

Trade Union Bill

Consultation on tackling intimidation of non-striking workers

An IER response to BIS

By

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There is no call nor any need for ‘a new criminal offence of intimidation on the picket line.’ The police have very wide powers to deal with violent and intimidatory behaviour, whether manifested on the picket line or elsewhere.

In 2014 the Association of Chief Police Officers told the Carr Review that:

“In general the legislative framework is seen by the police as broadly fit for purpose and the range of criminal offences available to the police sufficient to deal with the situations encountered.”¹

It is possible that the Government will be contemplating incorporating a statutory limit on the numbers permitted on a picket as part of, or to compliment, any putative offence of intimidation. They may be tempted to legislate to the effect that where more than a certain number of pickets gather there will be a presumption that there is an intention to intimidate or harass.

Such has been the success of the 1980 and 1992 Codes of Practice in establishing six pickets as a maximum,² that a blanket prohibition on the presence of more than a certain number of pickets would, for practical – rather than political - purposes be at best an irrelevance, and at worse, be likely to force the hand of the police in a situation where common sense might indicate that a light touch was required.³

Either approach, whether relating the numbers of pickets to a new offence of intimidation, or employing a straight forward statutory cap, would be likely to breach Articles 10 and 11 ECHR, and the ‘right to picket’ discussed by Fulford J. in the *Gate Gourmet* case.⁴ The old argument that “...mass picketing is *always* intimidatory and therefore unlawful”, although obviously attractive to those who wish to stifle the public expression of industrial grievances, has never held any water.⁵

¹ The Carr Report: the Report of the Independent Review of the Law Governing industrial Disputes. A Report from Bruce Carr QC to Government, October 2014 (5.58).

² It now the standard figure when the police seek to limit numbers or the courts grant an injunction (see, for example, *Thomas v NUM* [1986] Ch.20 para 72).

³ As well as a sitting duck to pick off at Strasbourg (see below pp 23-27).

⁴ *Gate Gourmet v TGWU* [2005] EWHC 1889 (QB) paras 22 and 26-27.

⁵ CG Hanson, *Taming the Trade Unions, a Guide to the Thatcher Government's Employment Reforms 1980-90*, 1991, p43.

An imaginative approach to the common law has long served the police and the judiciary when they have felt it appropriate to limit the numbers of pickets gathering. In *Piddington v Bates* Lord Parker established that a police officer was permitted to use his discretion and make arrests if he believed that it was necessary to do so in order to limit the numbers of pickets present and prevent a breach of the peace.⁶ During the Miners' Strike of 1984-85 the case provided authority for the arrest pickets on their way to the picket line.⁷

The Public Order Act 1986 – which followed hard on the heels of the Miners' Strike - provided a wide array of offences, many specifically targeted at picketing, although the Act avoided drawing a distinction between picketing and other public assemblies. The Act was drafted to provide the police with new powers to supervise marches and assemblies, and embraced acts of violence and intimidation, as well as less serious conduct. Some of the key provisions of the 1986 Act are featured below:

Section 14: Imposing conditions on public assemblies.

This section was drafted to permit the senior police officer involved to his or her discretion in determining the threshold of what amounts to intimidatory behavior on the picket line, and it may well be that the section 14 powers used in conjunction with clause 9 of the Trade Union Bill⁸ will incline the Government to decide that it will be unnecessary to place any statutory cap on picket line numbers.

Essentially police officers are empowered to give instructions, in advance, or on the day, and to arrest individuals disobeying those instructions:

- (1) If the senior police officer, having regard to the time or place at which and the circumstances in which any public assembly is being held or is intended to be held, reasonably believes that—
- (a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or

⁶ [1961] 1 WL 162. Parker, was Lord Chief Justice. He once claimed that his role was to act as 'handmaiden to the Executive.'

⁷ See *Moss v McLachlan* [1985] IRLR 76

⁸ See below pp 7-8.

(b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do, he may give directions imposing on the persons organising or taking part in the assembly such conditions as to the place at which the assembly may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it, as appear to him necessary to prevent such disorder, damage, disruption or intimidation – fines and 3 months.

Section 2: Violent disorder.

(1) Where 3 or more persons who are present together use or threaten unlawful violence and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using or threatening unlawful violence is guilty of violent disorder.

(2) It is immaterial whether or not the 3 or more use or threaten unlawful violence simultaneously.

(3) No person of reasonable firmness need actually be, or be likely to be, present at the scene.

(4) Violent disorder may be committed in private as well as in public places.

(5) A person guilty of violent disorder is liable on conviction on indictment to imprisonment for a term not exceeding 5 years or a fine or both, or on summary conviction to imprisonment for a term not exceeding 6 months or a fine...or both.⁹

Section 3: Affray.

(1) A person is guilty of affray if he uses or threatens unlawful violence towards another and his conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.

⁹ Where 'a fine' is referred to there is no cap on the amount.

(2) Where 2 or more persons use or threaten the unlawful violence, it is the conduct of them taken together that must be considered for the purposes of subsection (1).

(3) For the purposes of this section a threat cannot be made by the use of words alone.

(4) No person of reasonable firmness need actually be, or be likely to be, present at the scene.

(5) Affray may be committed in private as well as in public places.

(6) A constable may arrest without warrant anyone he reasonably suspects is committing affray.

(7) A person guilty of affray is liable on conviction on indictment to imprisonment for a term not exceeding 3 years or a fine or both, or on summary conviction to imprisonment for a term not exceeding 6 months or a fine...or both.¹⁰

Section 4: Fear or provocation of violence.

(1) A person is guilty of an offence if he—

(a) uses towards another person threatening, abusive or insulting words or behaviour, or

(b) distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting,

with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.

¹⁰ Section 6(2) A person is guilty of violent disorder or affray only if he intends to use or threaten violence or is aware that his conduct may be violent or threaten violence.

This summary offence is punishable by a fine or by a prison sentence of up to 6 months.¹¹

Section 5: Harassment, alarm or distress.

(1) A person is guilty of an offence if he—

(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

This summary offence is punishable by a fine of up to £1,000.¹²

This formidable array of offences was augmented in 1995 with an offence seemingly specifically tailored to embrace the picketing encountered by the plaintiffs in *Thomas v NUM*, and elsewhere during the Miners' Strike – shouts and threats from numbers of miners held back by police directed at strike breakers being transported through picket lines by coach and taxi.¹³

Section 4A: Intentional harassment, alarm or distress.

(1) A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he—

¹¹ Section 6 (3) A person is guilty of an offence under section 4 only if he intends his words or behaviour, or the writing, sign or other visible representation, to be threatening, abusive or insulting, or is aware that it may be threatening, abusive or insulting.

¹² Section 6(4) A person is guilty of an offence under section 5 only if he intends his words or behaviour, or the writing, sign or other visible representation, to be threatening, abusive or insulting, or is aware that it may be threatening, abusive or insulting or (as the case may be) he intends his behaviour to be or is aware that it may be disorderly.

¹³ *Thomas v NUM* [1986] (n.2).

(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing that or another person harassment, alarm or distress.

This is another summary offence punishable by a fine, and up to 6 months imprisonment or both.

More recent legislation, aimed more obviously at 'stalking' than criminalizing picketing, nevertheless embraces intimidatory conduct.

Harassment under the Protection from Harassment Act 1997

Section 1: "A person must not pursue a course of conduct which amounts to harassment of another."

Section 2 makes such a course of conduct an offence punishable on summary conviction to imprisonment for up to six months, or a fine, or both.

Section 3 provides for a civil remedy, allowing a victim to seek damages and an injunction in the High Court or the County Court.

Section 4 makes 'putting people in fear of violence' an offence:

"A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions." A breach of section 4 can, at the Crown Court, attract a prison sentence of up to five years, or a fine, or both, and on summary conviction an offender can be jailed for up to 6 months.

By section 5 a court may, having convicted an offender under sections 2 or 4, in addition to any fine or prison sentence make a restraining order, with a breach of that order liable to attract a further fine or prison sentence.

The Trade Union Bill

It is clear that the police do not need any additional powers to deal with breaches of public order. As we have seen ACPO specifically state they are not asking for new offences or new powers.

Nevertheless, by clause 9 of the new Bill it is intended to require a union to comply with a proposed new section of TULR(C)A 1992, and the section gives the police a supervisory role. A failure by a union to adhere to procedures stipulated in 220A will mean that the protection of the statutory immunities will be lost:

220A Union supervision of picketing

(1) Section 220 does not make lawful any picketing that a trade union organises, or encourages its members to take part in, unless the requirements in subsections (2) to (8) are complied with.

(2) The union must appoint a person to supervise the picketing.

(3) That person (“the picket supervisor”) must be an official or other member of the union who is familiar with any provisions of a Code of Practice issued under section 203 that deal with picketing.

(4) The union or picket supervisor must take reasonable steps to tell the police—

(a) the picket supervisor’s name;

(b) where the picketing will be taking place;

(c) how to contact the picket supervisor.

(5) The union must provide the picket supervisor with a letter stating that he or she is authorised by the union to act as such.

(6) The picket supervisor must show the letter of authorisation—

(a) to any constable who asks to see it;

(b) to any other person who reasonably asks to see it.

- (7) While the picketing is taking place, the picket supervisor must—
- (a) be present where it is taking place, or
 - (b) be readily contactable by the union and the police, and able to attend at short notice.
- (8) While present where the picketing is taking place, the picket supervisor must wear a badge, armband or other item that readily identifies the picket supervisor as such.
- (9) In this section “picketing” means attendance at or near a place of work, in contemplation or furtherance of a trade dispute, for the purpose of—
- (a) obtaining or communicating information, or
 - (b) persuading any person to work or abstain from working.

It is argued that these fresh ‘trips and hurdles’ for unions to surmount will be likely to help dissuade pickets from intimidating strike breakers.¹⁴ This level of interference is unprecedented, and is aimed, not at assisting the police, but at interfering with the right to strike. It has nothing to do with public order, or protecting workers from intimidation.

The BIS consultation document goes beyond even this and airs a proposal for ‘Requiring publication of picketing and protest plans.’¹⁵ It is suggested that the Trade Union Bill be amended unions to give 14 days’ notice of the tactics planned in relation to any impending dispute to the police and the Certification Officer, ostensibly on the grounds of ‘minimising risks of intimidation’ and increasing ‘transparency and accountability.’¹⁶ It is suggested that a union could be obliged to provide the following information in relation to a protest or picket:

¹⁴ In para 15 of the BIS Trade Union Bill, *Consultation on Tackling Intimidation of Non-Striking Workers*, July 2015.

¹⁵ *Ibid*, paras 25 -29.

¹⁶ *Ibid* para 26.

“Where it will be;

How many people it will involve;

Confirmation that people have been informed of the strategy;

Whether there will be loudspeakers, props, banners etc;

Whether it will be using social media, specifically Facebook, Twitter, blogs, setting up websites and what those blogs and websites will set out;

Whether other unions are involved and the steps to liaise closely with those unions;

That the union has informed members of the relevant laws.”¹⁷

The obvious intention is to build on clause 9 and make it harder still for unions to remain within the protection afforded by statutory immunities, and easier for employers to obtain labour injunctions.

The Government is mistaken if it believes that by refraining from making a failure to provide these details an offence it will avoid an adverse ruling at Strasbourg.¹⁸

There can be no doubt that these proposals will breach the Government’s obligations under ILO Convention 87 and Article 6(4) of the European Social Charter, and they will be highly likely to breach the ECHR (see below pp 18-26).

The Government is proposing to discriminate between picketing and other forms of public assemblies. That this is the intention is borne out by the proposal to require similar restrictions on protestors employing ‘leverage tactics’ in industrial disputes.

¹⁷ *Ibid*, para 25.

¹⁸ *Ibid*, para 29.

‘Leverage’

‘Leverage tactics’ tend not to involve any interference with commercial contracts, or with contracts of employment. The protestors assemble to communicate information, and to publicise their grievances, but cannot be said to be picketing.¹⁹ It is not only trade unionists who employ leverage tactics.

The INEOS dispute, perhaps better known as the ‘Grangemouth dispute’, is usually cited as the leading example of the use of leverage tactics in an industrial dispute.²⁰ Although some of the tactics employed may have seemed novel, they were neither ‘extreme,’ nor ‘intimidatory,’ and it is notable that these entirely peaceful protests did not provoke the intervention of the police. The protestors were doing no more putting their case across to the employers, to shareholders and to the wider public.

Brandishing a giant rat outside properties belonging to Jim Ratcliffe – the chief of INEOS - or distributing ‘wanted posters’ featuring his photograph would not be likely to put anyone in fear. Similarly, peaceful assemblies outside the houses of directors, or the offices of shareholders, or other businesses associated with INEOS were a threat nobody.

Simply because employers complain about these tactics, does not mean that such tactics are unlawful, or ought to be made unlawful, or it that it is unclear whether they are legal or illegal. It merely indicates that they are effective and that they are lawful. In the BIS consultation paper,²¹ an attempt has been made to stir up a controversy where none previously existed. These tactics are legal and they will continue to be used.

To cast the net of the criminal or civil law any wider, in relation to picketing and these supposedly new forms of protest, would be very likely to breach the Government’s obligations under a variety of regional and international

¹⁹ Of course the statutory immunities do not apply to leverage protests.

²⁰ See Carr 4.9 to 4.33 for a detailed analysis of the events surrounding the dispute.

²¹ (n. 12) ‘Wider protests’ paras 5-11, and ‘Protests related to pickets’, paras 20-29.

instruments,²² as well as its constitutional obligation to uphold the freedoms of its citizens.

Any acts which stray beyond the bounds of lawful protest – and, unfortunately, many acts which are within the bounds of lawful protest - will fall within the ambit of the existing offences listed above, or within the offences below:

Section 241 of the Trade Union and Labour Relations (Consolidation) Act 1992, (formerly section 7 of the Conspiracy and Protection of Property Act 1875)²³.

Section 241 effectively embraces both civil and criminal liability for unlawful conduct on the picket line. The application of the section is not confined to trade disputes – although police and Magistrates have, on occasion, appeared to believe that it is.²⁴

“Intimidation or annoyance by violence or otherwise

(1) A person commits an offence who, with a view to compelling another person to abstain from doing or to do any act which that other person has a legal right to do or abstain from doing, wrongfully and without legal authority –

a) uses violence to or intimidates that person or his wife or children, or injures his property,

b) persistently follows that person about from place to place; or

c) hides any tools, clothes, or other property owned or used by that person, or deprives him of or hinders him in the use thereof,

²² Including the UN International Covenant on Civil and Political Rights, Articles 19, 21, 22 & 26; the UN International Covenant on Economic, Social and Cultural Rights, Article 8, and the obligations touched upon on below pp 19 – 27.

²³ There are differences between section 7 of the 1875 Act and section 241 – and amendments were made to the old Act between 1875 and 1992 – but they are essentially the same.

²⁴ R v Todd [1996] 3 Crim LR 344.

d) watches or besets the house or other place where that person resides, works, carries on business, or happens to be, or the approach to such house or place, or

e) follows that person with two or more persons in a disorderly manner in or through any street or road

2) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months or a fine... or both. ”

Although the whole of section 241 relates to what might be seen in lay terms as intimidation it defines actual intimidation very narrowly - as the threat of violence against an individual or the individual’s immediate family. Nevertheless, all of the conduct described in section 241 must be undertaken *with a view to compel*.

In *R v Jones* [1974]²⁵ – the appeal of ‘the Shrewsbury Six’ – the Court of Appeal held that intimidation within what is now section 241 1(a) is not necessarily restricted to the threat of violence.²⁶ Lord Widgery stated that:

“In the present case we do not seek to define ‘intimidation’ exhaustively...In our judgement, ‘intimidate’ in this section includes putting persons in fear by the exhibition of force or violence or the threat of force or violence, and there is no limitation restricting the meaning of cases of violence or threats of violence to the person.”²⁷

Tortious intimidation

Section 7 of the 1875 Act - what is now section 241 - made “certain classes of acts which were previously wrongful” offences with “penal consequences capable of being summarily inflicted.”²⁸

²⁵ ICR 310.

²⁶ Widgery referred to a couple of 19th Century High Court cases (principally *Judge v Craddock* [1887]) where it had been ruled that any attempt, by conduct or by language, to put another in fear was sufficient to satisfy the requirements of section 7(1). Widgery also suggested that *Gibson v Lawson* [1891] was not authority for the view that section 7 intimidation was restricted to violence or threatened violence against the person.

²⁷ Lord Widgery (n. 23) p 318.

²⁸ *Fletcher Moulton LJ in Ward, Lock & Co Ltd v Operative Printers’ Assistants’ Society* [1906] 22 TLR (CA) 327 at 329. This view was approved by the Court of Appeal after the 1906 Trade Disputes Act in *Fowler v Kibble* [1922] 1 Ch.487.

These tortious origins mean that in order to secure a conviction under what is now section 241 1(a) the conduct must first amount to tortious intimidation. Similarly, to secure a conviction for unlawful 'watching and besetting,' or the more specific conduct listed in section 241, the act or acts complained of must amount to at least tortious nuisance, and must also have been undertaken with a view to compel, rather than an view to persuade.²⁹

A recent example of a prosecution under section 241 failing on the ground that the defendants had not intervened "with a view to compelling to abstain from doing or to do any act" is DPP v Fidler [1992].³⁰ In this case anti abortion campaigners were charged under section 5 of the POA 1986 and section 7(4) of the 1875 Act. On appeal to the High Court it was held that the 'verbal abuse and reproach' from those 'watching and besetting' a clinic was an attempt to dissuade rather than compel. The conduct complained of was deemed to fall outside of the ambit of the Act.³¹

The tort, as an essential element of the offence, must be complete. This throws up a particular obstacle in relation to s.241 1(a) as at it means that to secure a conviction the attempt to compel must have been successful.

Lord Denning in Morgan v Fry [1968]³² stated that the tort of intimidation required:

"The essential ingredients... there must be a threat by one person to use unlawful means (such as violence or a tort or breach of contract) so as to compel a plaintiff to obey his wishes: and the person so threatened must comply with the demand rather than risk the threat being carried into execution."

Stuart Smith, in News Group newspapers Ltd and Others v SOGAT '82 and Others (No.2) [1987], stated that "If a threat is little more than idle abuse and is not to be taken seriously, then it would not be sufficient to found an action for intimidation...the tort is not complete unless the person threatened succumbs to the threat and damage is suffered. But it is clear that injunctive relief can be

²⁹ Ibid, Lord Sterndale M.R. in Fowler v Kibble at 494.

³⁰ 1 Cr. App. R. 286

³¹ Nolan L.J. P295. See also Bonsall & Orrs [1985] Crim.L.R. 150.

³² 2 QB 710 at 724

granted to restrain the unlawful act and also threats to commit the unlawful act.”³³

In the civil courts it is only necessary for the tort to be threatened before interlocutory relief can be obtained. Instead of a heavy handed, ‘hit or miss’ bid to punish and deter, the civil law permits a more nuanced approach.³⁴

In *Gate Gourmet London Ltd v T & GWU* [2005]³⁵ the company sought to to restrain ‘intimidatory actions,’ and restrict the numbers of pickets and protestors attending at and at sites around the company’s Heathrow Airport premises. A summary of the evidence against the named defendants revealed a variety of complaints:

“There is a substantial amount of shouting and chanting from the pickets gathered at that location which may well come within the parameters of lawful and peaceful assembly. However, individuals... sometimes act unlawfully. Traffic is interrupted by pickets standing in the road taking photographs and challenging employees; on occasion the shouts and screams include threats and abuse directed at employees; the path to and from work for employees has sometimes been deliberately blocked by pickets who thereafter abuse or threaten the employees and take photographs of them; at least one truck has been hit by pickets; water has been thrown through the open window...”

As it was, the judge found that “a largely lawful and peaceful (if somewhat noisy) picket is having its proper activities compromised by repeated incidents that are occurring away from, but nonetheless still close to, and in sight of, the pickets... an attempt should be made by way of a more limited injunction to restore lawful picketing and good public order by prohibiting all unlawful behaviour.”

Doubtless the police at Heathrow could have made a number of arrests for public order offences and for obstruction of the highway – and very likely inflamed an already tense situation. A prosecution for unlawful ‘watching and besetting’ might

³³News Group newspapers Ltd and Others v SOGAT ’82 and Others (No.2) [1987] ICR 181, p 204.

³⁴ See, for example the musings of Scott J. on the inevitability of the use of strong language and threats on any South Wales mining picket line(*Thomas v NUM* [n.2] paras 70-71).

³⁵ EWHC 1889 (QB)

well have have resulted in a conviction. Perhaps a new offence of intimidation, shorn of the need to show compulsion, might have served to ensure a few convictions.³⁶

Instead the police refrained from intervening and the dispute passed over without becoming a national scandal. Industrial disputes require deft handling – arrests and criminal charges are, for the most part, inappropriate.

It is easy to see why a Government keen to see pickets convicted under section 241 might feel that the distinction drawn between robust persuasion and coercion gets in the way. The Heath Government, having taken a metaphorical beating in the industrial disputes of the early 1970s, took the same view, and following the failure to secure the conviction of the Shrewsbury Pickets Magistrates Court under what was then section 7 of the 1975 Act, the Home Secretary intervened generating a national scandal which very likely contributed the Government's defeat at the February 1974 general election.

That politically motivated miscarriage of justice saw men who had engaged in lawful picketing sentenced to long periods of imprisonment for unlawful assembly and conspiracy to intimidate. In 1972 -1974, as now, **the Government's aim is not to ensure public order, but to put a stop to effective picketing. Effective picketing is about persuasion, not intimidation. Any new offence of intimidation would be targeted not at violent or coercive behaviour – there are no 'gaps in the legal framework'. The new offence will be aimed at criminalising firm persuasion.**

In recent years no union has been as successful as the RMT in pressing its case on the picket line. A recent attempt to convict an RMT picket – union official Mark Harding - under section 241 resulted in an acquittal. The prosecution was essentially a mistake - a failure of the British Transport Police and the Crown Prosecution Service to grasp the elements of section 241, and to understand that robust persuasion is lawful.

³⁶ It is noticeable that the pickets in *Gourmet* preferred the word 'traitor' to 'scab.'

The Carr Report, Transport for London and the RMT.

The Carr Review was commissioned as a response to long standing calls from within the Conservative Party for further restrictions on the power of trade unions to manage their own affairs and to take effective industrial action.³⁷

Carr had been invited to look into the “alleged use of extreme tactics in industrial disputes,” and the “effectiveness of the existing legal framework to prevent inappropriate or intimidatory actions in trade disputes.”³⁸ Carr invited submissions from interested parties, and Transport for London stepped up to the mark, ultimately providing the meat of the allegations in paragraph four of the BIS Consultation document.

Transport for London, is presided over by Chairman, Boris Johnson, Mayor of London, Conservative MP, and *Daily Telegraph* columnist. He is a member of Cameron’s ‘Political Cabinet’ and is widely tipped as the next leader of the Tory Party. Johnson is one of the most vocal supporters of many of the proposals that came to be incorporated into the Trade Union Bill, and has long supported swingeing restrictions on the right to strike.

TfL complained to Carr that “...there is no obvious legal remedy to deal with picket lines which are intimidatory or obstructive.”³⁹

In the light of the array of offences detailed above this is a transparently ludicrous statement. In an effort to support their argument TfL detailed a number of examples of what they purport to believe to be inappropriate or intimidatory behaviour on the part of RMT pickets. Essentially TfL, like the Government, are opposed to lawful picketing.

³⁷ The Carr Report: the Report of the Independent Review of the Law Governing industrial Disputes. A Report from Bruce Carr QC to Government October 2014.

³⁸ Ibid, See Foreword, Para 1.11 and Chapter 3. Carr ultimately chose to release the evidence he had received without making any proposals or recommendations Trade unionists were reluctant to participate (see 3.16-3.25). Carr had not realised that the Tories were depending on him to produce an indictment of the labour movement in the build up to the election.

³⁹ 5.63 & 5.64.

According to Carr:

“TfL has described the atmosphere and conduct of picket lines as sometimes being intimidating to non-striking staff and potentially customers. They cite the example of alcohol being consumed by a picket outside the Seven Sisters Depot. Pictures of the event are available on the ‘RMT London Calling’ website, although it is not clear from these pictures that alcohol was consumed.”⁴⁰

According to Carr TfL reported that “inappropriate behaviour towards colleagues is fairly common, and there were a number of cases covered in the media. TfL’s submission described a case in 2014 in which ‘a member of staff was approached by a trade union activist as he entered the premises and was verbally abused in strong terms.’ The Police attended this incident but there was insufficient evidence to charge the individual involved. Cases involving RMT members Mark Harding and Arwyn Thomas have a lot of media coverage – neither resulted in a conviction, but both give a sense of the atmosphere on picket lines and the strength of feeling on both sides.”⁴¹

In the Mark Harding case a cover supervisor had crossed a picket line and, later that day, had complained to the British Transport Police that Mr Harding had shouted at him and called him a ‘scab.’ He was arrested and held for over 12 hours. The police charged him with a public order offence but later substituted section 241. Four months later he was acquitted. Outside the Magistrates Court he told those assembled:

“I believe this case was politically motivated. I did nothing wrong on that day except to ask someone not to go to work and respect a picket line.”⁴²

Arwyn Thomas had sacked by TfL on the grounds that he had intimidated non striking workers.⁴³ He brought a claim for unfair dismissal, and the tribunal found

⁴⁰ 4.42 It is notable that the RMT’s guidance for pickets emphatically prohibits alcohol on the picket line.

⁴¹ 4.44.

⁴² See WWW.defendtherighttoprotest.org/rmt-activist-mark-harding-found-not-guilty-an-important-win-for-the-right-to-picket/. See also Morning Star 3 June 2014.

⁴³ Strictly speaking he was sacked by London Underground Limited.

that he had been dismissed for his trade union work – an independent witness had been able to confirm that Mr Thomas had not behaved aggressively and had certainly not intimidated anybody. The tribunal questioned the honesty of the London Underground managers who had taken the decision to sack him. Mr Thomas wanted to be reinstated. TfL refused to reinstate him. Following more strikes TfL backed down and gave him his job back. The Thomas case had followed the dismissal of RMT Health and Safety representative Eamon Lynch, who was sacked, went to tribunal, and was found to have been dismissed for legitimate trade union activity. Mr Lynch had also pressed to be reinstated, and following industrial action by the RMT, TfL gave him his job back.

TfL told Carr of “... an incident during industrial action in March 2011, in which a member of TfL staff at Mile End Station who was not participating in the strike ‘was assaulted on our property by an RMT official’. This appears to refer to the RMT official, Steve Hedley, who had his conviction for assault overturned on appeal for ‘abuse of process’ as British Transport Police had failed to download and provide to the court all relevant CCTV evidence. TfL described the events that took place as follows: the official was attending the picket line outside the station but then entered the unpaid side of the station and had an altercation with the manager standing on the ticket barriers. TfL reported that this resulted in the official being convicted of assault in the Magistrates’ Court. However, the conviction was subsequently overturned on appeal.”⁴⁴

TfL’s final allegation was “that the word ‘scab’ is often used and that individuals are sworn and shouted at. Other forms of intimidation that are alleged to have been used in the strikes between November 2013 and May 2014 include taking photos of station staff who attended work during a strike and a trade union representative posting them on a Facebook page.”⁴⁵

SOCIAL MEDIA

During the Wapping Dispute of 1986-1987 photographs were taken of those who had continued to work for the Murdoch press and a ‘Roll of Dishonour,’ complete with names and addresses circulated. In isolation such acts – essentially picket

⁴⁴ 4.45

⁴⁵4.46

line leverage tactics - would not breach section 241, but if linked to other incidents, like damage to property at the addresses publicized, then they might.⁴⁶

Of course, as the term 'Roll of Dishonour' suggests, the purpose of publicising the names of strike breakers was to shame them, not to intimidate them. In a recent case heard by the Court of Appeal of Alberta the filming of strike breakers on a picket line was held to be lawful, protected by the right to freedom of expression guaranteed by the Canadian Charter of Rights.⁴⁷ In the course of the case one of the judges noted that:

"Mockery and shaming have been part of strike and picket line expression since at least the 1890s."⁴⁸

The Gate Gourmet pickets and protestors took photographs of strike breakers. No doubt pictures and names were posted on line. In 2015 very many more people take photographs and post them on line. Many people routinely record often very trivial aspects of their daily life and post photographs, alongside commentaries, on the internet. Those so disposed will be very likely to step up their activities when embroiled in a trade dispute, and there is no reason why they should not. The picket line is a public place. Filming and photographing at a picket line, then posting the results on line will contribute to 'transparency and accountability' and be likely to ensure that individuals behave themselves.

The proposals to require unions to inform the police and Certification Officer of the likely use of "social media, specifically Facebook, Twitter, blogs, setting up websites and what those blogs and websites will set out" in any industrial dispute are absurd, and unworkable.⁴⁹ They are the barrel scrapings of a 'think tank' briefed to come up with fresh ways of preventing workers from taking lawful industrial action.

Like much else in the Trade Union Bill, and many of the additional proposals in the BIS consultation paper, these new 'trips and hurdles' appear to have been contrived with little serious thought to the Government's obligations under regional and international treaties.

⁴⁶ See *News Group*(n.33) paras 198 and 204-205.

⁴⁷ *United Food and Commercial Workers, Local 401 v Alberta (AG)* 2012, ABCA 130.

⁴⁸ *Ibid*, para 30.

⁴⁹ Para 25. See also pp 8-9 above.

The ILO

The ILO Committee of Experts has stated on many occasions that "... restrictions on strike pickets and workplace occupation should be limited to cases where the action ceases to be peaceful."⁵⁰

The ILO Committee on Freedom of Association also maintains that: "Taking part in picketing and firmly but peacefully inciting other workers to keep away from their workplace cannot be considered unlawful."⁵¹

The right to picket – and the right to strike - is guaranteed by Articles 3 and 10 of convention No.87.

Article 3

- 1) Workers' and employers' organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes.
- 2) The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof

Article 10

In this Convention the term 'organisation' means any organization of workers or of employers for furthering and defending the interests of workers or of employers.

Article 11

⁵⁰ General survey of the reports on the Freedom of Association and Protection of the Right to Organise 1948 (No 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No.98). Report III(Part 4B) International Labour Conference, 81st Session, 1994, Geneva. Para 174. Cited in "ILO Principles concerning the Right to Strike." Bernard Gernigon, Alberto Odero, Horacio Guido (International Labour office Geneva) 2000 edition.

⁵¹ Para 651, 2006 Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Fourth (revised) edition. Geneva.

Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measure to ensure that workers and employers may exercise freely the right to organise.

The Government's proposals with regard to picketing – and much of the Trade Union Bill – do not merely breach Convention No.87. They proclaim the British Government's contempt for the fundamental principles of the ILO to the world.

The Government's proposals appear to owe much to the approach of Moroccan Government to industrial relations during the 1990s.

In Morocco strike tactics and picketing arrangements had to be agreed in advance with the authorities. There the police were permitted to intervene and made arrests when it appeared that pickets were doing no more than 'firmly but peaceably inciting other workers to keep away from their workplace'.

Cases 1691 and 1712⁵² were brought to the attention of the Committee on Freedom of Association by the Moroccan Labour Union and the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers. Needless to say, the Committee found against the Government. The arguments presented by the Moroccans are reminiscent of the British Government's fatuous reassurances that the Trade Union Bill does not breach its obligations under the European Convention on Human Rights.

The police had forcibly broken up peaceful workplace pickets, arresting workers taking sympathy action against anti-trade union practices. In the second of these cases the Government reassured the Committee that, as well as respecting the right to strike, "national legislation guarantees all trade union rights as well as the rights respecting their exercise, in particular the right to safety of persons, the right of assembly and the right to freedom of assembly in all its forms."⁵³

⁵² International Labour Office Official Bulletin: 299th report of the Committee on Freedom of Association Vol LXXVIII 1995, Series B, No 2. *Complaints against the Government of Morocco presented by UMT Moroccan Labour Union and IUF International Union of Food, Agricultural, hotel, Restaurant, Catering, Tobacco and Allied Workers.*

⁵³ Para 450.

In both cases the Government maintained that the police intervention was “within the framework of the legislative and statutory provisions of concerning the maintenance of public order... the public authorities will intervene to prohibit any assembly which is contrary to public order or freedom of work...police intervention was justified by the absence of any prior authorisation, and by the need to guarantee freedom of work of non-striking workers.”⁵⁴

The European Social Charter

The European Committee on Social Rights observed in Conclusions XX-3 (2014) that in the UK “the possibilities for workers to defend their interests through lawful collective action are excessively limited.”⁵⁵ The Committee had made the same criticism in Conclusions XVII (2004), XVIII (2006), and XIX-3(2010), and on numerous previous occasions.

The Government’s argument that the prohibition of secondary action, and the numerous and complex ‘traps and hurdles’ which have to be overcome before collective action is deemed to be lawful, were proportionate and “necessary in a democratic society for the protection of the rights and freedoms of others and for the protection of others,’ ⁵⁶ was once again rejected.⁵⁷

Following a complaint brought under the collective complaints procedure against the Government of Belgium the European Social Rights Committee warned that “where picketing activity does not violate the right of other workers to choose whether or not to take part in the strike action, the restriction of such activity will amount to a restriction on the right to strike itself, as it is legitimate for striking workers to attempt to involve all their fellow workers in their action.”⁵⁸

Any new criminal offence of intimidation will be an interference with peaceful picketing – there are no ‘gaps in the framework’ above this threshold. The framework in question is a complex web of regulation permitting the intervention

⁵⁴ Para 444. Article 8 of Convention No.87 indicates the balance to be struck.

⁵⁵ P24.

⁵⁶ Article 31.

⁵⁷ P22.

⁵⁸ European Trade Union Confederation v Belgium [2012] 54 E.H.R.R. SE21, paras 35 and 36.

of the police and the courts in most circumstances beyond mere attendance by a handful of pickets. It is very likely that any new offence, and the proposed procedural requirements, breach of which will expose workers and unions engaged in peaceful picketing to injunctive intervention, to civil liabilities and contempt proceedings, will be seen to breach Article 6(4) of the European Social Charter.

The proposed requirement for annual reports on industrial action to be submitted to the Certification Officer, while perhaps likely to be deemed to fall into margin of appreciation afforded states which have acceded to the ECHR, is more likely to be held a breach of the ESC.

In relation to the question of the UK ban on secondary action (see below) the Committee held in its 2014 Conclusions that the ban was “an interference with the right of workers guaranteed in Article 6(4) of the 1961 Charter...the obligations of the UK under the charter 6(4) is more specific than Article 11...while the rights at stake may overlap the obligations on the state under the Charter extend further in their protection of the right to strike, which includes the right to participate in secondary action.”⁵⁹

The European Convention on Human Rights

Much of the Trade Union Bill, and many of the additional proposals floated in the BIS consultation paper are *prima facie* breaches of the Convention. Although Parliament can legislate as it pleases, this sovereignty has to be squared with the Government’s obligation to comply with the European Convention, and with the rulings of the ECtHR.

The rights to freedom of thought, conscience, expression and speech are guaranteed by Articles 9 and 10 of the European Convention. Freedom of assembly and association are guaranteed by Article 11. All will be engaged by any

⁵⁹ Conclusions XX-3 (2014). pp 21- 22. The prohibition of secondary action does not, of course, extend to withdrawing the section 219 statutory immunities from pickets attending their own place of work and peacefully persuading individuals employed by third parties – delivery drivers for example - to breach commercial and employment contracts.

UK legislation which restricts further the right to picket and to protest. The discriminatory application of these proposals to those participating in industrial disputes will engage Article 14.

‘Declarations of incompatibility’ may be forthcoming from the domestic courts,⁶⁰ and the Strasbourg Court, will, in time, be likely to rule that the UK Government has breached its obligations to safeguard the Convention rights.

It may be that the Government was emboldened to introduce the Trade Union Bill following the recent RMT case at Strasbourg.⁶¹ In that case the Court held that the longstanding prohibition of secondary action in the UK was within the margin of appreciation afforded member states. The RMT had also challenged the complex pre-strike procedural requirements, but that application was declared inadmissible, essentially on the ground that the dispute in question had been settled.

Although the RMT decisions appeared perhaps to be a step back from Article 11 cases in earlier 21st Century cases, the Court did once again confirm that the right to strike is guaranteed by Article 11 of the ECHR.⁶² Should the proposed restrictions on picketing be enacted and subsequently challenged at the

⁶⁰ Other judicial embarrassments may befall the Government: s3(1) HRA “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.” That might even involve departing from the express intention of Parliament (see *Ghaidan v Godin-Mendoza* [2004] 2 AC 557). The *Gate Gourmet* case, of course, referred to a ‘right to picket’, deriving from Articles 10 and 11 ECHR and incorporated into UK law via the HRA (see above pp 1-2).

⁶¹*National Union of Rail, Maritime and Transport Workers v United Kingdom* (2015) 60 E.H.R.R. 10.

⁶²“The Court will consider first the applicant’s argument that the right to take strike action must be regarded as an essential element of trade union freedom under art.11, so that to restrict it would be to impair the very essence of freedom of association. It recalls that it has already decided a number of cases in which restrictions on industrial action were found to have given rise to violations of art.11. [See, e.g. *Karaçay* (6615/03) 27 March 2007 ; *Dilek v Turkey* (74611/01, 26876/02 and 27628/02) 17 July 2007 ; *Urcan v Turkey* (23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04) 17 July 2008 ; *Enerji Yapı-Yol Sen v Turkey* (68959/01) 21 April 2009] The applicant placed great emphasis on the last of these judgments, in which the term “indispensable corollary” was used in relation to the right to strike, linking it to the right to organise. It should, however, be noted that the judgment was here adverting to the position adopted by the supervisory bodies of the ILO rather than evolving the interpretation of art.11 by conferring a privileged status on the right to strike. **More generally, what the above-mentioned cases illustrate is that strike action is clearly protected by art.11.**’ (Para 84).

Strasbourg Court, it seems unlikely that it will be possible for the Court to continue to extend such leniency to British infringements of the Convention rights.

We have seen that in the UK there exists very considerable scope for police and employers to use the criminal law and the civil law to restrain pickets and protestors. It would be stretching credulity for the court to view further restrictions as a proportionate response to “a pressing social need.” A new criminal offence on the picket line cannot conceivably be seen as “necessary in a democratic society in the interests of national security or public safety, for the prevention of public disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”⁶³

The Court has for some time given considerable persuasive weight to the findings and decisions of the supervisory bodies of the ILO, and the ECS. As the Grand Chamber put it in *Demir v Turkey* [2009]:⁶⁴ “in defining the meaning of terms and notions in the text of the Convention, the Court can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European states reflecting their common values.”⁶⁵

The UK Government prefers to pretend that it is not bound by the decisions of the ILO Committee of Experts and the European Social Rights Committee. It is noticeable that the Government has avoided referring to the ILO and the ESC in any papers published in relation to the Trade Union Bill consultation.

In the RMT case the Government, forced to acknowledge the ESC, argued that “the ECSR was not a judicial or quasi-judicial organ, but simply an independent body that submitted its conclusions to the Committee of Ministers annually. It

⁶³ Article 11(2) ECHR. Article 9, 10 and 11 all incorporate broadly similar qualifications permitting state infringement of the rights.

⁶⁴ 48 E.H.R.R. 54

⁶⁵ *Ibid*, para 85.

was the latter that had the power to adopt recommendations to states in relation to any instance of non-compliance with the Charter.”⁶⁶

As for the ILO Committee of Experts, the Government argued that the “Committee was not a judicial or quasi-judicial body either, and its interpretation of ILO Conventions was not definitive. Rather, its role was to provide impartial and technical evaluation of the state of application of international labour standards.”⁶⁷

The Court was unimpressed with these arguments, observing that “the ECSR’s competence is stipulated in the Protocol Amending the European Social Charter (also known as the “Turin Protocol”, Council of Europe Treaty Series No.142), namely to “assess from a legal standpoint the compliance of national law and practice with the obligations arising from the Charter.””⁶⁸

The UK has failed to ratify the Protocol, but the court noted that, nevertheless, “the interpretative value of the ECSR appears to be generally accepted by states and by the Committee of Ministers,” and the authority of the ECSR “is certainly accepted by the Court, which has repeatedly had regard to the ECSR’s interpretation of the Charter and its assessment of state compliance with its various provisions.”⁶⁹

With respect to the ILO Committee of Experts, the Court, noted that the Committee itself defines its findings as ‘soft law,’ and acknowledged that since 1990 article 137 of the Constitution of the ILO has given the International Court of Justice interpretive authority. However, the Strasbourg Court endorsed the Committee’s view that “in so far as its views are not contradicted by the International Court of Justice, they should be considered as valid and generally recognized. The Committee considers the acceptance of these considerations to

⁶⁶ RMT Case (n.61) para 69.

⁶⁷ *Ibid.*

⁶⁸ *Ibid*, para 94.

⁶⁹ *Ibid.*

be indispensable to maintaining the principle of legality and, consequently, to the certainty of law required for the proper functioning of the International Labour Organization.”⁷⁰

Whether the Government likes it or not the ILO Conventions and the ESC, along with the conclusions and decisions of the associated supervisory bodies will weigh heavily in any consideration by the European Court of the question of whether any future Trade Union Act has breached the Convention rights. This will be so even where the Government has failed ratify a particular instrument, or – as is the case with the EU Charter of Fundamental Rights – steps have been taken in an attempt to distance the UK the effects of the instrument.⁷¹

As the Grand Chamber noted in *Demir* “In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of Member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.”⁷²

⁷⁰ RMT Case (n.61) para 96. The UK Government’s argument that the existence of a ‘right to strike’ based on the provisions of Convention No.87 was doubted by the ILO was dismissed: “While the Government referred to disagreements voiced at the 101st International Labour Conference, 2012, it appears from the records of that meeting that the disagreement originated with and were confined to the employer group” (Para 97). The government had, in any case, acknowledged earlier in the case that article 11 ECHR guaranteed the right to strike.

⁷¹ Protocol 30 to the EU Charter of Fundamental Rights.

⁷² *Demir* (n. 64) para 86.