



Association of Revenue and Customs

**ARC Response To BIS Consultation on tackling intimidation of non-striking workers - Picketing and Protest**

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## **Introduction**

The Association of Revenue and Customs (ARC) is both an independent trade union and the HMRC section of the FDA, the trade union for senior managers and professionals in public service.

- ARC represents around 2400 members in HMRC, at grade 7 and above, as well as trainees in grade 7 entry schemes.
- Our members are senior officials, lawyers and tax professionals, collectively taking responsibility for the collection of UK taxes, and tackling tax evasion and avoidance, at the highest and most complex level.
- We articulate the views of the professional staff working in HMRC to collect taxes from individuals and businesses operating in the UK.

- We are partners with HMRC in Consultation and Negotiation. HMRC also recognises ARC as a stakeholder on professional matters within HMRC.
- ARC is firmly committed to the principles of equality and diversity in both employment and the delivery of services.

ARC is deeply concerned at the scope and scale of measures set out in the Trade Union Bill. ARC members only embark on industrial action as a last resort, as a union with an almost 100 year history we have engaged in national industrial action only very rarely. Nevertheless it is a fundamental right for all working people to have the option to take industrial action. The current proposals will unjustifiably restrict the right of trade unions to organise in the UK by placing them under financial, operational and legal burdens which go far beyond those placed on other British campaigning organisations. By introducing yet more unwarranted legal obstacles in the way of unions organising strike action the Trade Union Bill will undermine workers' ability to organise collectively to protect their jobs, their livelihoods and the quality of their working lives.

The right to strike is a fundamental human right which is protected by an array of international treaties and human rights standards, including International Labour Organisation (ILO) Conventions, the UN Covenant on Social and Economic Rights, the European Social Charter (1961) and the European Convention on Human Rights.

The government is also proposing to restrict the rights of trade unions and their members to picket and protest in defence of their jobs, livelihoods and the quality of their working conditions. The ability to picket and protest are fundamental human rights which are safeguarded by ILO Convention 87 (Article 3), the European Social Charter (Article 6(4) and the European Convention on Human Rights (Articles 10, 11 and 14). Pickets and protests enable trade unions and their members publicly to communicate the reasons and purposes of industrial action, peacefully to persuade workers and substitute workers to support the industrial action and to mobilise support for their campaigns.

The Trade Union Bill and the current consultation document propose significant additional restrictions on picketing activities and union protests. Unions will be required to appoint picket supervisors who must wear armbands and carry letters of authorisation, the absence of which could expose their unions to legal action. Unions could also be required to publish picket and protest plans and to state in advance if they plan to use social media, including twitter and Facebook during their campaign and what they plan to set out on websites and blogs. As a result, the campaigning activities of; unions, union officials and workplace reps could be subjected to unprecedented scrutiny and monitoring by employers, the police and other state agencies such as the Certification Officer.

The government is also contemplating introducing new criminal offences and the use of anti-social behaviour orders (ASBOs) to regulate the activities of pickets. ARC believes that these measures represent a serious and unjustified attack on the civil liberties and human rights of trade unions and their members. The proposals are discriminatory as no other citizens or campaign groups in the UK are subject to such restrictions.

It is a real concern that the government has failed to demonstrate why its proposed reforms are necessary or justified. The absence of substantiating evidence has attracted censure from the independent Regulatory Reform Committee (RRC) and the proposals have been widely criticised by lawyers, civil liberties groups and politicians.

In the light of such criticism ARC is calling on the government to pause and reconsider its proposals. We would urge the government to concentrate on introducing policies which secure the recovery, invest in skills and quality employment and increase workplace productivity and engagement rather than attacking the civil liberties of working people in the UK.

## Consultation Questions

### Question 1

**Most of this consultation focuses on specific proposals. Before turning to this detail, do you have any other evidence of intimidatory behaviour, directed either at non-striking or striking workers, that you believe should be considered as part of this consultation? If so, do you have any estimate of the economic impact of this?**

The proposals set out in the consultation document are not even-handed. No consideration has been given to protecting striking workers from intimidation by their employer. Union members and activists are highly vulnerable to intimidation and victimisation by employers if they contemplate or take part in industrial action.

UK law provides workers engaged in industrial action with very limited protections. Indeed, the absence of effective protections for striking workers has been roundly criticised by the ILO Committee of Experts and the European Social Rights Committee on a number of occasions. The protections from dismissal for striking workers in the UK are restricted and limited to 12 weeks, after which employers are entitled to dismiss striking employees providing they do not do so in a selective

manner. Neither do union members have a right to automatic reinstatement if they are unfairly dismissed for participating in industrial action.

In the alternative, ARC calls on the government to introduce a new framework to protect those exercising their fundamental rights to strike. These include:

- Dismissal in anticipation of, during or after lawful industrial action should be void and ineffective, unless the employer can show that the reason for the dismissal was not connected to the industrial action.
- It should be automatically unfair for an employer to dismiss an employee once he or she returns to work following lawful industrial action. This will act as a powerful disincentive to employers from employing replacement staff and making strikers redundant.
- Interim relief should be available in all unfair dismissal claims relating to lawful industrial action and employees who have been unfairly dismissed should be entitled to automatic reinstatement if they request it.
- All workers, including those on non-guaranteed hours contracts, should be protected from suffering detriment or for being sued for damage as a result of their taking part in industrial action other than appropriate deductions from wages for work not done due to industrial action.

## Question 2

**The Government is interested in whether there are any further gaps in the legal framework in relation to intimidation of non-striking workers and third parties. How could the framework be strengthened - for example, should there be new criminal sanctions such as an offence of intimidation on the picket line?**

In ARC's view there are no gaps in the current legal framework which governs picketing or protests by trade unions and their members.

The conduct of those involved in picketing is heavily regulated in the UK by an extensive range of civil and criminal laws. Unions must comply with the requirements for a peaceful pickets contained in section 220 of the Trade Union and Labour Relations (Consolidation) Act 1992. Failure to comply with these provisions will mean the union loses its statutory immunity for liability in tort and may be vulnerable to damages or injunctions preventing or restricting the picket.

Unions and their members are subject to a range of laws on public order, protection from harassment and criminal damage. It is a criminal offence for pickets to; use violence or intimidate individuals or their families, follow individuals from place to place, hide work tools or engage in the act of "watching and besetting". ARC sees no need to consider introducing a criminal offence of

intimidatory activities on a picket line when such an offence already exists in Section 241 of the Trade Union and Labour Relations (Consolidation) Act 1992. Any duplicate offence would be excessive.

ARC is also concerned that the government's proposals do not comply with the requirements of international law. Future offences arising out of the Government's proposals will only apply to trade unions and their members, not to other citizens or campaign groups in the UK. This would be discriminatory and is likely to fall foul of Article 14 of the European Convention on Human Rights

There is simply no case for introducing additional criminal offences or sanctions. Scarce police resource would be better deployed protecting the wider community rather than monitoring the peaceful activities of trade union members.

### Question 3

**The Government is legislating to make a number of key aspects of the Code legally enforceable, such as the appointment of a picketing supervisor. Are there other practices that should be directly legally enforceable - for example, training or a requirement for all pickets to be properly identifiable in the same way as the supervisor? Please explain your views**

ARC is firmly opposed to Clause 9 of the Trade Union Bill which will require unions to appoint a picketing supervisor. The provisions of the Bill are unwarranted and overly-prescriptive. As the RRC has pointed out, it is unclear how compliance with the detailed requirements of Clause 9 will in any way prevent intimidation of non-striking workers. The provisions will simply impose red tape on unions and will make it easier for employers to take legal action against a union, for example, because a union official has advertently left a badge in the office.

The sanctions accompanying these provisions are excessive. It is disproportionate that a union should lose its statutory immunity from tortious liability simply because a union official accidentally forgets to wear an armband or has inadvertently misplaced their letter of authorisation. As a result the union could face applications for injunctions preventing or imposing conditions on the pickets, or even damages (potentially of up to £250,000). ARC believes such penalties are unjustified and conflict with the requirements of the European Convention on Human Rights, the European Social Charter and ILO Convention 87.

ARC is also concerned that Clause 9(6) states that a picket supervisor must show the letter of authorisation to any police officer who asks to see it. In our opinion, it is not appropriate for the police to demand to see information if there is no evidence of criminal behaviour. Furthermore, we are concerned that the

interaction between a police officer and an individual could form the basis of a future legal challenge by the employer. These provisions call into question the independent role of the police in relation to industrial disputes. Clause 9(6) also requires picket supervisors to show their letter of authorisation to anyone who reasonable asks to see it. This requirement is broader than the current wording of the governments Code of Practice on Picketing (PL928 (1st Revision)) which requires the letter to be shown to 'the people who want to cross the picket'. It is unclear why members of the public should be entitled to know the identity of picket supervisors. This provision will encourage employers, officious third parties or members of anti-union campaign groups to approach picket lines to demand to see the individual's letter of authorisation unnecessarily aggravating pickets and leading to needless tensions.

Further elements of the Code of Practice should not be transposed into legislation. The BIS consultation document acknowledges that most pickets conform to the guidance set out in the Code. The existing Code is therefore effective as a regulatory tool. There is no justification for imposing additional, legislative regulations on unions.

Requiring unions to identify pickets, in the same way as the picket supervisor, would be a form of intimidation. Many individuals would fear being victimised by their employer. They would therefore be unreasonably deterred from exercising their fundamental democratic rights.

ARC already ensures that union officials are familiar with the laws governing picketing. If Clause 9 comes into effect, ARC will make picket supervisors aware of their additional responsibilities and the implications of not complying with them. However, ARC believes it would be excessive and unreasonable for the government to impose a legal duty on unions to train officials in law relating to picketing. No equivalent duty applies to employers.

#### **Question 4**

**Do you have any figures that would enable us to estimate any costs to unions generated by making aspects of the Code legally enforceable?**

ARC is very concerned at the increased costs to unions proposed by these reforms. We are a small trade union with income and staffing commensurate to that of a small business. The uncertainty around, and potential extremity of, the additional costs proposed are a particular issue for small unions (who are the majority in the sector) yet they have been side-lined in the consideration of these reforms. The provisions contained in Clause 9 of the Bill will create significant additional costs for ARC. These include:

- Increased risk of legal challenges by employers on the basis that picket supervisors have failed to comply with the new requirements. As a result, unions will need additional legal advice and will need to meet the costs of litigation.
- Deterrent effect on individuals who might otherwise have volunteered to act as a picketing supervisor due to the prescriptive nature of Clause 9.

ARC believes that it would be unreasonable for the government to place a legal duty on unions to train officials in law relating to picketing. This would create significantly additional costs for unions when at the same time the government is withdrawing the fee remission arrangements for trade union education. Union members will also lose out as a result of these proposals. Increasing constraints on facility time mean that union reps find it difficult to negotiate release time to attend union education courses. Workplace representatives could be required to attend courses in the evenings or weekends or take annual leave in order to attend. This necessarily intrudes on the family life and caring responsibilities of union members.

## Question 5

**What are your views on the Government's proposal to require unions to publish their plans? What information should unions be required to provide? Please set out the reasons for your answer**

ARC is opposed to the government's proposal to require unions to publish picketing and protest plans in advance of taking industrial action. These measures represent a serious attack on the civil liberties of trade unions and their members which are protected by the European Convention on Human Rights. ARC also believes that the government's proposals conflict with ILO Convention 87 (Article 3) and the European Social Charter 1961 (Article 6(4)).

ARC is profoundly concerned that the proposals will constrain the rights to freedom of expression for the union, their officials and members. The measures are clearly designed to stifle democratic debate and to deter unions and their members from using social media to promote their campaigns and to mobilise support. The government claims that the measures will not apply to individual union members. However, we anticipate that employers will argue that unions are responsible for the actions of union officials and workplace representatives. We are concerned that unions may be expected to monitor and report on the Facebook accounts and Twitter feeds of their members. This will create significant workloads for unions and is neither desirable nor feasible from the perspective of either the union or its member. It will lead to endless litigation on whether tweets had been written and sent in a personal capacity or on behalf of the union. The overall effect of these

measures will be to constrain rights to freedom of expression for unions, individual members and activists.

We are also seriously concerned that the government's proposals will lead to an unacceptable level of state supervision of picketing and protest activities. The union's plans and activities will be scrutinised in detail by the police and other state agencies, notably the Certification Officer.

The consultation document suggests that unions who fail to publish accurate and up to date notices could face financial penalties, imposed by the Certification Officer and that the Certification Officer through his/her inspectors will be expected to 'police' pickets and protests in "real time". This would constitute excessive State monitoring of trade unions and their members exercising their fundamental, democratic rights to assemble and protest.

Furthermore, the government's proposals to impose a levy on unions to meet the costs of the Certification Officer's enforcement activities, means that unions are also likely to face substantial additional costs. Unions will be expected to pay for the appointment of additional inspectors. Inspectors who are likely to generate significant travel and accommodations costs as they move around the country monitoring union protests and pickets in real time. Unions will be expected not only to accept additional state supervision but also to pay for the privilege.

If this proposal proceeds, the Certification Officer will have wide-ranging powers to initiate complaints against the union, to investigate the activities of the union and to decide which penalties should be imposed on the union. This would not be consistent with basic principles of justice.

Neither has the government ruled out the possibility that unions who fail to publish an accurate notice of their picket and protest plan may lose immunity from liability in tort under section 220 of Trade Union and Labour Relations (Consolidation) Act 1992. Were this to be the case, unions would face an increased risk of legal challenges by employers for minor technical oversights in the notice. ARC believes it would be unreasonable and disproportionate for unions to face an injunction preventing the picket from taking place or claims for damages simply because they failed to list a twitter account being used by a branch secretary.

The government's proposals are discriminatory. No other campaign groups in the UK are required to comply with such requirements. They may therefore violate Article 14 of the European Convention on Human Rights. Neither are they even-handed. Unions will be required to notify employers that industrial action will be taking place 14 days in advance, but employers are not required to announce

whether they plan to use agency workers to break the strike. The employer will be under no obligation to publish a notice which details their plans to campaign against any proposed strikes, for example by way of communications with staff.

The proposals represent a serious attack on the fundamental rights of trade unions and their members to protest in defence of their job, their livelihoods and their working conditions. They seek to limit freedom of expression and as such are bad for democracy. The measures will do nothing to encourage the earlier settlement of disputes, promote good employment relations or to increase workplace productivity. ARC therefore calls on the government not to proceed.

### **Question 6**

**Do you have any figures that would enable us to improve the estimates in the Impact Assessment of the cost to unions of publishing their plans?**

ARC is likely to incur significant additional costs and administrative duties if the proposals requiring unions to publish protest and picketing plans proceed. Even if the union does not engage in any industrial action, the Certification Officer's task of 'policing' union activities on a 'real-time basis is likely to significantly increase the levy charged to ARC to cover the running costs of its office.

### **Question 7**

**What are your views on the Government's proposal to strengthen accountability?**

ARC does not agree that unions should be required to report annually to the Certification Officer about public demonstrations and picketing activity that has taken place in the preceding year.

Whilst ARC cannot see any benefits from this proposal the measure would have significant detrimental effects. It would mean that union activities will be subjected to unprecedented supervision and scrutiny by the State. The proposals will undermine employment relations.

It is likely that employers will object to information detailing disputes in specific workplaces being published online and to a permanent record of disputes being retained. Strikes are a symptom of poor industrial relations rather than their cause. Many employers may be concerned to find that the government is proposing that detailed information about their workplace operations will be made publicly available.

## **Question 8**

**Do you have any other suggestions how union accountability and/or transparency could be improved?**

Trade unions are already subject to wide-ranging regulation by the state. As a result, the UK has been repeatedly criticised by international supervisory bodies including; the ILO Committee of Experts, the European Social Rights Committee which supervises compliance with the European Social Charter (1961) and the European Court of Human Rights. ARC believes that rather than imposing an additional bureaucratic burden on unions, the government should repeal much of the administrative red tape contained in the Trade Union and Labour Relations (Consolidation) Act 1992.

## **Question 9**

**Do you have any figures that would enable us to improve the estimates in the Impact Assessment of the cost to unions to report on industrial action in their annual reports?**

If these proposals are implemented, unions are likely to incur significant additional costs. It is difficult for ARC to provide detailed costings until the government publishes more detailed proposals and unions are made aware of what any new reporting requirements will involve. It is also important that the government does not consider the impact of this proposal in isolation from other measures in the Trade Union Bill.

## **Question 10**

**How should the Code be updated to be more useful for parties affected by industrial disputes? Please explain your answer.**

In ARC's opinion, the Code of Practice is fit for purpose and does not need to be updated. As the BIS consultation document acknowledges most union activity complies with the Code. It is already therefore effective as a form of regulation. If the text is to be amended, ARC believes that the Code should include advice to employers on the importance of not intimidating union members with a view to deterring them from participating in industrial action or victimising those who do.

