- As currently drafted, the Code, in particular Section E, repeatedly suggests that employers will normally actively campaign against recognition. Amicus takes the view that this is inconsistent to the spirit and purpose of Schedule A1 of TULCRA 1992, which makes no reference to employer campaigning. It is also inconsistent with the conduct of many employers. There are many cases where employers decide not to campaign or distribute information regarding recognition, on the basis that they acknowledge the democratic rights of workers to vote on whether a union should be recognised to represent them in collective bargaining.

- Section E of the Code should be substantially revised to focus on prohibited conduct as opposed to campaigning by the parties.

2. Threats of jobs cuts and workplaces closures

- The Code should make clear that threats of job cuts, workplace closures or relocations during recognition campaigns will constitute unfair practices.

- The GPM Sector of Amicus in particular has reported to the Central Arbitration Committee many incidents where employers have used the threat of plant closures or job cuts with a view to intimidating workers to vote against union recognition. Examples include Stoke Sentinel – TUR1/37/01: The Printworks TUR1/99/01:South West Wales Publications TUR1/147/01 and West Country design and Print TUR1/231/02. In each of these companies which are all owned by the

Daily Mail Group, a continual campaign of anti-union material along with threats of demotion and actual dismissal of union representatives, has been orchestrated from group rather than site level with the company using a private anti union firm to advise on action to be taken.

As a result, paragraph 66 of the draft Code should be deleted and paragraph 55 which deals with what constitutes ‘undue influence’ should explicitly refer to job cuts and plant closures.

In the case of the Daily Mail Group each site where a CAC claim has been submitted, the threat of closure has been the company response. This tactic has been so successful that even where the union has pursued the claim through to the ballot, union members have voted against the union while retaining their membership.

3. Undue influence

- The Code does not provide sufficiently clear or broad guidance on what constitutes ‘undue influence’ for the purposes of sections 10 and 13 of Schedule A1 of TULCRA 1992.

- Paragraph 55 of the Code should be redrafted to specify broad categories of actions and omissions by employers, which are likely to constitute undue influence. Possible categories include:

    - The threat of job cuts, plant closure or relocation or the contracting out of work;
    - Inappropriately worded communications, including threats, suggestions or innuendoes about the consequences of recognition or hostile, anti-union propaganda;
    - The offer to establish alternative forms of representation, for example, works councils;
    - Surveillance of workers or union activists or interference with union

activities and access meetings;

- The dilution of the bargaining unit through the promotion of union activists or the employment of additional staff or agency workers; and
- Changes or offers of improved terms and conditions of employment.

4. Employer's programme during the access period and use of external consultants

- When the access agreement is being agreed, the employer should be required to set out their programme for when, where and how they will access the workers. The employer should also be expected to disclose at this stage whether they intend or plan to use external consultants during the access period. The consultants should be identified. An additional bullet-point should be added to paragraph 17, to this effect.

- Requiring the employer to disclose their proposed activities to access workers during the access period would introduce a level of equivalence between employers and unions. It would also assist in avoiding unnecessary disputes between the parties during the access period.

Amicus also has a number of detailed comments about the draft Code. These are set out in the sections below.

Section A - Introduction

General Purpose of the Code

Employers have no right to control meetings arranged by the union, which take place outside of the workplace and out of working time. The word 'generally' should be deleted from the third sentence in paragraph 7.

The fourth sentence in paragraph 7 should make clear that the rules relating to employer interference in access meetings apply to meetings, which take place off site or out of working time. In addition, parts of the Code dealing with unfair practices also apply to these meetings.

As noted above, Amicus objects to the frequent reference to ‘active’ campaigning by employers. Paragraph 9 is a clear example of this. We take the view that this paragraph should be reworded to make clear that the purpose of the Code of Practice is to provide guidance on inappropriate or unlawful conduct by either party during the access period.

The final sentence of paragraph 9 makes the important point that, while the Code of Practice and the legislation only applies to the period after the CAC has decided that a ballot should be held, the parties should also act responsibly before this stage. Amicus takes the view that this point should be highlighted and repeated throughout the Code, in particular in section E on unfair practices.

Section B – Preparing for Access

Establishing an access agreement

Amicus has serious concerns about the use of US-style union busting firms who act as consultants to employers during recognition campaigns. Examples of this have included the aggressive campaign led by a union-busting firm at T-mobile, and the complaints by the CWU, which in part led to the Government introducing legislation on unfair practices.

Amicus believes that the use of consultancy firms should be prohibited during recognition campaigns. Failing this, we take the view that the Code of Practice should require employers to disclose whether they intend to use consultants, when discussing and agreeing the access agreement with the union.

This practice would offer greater transparency and assist in avoiding disputes later in the access period. The approach would also be consistent with paragraphs 56 and 57 of the draft Code.

An additional bullet point should be added to paragraph 17 suggesting that the access agreement should include the employer's programme for accessing workers in the run up to the ballot. Employers should be expected at this point to state whether they are considering or intending using external consultants during the access period and to identify those consultants.

Section C – Access in Operation

In paragraph 25 the sentence where the union has had adequate access opportunities should be replaced with the union having equivalent access to that of the employer.

Amicus believes that where the employer insists that union access meetings cannot be held on site, then it must be stipulated that the employer must also hold access meetings offsite.

Section D – Other Access Issues

Surveillance

Amicus believes that there should be a separate section on surveillance of workers by the employer, applying to matters such as off site meetings, and the monitoring of conversations between workers and union officials at the entrance to the workplace. Comments on unacceptable surveillance should not be limited to issues relating to the privacy of meetings, etc, as in paragraphs 46, 66 and 67.

Privacy of meetings

Protecting the privacy of individuals who attend access meetings or seek information from union reps and officials during the access period is critical. Union officials report that, in workplaces where employers are hostile to unions and to recognition, individuals are often intimidated into not attending union meetings or approaching union activists or officials. Sections C, D and E therefore should stress that employers should not seek to monitor who attends access meetings or seeks information from unions outside access meetings. Section E should contain a separate section on surveillance and should make clear that employers should avoid monitoring workers on the grounds that could place 'undue influence' on individuals.

Paragraph 43 should be rephrased to make clear that 'an employer or any representative of his *must not* attend an access meeting unless invited to do so. Likewise, the employer *must not use* the union's unwillingness to allow him or his representative to attend as a reason to refuse an access meeting, unless it is reasonable so to do'. The use of the phrase 'should not' implies that it is not good practice to take such action. However, Paragraph 26(4D) of Schedule A1 makes clear that the employer will 'be taken to have take to have failed to comply with' the second duty to give the union reasonable access to meet workers and seek support for recognition if they interfere with union access meetings in this way. The term '*must not'* is therefore accurate

Paragraphs 43 and 46 cover the issue of recording and surveillance or monitoring of access meetings. Amicus has concerns that there is a potential conflict between these paragraphs and data protection laws. The Information Commissioner's Draft Code of Practice on Monitoring and Surveillance in the workplace makes clear that covert surveillance in the workplace will almost always be unlawful. The Code suggests that an employer should only consider covert monitoring where there is a very serious risk, for example, the risk of criminal activity, and the employer is contemplating contacting the police. Under data protection laws, therefore, employers are under an obligation to inform both employees and any other third parties of any CCTV cameras or recording equipment, except in very exceptional circumstances.

The third sentence in paragraph 46 must be changed to be consistent with data protection laws. In particular, the phrase ‘should generally’ should be replaced with ‘must always’. ‘Key security considerations’ is too broad a term and does not accurately reflect the exceptional cases where covert surveillance is permissible by law.

Furthermore, the Data Protection Act 1998 also places significant restrictions on any processing of ‘sensitive’ data, which includes information relating to trade union membership. It is therefore highly likely any recording or processing of data relating to any communication between union officials or reps and workers will be in breach of data protection law. It is important to bear in mind that these rules not only apply to formal access meetings or surgeries but also other interactions inside or outside of the workplace. In such cases it will not be sufficient for the employer to argue that the surveillance was being conducted for health and safety or security purposes. Informing workers and the relevant reps of the surveillance will also not satisfy the requirements of data protection law.

It is also important to bear in mind that data protection laws not only apply to information gathered and stored electronically. They also apply to written records which are filed or which the employer *intends to file* in an organised filing system relating to identifiable individuals. Amicus therefore believes that Section D and E of the Code should clearly specify that surveillance in the workplace could not only to constitute a breach of the employer’s access duties or an unfair practice. It could also constitute a breach of data protection laws.

Paragraphs 29, 45 and 49 deal with the timing and location of access meetings. Union officials report that employers refuse to agree to access meetings on operational grounds and the need to maintain continuous production. The Code should therefore make clear that where continuous production is necessary appropriate arrangements must be made for access meetings. It would also be useful if paragraph 45 stated that consideration must be given to ability of different categories of workers to attend meetings.

Meetings at the end of shift, for example, discriminate against workers with caring responsibilities.

The employer has no right to enquire what occurred at an access meeting between workers and unions. In paragraph 47 the word 'pressurise' should therefore be replaced with 'ask'. We also take the view that the final two sentences of paragraph 47 are unnecessary and should be deleted. As worded, they tend to indicate that it is normal and appropriate for workers to disclose information to managers.

Behaving responsibly

The fourth sentence in paragraph 48 should be reworded. The phrase 'refrain from offering inducements to workers not to attend' meetings with trade unions, should be replaced by 'not offer inducements to workers to refrain from attending' a meeting with a trade union. While the term 'refrain' is used in the statute, this is misleading in the Code. In a statutory context 'refrain' means 'shall not do', however in general language, its meaning can be perceived as being less strong and clear.

The end of paragraph 48 deals with cases where employers require workers not to attend an access meeting due to an unforeseen order, etc. This paragraph should make clear that such alterations to arrangements should only take place in exceptional cases. Also the union should be notified '*immediately'* of such changes, as opposed '*as soon as it is reasonably possible'* for the employer to do so.

Section E – Normal campaigning and unfair practices

Amicus believes that Section E of the Code is the most problematic and the part which requires the most substantial revision. Of particular concern is emphasis on what is termed 'normal or active campaigning' by employers. Amicus believes that the Code should set out clear advice on what constitutes

unfair practice and what parties, in particular employers, are prohibited from doing.

However, as currently drafted the Code advises that it is normal for employers to engage in active campaigning and could be perceived as offering employers a campaigning handbook. This not only conflicts with the purpose of the legislation but also is also inconsistent with the conduct of many employers. Union officials report that in a range of cases employers do not to campaign or distribute information regarding recognition, on the basis that they acknowledge the democratic rights of workers to vote on whether a union should be recognised to represent them in collective bargaining.

Amicus believes that the Code should not provide guidance for employers on how to run effective campaigns against union recognition. Indeed the Code should make clear that any *'anti-union posture [by employers] [] is inconsistent with the aims of the legislation and shows no respect for the democratic purpose of the balloting process.'* This highlighted phrase is taken from paragraph 66 of an earlier version of the Code. Amicus regrets that it has been deleted from the version circulated for consultation. We strongly believe that it should be reinstated and should represent one of the key principles set out within the Code.

We therefore take the view that Section E of the Code should be substantially revised to focus on prohibited conduct as opposed to campaigning by the parties.

Failing the substantial re-writing of this section, we would like to make a number of detailed suggestions for amendments.

Surveillance as a form of unfair practice

Section E should contain a separate section on surveillance, mirroring the relevant paragraphs in Section D. Section E should also make it clear that employers should avoid monitoring workers on the grounds that could place 'undue influence' on individuals.

Normal campaigning

The third sentence in paragraph 50 should be deleted. This states ‘Active campaigning by the parties is generally to be expected and can benefit the balloting process’. As stated above, Amicus believes that it is not generally to be expected that employers will actively campaign against recognition.

The second sentence in paragraph 51 should be substantially re-written or deleted as it suggests that in some circumstances campaigning will be ‘aggressive or personalised’. The issue of intimidating and personalised communications are best dealt with elsewhere in the Code.

The fifth sentence in paragraph 51 should be deleted, as it is unnecessary. It states that ‘ Parties may understandably not wish to disclose their detailed plans for campaigning’. This encourages the parties not to engage in an open discussion prior to agreeing access arrangements. We however support the final two sentences in paragraph 51 which encourages the parties to agree what is appropriate and inappropriate conduct at the start of the access period.

What are unfair practices?

Amicus continues to take the view that the Code does not provide sufficiently clear or broad guidance on what constitutes ‘undue influence’ for the purposes of sections 10 and 13 of Schedule A1 of TULCRA 1992.

Paragraph 55 of the Code should be redrafted to specify broad categories of actions and omissions by employers, which are likely to constitute undue influence. Possible categories include:

- The threat of job cuts, plant closure or relocation or the contracting out of work;
- Inappropriately worded communications, including threats, suggestions or innuendoes about the consequences of recognition or hostile, anti-union propaganda;
- The offer to establish alternative forms of representation, for example, works councils;

- Surveillance of workers or union activists or interference with union activities and access meetings;
- The dilution of the bargaining unit through the promotion of union activists or the employment of additional staff or agency workers; and
- Changes or offers of improved terms and conditions of employment.

We take a view that a list of generic categories of prohibited conduct – including actions and omissions by employers. We take the view that this approach is preferable, as opposed to the inclusion a long list of inappropriate actions. It is more comprehensive but also does not provide employers with an *aide memoir* on how to campaign prior to the access period.

We acknowledge and welcome some of the changes made to paragraph 55 since the earlier draft of the Code, reflecting earlier trade union comments. In particular the inclusion of pay rises, pay reviews and improved terms and conditions of employment in the definition of undue influence is helpful. We believe these specific items should be retained, but included within paragraphs 53 and 54.

Union officers have also reported that employers are increasingly adopting the practice of allocating each worker with a time slot in which they must vote in the ballot. Employers sometimes go as far as sending workers an email stating when their allocated time commences. This practice is intimidating and implies to the worker that their employer is monitoring whether they vote in the ballot. The Code should make clear such practices represent undue influence.

Who should campaign?

Amicus generally welcomes the advice provided in the Code on transparency. As noted above Amicus believes that the use of consultancy firms by employers should be prohibited during recognition campaigns. Failing this, it is critical that such parties make clear to the workforce that they are employed

by the employer, act as their agents and do not provide independent, impartial advice.

Paragraphs 56 to 59, however, should make it absolutely clear that the employer is always responsible for anything that may be said or done by line managers or consultants. Line managers and consultants should not make unattributed claims in the form of veiled threats, 'hearsay' or 'suggestions' about a workplace being closed or relocated in the event of a union being recognised. Nor should they make claims about redundancies or other prejudice to terms and conditions being inevitable. An employer will be responsible for such conduct, which will almost certainly constitute an unfair practice. The employer will also be responsible for anti – union material that is displayed in the workplace and which makes threats of closure.

The word 'usually' should be deleted from the first sentence of paragraph 58. Amicus believes that the employer should always be held responsible for the actions of those authorised or employed to act on their behalf. Similarly, trade unions recognised that they are responsible for the actions of authorised reps. This does not however include members or workers who act independently of the union.

What are the main forms of campaigning?

As noted throughout this response, Amicus is concerned that this section of the Code focuses on how parties can actively campaign. We therefore recommend that the heading for this section is revised and the first sentence in paragraph 60 is deleted.

Amicus welcomes the improvements, which have been made to this paragraph in the light of earlier comments we submitted. In particular the removal of the sentence staying that 'it is good practice not to 'compel' workers to attend meetings'. However, we also take the view that the word 'normally should be deleted in the fourth sentence of paragraph 60. Workers should never be required to attend small meetings where the issue of recognition is being discussed.

Paragraph 61 should make clear that employers should take particular care before carrying out home visits. Such visits are hugely intimidating to workers and are likely to represent undue influence.

Amicus welcomes paragraph 62 and in particular the reference to the persistency of communications constituting harassment.

It is unnecessary and potentially inappropriate for paragraph 63 to list the range of communications, which parties may use, including emails, videos, etc. This could be perceived as giving advice to employers on the range of methods they should deploy when seeking to oppose recognition. We therefore recommend that all references to different mediums for communication are deleted. However the third and fourth sentences should be retained.

How should campaigners put across their message?

Paragraph 64 is unnecessary and could be interpreted as encouraging the parties to engage in partisan activity. Consequently, the word 'nonetheless' should be deleted from the first sentence of paragraph 65.

Paragraph 66 is seriously problematic and Amicus strongly believes takes the view that it should be deleted and that paragraph 55 should make it explicitly clear that any threat of job cuts, plant closures or relocations will always be construed as the exercising of 'undue influence' by employer.

Union officials have reported many incidents where employers use the threat of plant closures or job cuts with a view to intimidating workers to vote against union recognition, such as the Daily Mail group cited above.

Amicus does not agree that any distinction can be drawn between an employer's prediction about an organisation's prospects and direct threats that jobs will be cut if recognition is awarded. Either form of comments by employers intimidate workers equally, who recognise that employers hold the economic power to make such decisions. The inclusion of paragraph 66 significantly threatens the purpose and effectiveness of the unfair practices

provisions in sections 10 and 13 of Schedule A1 of TULCRA 1992. We therefore call on the Government to delete this paragraph.

Amicus also greatly regrets the deletion of the following sentence (*in italics)* at the end of paragraph 66, which has been deleted from this later version. This read:

> 'On the other hand, statements that the employer will make redundancies or relocate simply because a union is recognised ought to be avoided. *They reflect an anti-union posture which is inconsistent with the aims of the legislation and shows no respect for the democratic purpose of the balloting process.'*

Amicus strongly believes that this sentence should be reinstated and should represent one of the main principles reflected within the Code.

Conclusion

Amicus welcomes the new legislation on access and unfair practices during recognition and derecognition ballots. We would, however, call on the Government to keep the operation of the legislation under review and in particular to monitor whether the new unfair practices provisions create an opportunity and incentive for employers to submit spurious complaints to the CAC with a view to delaying a ballot for recognition. Such delays will necessarily disadvantage the union.

Amicus generally welcomes the draft Code of Practice on access and unfair practices, although takes the view that substantial revisions should be made to it as outlined above. We have outlined the essential issues, which need to be addressed in paragraph 9 above.