CONFIDENTIAL

THIS DOCUMENT IS THE PROPERTY OF HER BRITANNIC MAJESTY'S GOVERNMENT

E(79) 10

13 June 1979

COPY NO 56

CABINET

MINISTERIAL COMMITTEE ON ECONOMIC STRATEGY

INDUSTRIAL RELATIONS LEGISLATION

Memorandum by the Secretary of State for Employment

This paper sets out the proposals on the basis of which I propose to conduct the full consultations we have promised with employers and unions on changes in the law on picketing and the closed shop and on legislation to provide public funds for trade union ballots.

2. The timetable I propose is for a Bill to be introduced in November with a view to getting it into Committee before Christmas. A shorter timetable would not allow an adequate period for consultations, with the almost certain result that the TUC would declare their outright opposition to the legislation and do nothing to discourage attempts to frustrate and discredit it during the winter pay negotiations.

3. There are therefore in my view compelling advantages in not rushing the legislation in an attempt to get it on the statute book before next winter. However I would like to discuss with the Home Secretary any ways in which the existing law can be clarified for the guidance of the police, who may have to deal with breaches of the peace arising from picketing next winter. I am also pursuing with the CBI the need for and means of bringing to the attention of employers the considerable rights of civil action which are already available to them when picketing is unlawful and damaging their operations.

4. I have had initial informal talks with leading representatives of the CBI and TUC. I intend to broaden these discussions into formal consultations with these and other appropriate organisations on the contents of the proposed Bill. I do not propose to publish a single consultative document. Instead, I aim to proceed with the consultations

CONFIDENTIAL

by tabling informal working papers on our proposals. I envisage that, subject to the progress of the consultations, we should be able to take final decisions on the contents of the Bill in September with the aim of getting a Bill ready for introduction in November. Because the overall timetable is still quite short for a topic of this importance and complexity, I am anxious to begin consultations as soon as possible.

5. I have set in train an internal review of the immunity given by s.13 of the Trade Union and Labour Relations Act 1974 (TULRA) as amended in 1976, in respect of acts done in contemplation or furtherance of a trade dispute, which consist only of inducing a breach of contract or interfering with or inducing another to interfere with the performance of a contract (or threatening to do any of those things). Colleagues will recall that in 1974 we carried amendments to this section limiting it to "contracts of employment", thus for most (if not all) practical purposes limiting its effect to primary (as distinct from secondary) action. Ever since then our position has been that we should return s.13 to the form to which we then amended it but there are a number of factors which I wish to examine in detail and discuss with all who are interested before reaching a final conclusion. There is at least one case on its way to the House of Lords and due to be heard in November, the decision in which must be of importance to and may very well reduce the overall significance of this part of the package, and I think that it would be unwise to come to any final conclusion before seeing what is laid down in that case.

6. However, an alternative approach would be for the immunity accorded by this section to be more severely restricted in respect of picketing than in respect of other forms of industrial action. This approach would be the simplest and most far reaching as far as picketing is concerned. I wish to consider and discuss it with interested parties.

7. There are also the further related (and important) questions of the definitions of "trade dispute" and "worker" which I wish to discuss in due course.

8. The ways in which I propose to meet our commitments on picketing, the closed shop and financial support for union ballots are outlined in the three annexes to this paper. They are close to what the CBI have so far intimated to me is in their belief practical and, in formulating these proposals, I have had very much in mind that legislation in this area must be capable of enforcement and not place impossible tasks on the police which will bring the law into disrepute. In my view we must limit the changes we make in the law to those which are likely to stick and thereby create a basis of successful legal restraint. I have nonetheless included among the proposals certain items which raise difficult practical and legal issues and may not eventually prove feasible, but which I think we should air in the consultations.

9. In outline my proposals are:

(1) to limit the specific immunities for picketing given under s.15, or alternatively under s.15 and 13, to those who are party to the trade dispute and who are picketing at the

premises of their employer, and to take powers to prepare a statutory Code.

(2) on the closed shop

- to protect, by means of a right to apply to an industrial tribunal for compensation, any existing employees who may be dismissed for refusing to join the union when a closed shop agreement is made;

- to extend the present "religious belief" protection to include those who have a deeply held personal conviction against joining any union;

- to enable an employer with a closed shop agreement who is coerced by the union into dismissing an employee and against whom the employee claims compensation to bring in the union as a party to the proceedings in the tribunal;

- to provide a legal right of complaint for those arbitrarily or unreasonably expelled or excluded from union membership;

- to ensure that a closed shop should be established only if an overwhelming majority of workers involved vote for it by secret ballot;

- and to take powers to draw up a statutory Code relating to the institution and operation of a closed shop.

(3) to take powers to reimburse trade unions for postal and administrative costs of secret ballots.

10. My proposals on the closed shop do not deal specifically with the newspaper industry, where we are committed to resisting further moves towards the closed shop. This links with the question of the Press Charter and I shall be giving separate consideration to this as our consultations on the closed shop proposals proceed.

11. I seek my colleagues' agreement to proceed with consultations with employers and unions in the way outlined above and on the basis of the proposals in the three annexes to this paper.

JP

Department of Employment
LONDON SW1

13 June 1979

Picketing

1. In her speech during the Debate on the Address on 15 May the Prime Minister summarised the Government's proposals on picketing as follows:

"the right to picket will be limited to those in dispute picketing at their own place of work".

/Hansard 15 May col 8377

Civil or criminal offence

2. In the first place I have considered whether picketing outside these limits should be made a criminal offence. My conclusion is that it should not. A criminal offence could involve the police in difficult problems of interpretation and identification, create conflict where none existed previously and involve on some occasions insuperable problems of enforcement as well as absorbing a great deal of police manpower. Moreover, the police already have considerable powers to deal with obstruction, violence, threatening behaviour and breaches of the peace. I recommend therefore that picketing outside the limits we are proposing should be a matter for civil action. Employers - and others - would then be able to initiate actions when they think that picketing is unlawful and is damaging their firm's operations. The CBI have made it clear to me informally that this - rather than a criminal offence - is what they want.

Proposed approach

3. Secondly I have considered whether the new legislation should create a new tort; that is to say whether it should lay down that picketing outside the limits we are proposing is in itself an unlawful act controllable by means of a civil injunction. This would have the advantage of defining clearly the limits of lawful picketing and the consequences of going beyond them. On the other hand the creation of a specific statutory tort of unlawful picketing would be strongly criticised as conflicting with the right to demonstrate and protest without impediment which, along with the right to free speech, is generally held to be in the public interest so long as it is exercised without any wrongful act being done. It would be difficult in my view to justify legislating to create "no go" areas where peaceful communication or even silent demonstration would in themselves become unlawful acts.

4. The approach I therefore recommend is to amend the present law relating expressly to picketing, which is set out in s.15 of the Trade Union and Labour Relations Act 1974 on the following lines:

"It shall be lawful for one or more persons in contemplation or furtherance of a trade dispute to which he or they are party to attend at or near the place where he or they work or his or their employer carries on business for the purpose only of peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working" (new words underlined).

5. An amendment of this kind would not create a new tort. Persons who picketed peacefully other than in the circumstances specified in the amended s.15 would not,, "ipso facto" be committing an unlawful act, but they would not benefit from tne immunities conferred by s.15. It would be for the police to prosecute if they committed a criminal act such as obstruction, intimidation or assault or for an aggrieved employer to bring a civil action against them for private nuisance or, more importantly, if the conduct of the pickets were outside the immunity conferred by s.13 of TULRA 1974 for inducing breaches of contract. A change in the law of this kind would, I believe, in itself have important psychological effects; those who engaged in picketing outside the limits laid down in the amended s.15 would know that they ran the risk of being taken to court on a number of different grounds.

6. However, to be really effective such an amendment would I think need to be buttressed by changes in the law on immunities for individuals who induce breaches of contract in furtherance of a trade dispute, which is set out in s.13 of TULRA 1974 as amended by the TULR (Amendment) Act 1976. One way to do this would be to amend this section as we amended it in the course of the passage of TULRA 1974 and for the reasons which we then gave. Another possibility would be to limit the immunities conferred by this section in respect of picketing to persons who were picketing within the limits of the amended s.15. It will be necessary to consider and discuss all these matters and the related question of the definitions of "trade dispute" and"worker" together and in the light of what is said by the House of Lords in the case shortly to be decided by that Court.

7. There are two other questions which arise from my proposal to amend s.15:

(i) Place of work. The wording of the amendment suggested in para 4 above is not limited strictly to the employee's own place of work but extends to any place "where his or their employer carries on his business". I think it is right for two reasons to extend the permissible location of peaceful picketing to all the premises of the employer - ie the employer with whom the pickets have a contract of employment. First, a narrower formulation in terms of the employees' own place of work would, if incorporated in legislation, give rise to anomalies and difficulties. Secondly, given the traditions of industrial action in this country, any narrower definition would have no hope of sticking and might indeed invite a deliberate campaign to flout it with the intention of discrediting our legislative proposals as a whole. The CBI favour a restriction in terms of the premises of the employer with whom those picketing have a contract of employment;

(ii) Unnamed Pickets. The view has been expressed that there is a danger that such proposals might be frustrated by a simple rotation of pickets so that the person picketed would never be able to name the person(s) against whom he wished to obtain an injunction. I would wish to avoid this and have been glad to find on enquiry that practical

CONFIDENTIAL

270

means of dealing with such a situation have been found in many instances but I am exploring what more may be done to provide against this danger.

Provision for Statutory Code

8. Finally, I recommend that the law should empower the Secretary of State to produce a Code on picketing. This Code could have the same status in law as the Highway Code in that it could be taken into account in court proceedings. As a document approved by Parliament it could be expected to have considerable moral force as well as helping to bring about a more consistent interpretation of the law by police and magistrate One possibility would be for the Code to be drawn up by ACAS, subject to Government approval. But it would in any case be prudent to amend s.6 of the Employment Protection Act 1975 to enable the Secretary of State to draw up a Code on this and other subjects (eg the closed shop).

9. The Code would explain the amended law on picketing in plain terms and could also cover such matters as the conduct, control and organisation of pickets. These latter topics are however already dealt with in the TUC Guide (published in February this year) in terms which both the CBI and I regard for the most part as satisfactory. There would be advantages in these topics continuing to be the subject of TUC guidance if the TUC are prepared to maintain these parts of their Guide, and for as long as there is reason to believe that voluntary guidance is likely to be more effective in influencing the behaviour of pickets than a Statutory Code. Whether the Secretary of State will need to exercise his power to draw up the Code will depend on these two factors. These are matters I intend to explore with the TUC in consultations.

CLOSED SHOP ANNEX 2

In the debate on the Queen's Speech the Prime Minister said that the Government would "amend the law on the closed shop so that those arbitrarily excluded or expelled from any union are given the right of appeal to acourt of law ... Existing employees and those with personal convictions against joining a union will be protected. If they lose their jobs as a result of a closed shop they will be entitled to full compensation".

Existing employees and those with personal conviction

2. Under the present law only the employee who "genuinely objects on grounds of religious belief to being a member of any trade union whatsoever" enjoys any protection (Section 58(3) of the Employment Protection (Consolidation) Act 1978). This protection consists in making his dismissal for non-compliance with a union membership agreement unfair. In the first place, I propose that we should extend protection of this nature to include all those who are existing employees at the time of the conclusion of a union membership agreement and who do not wish to join the relevant union.

3. Secondly, I propose that the existing "religious belief" provision should be widened so as to cover at least any employee who "genuinely objects on grounds of deeply held personal conviction to being a member of any trade union whatsoever". I do not favour extending this protection to those who simply object to being members of a particular union. To refer in the legislation simply to "a particular union" might well open the exception to those in temporary disagreement with a union's policy; be regarded by the unions as a very major change; and make for industrial conflict.

4. Charity option There might be advantage in providing that those who claim the protection of the sections, extended as I have described above, should accept an obligation to pay to a charity the equivalent of union dues. This would be one counter to the "free rider" argument which will be raised against our proposals. I intend to keep these possibilities in mind and canvass them in my consultations if it appears that that would be helpful.

5. Joinder An employer who considers that he has been coerced by a trade union into dismissing an employee in these circumstances should, I suggest, be enabled to join any third party, including the union concerned, as a party in any tribunal proceedings.

6. A joinder provision does, of course, have its limitations and difficulties. For example, the coercion on the employer may result from unofficial shop floor action. Where a union is

272

joined, this could involve judicial bodies in untangling responsibility in quite confused industrial situations, leading them in the course of their investigations into difficult areas and giving rise to considerable friction. Sequestration of union funds as a last resort could also increase the risk of wider conflict.

7. On the other hand, the mere existence of a joinder provision should encourage unions to adopt a more tolerant attitude in negotiating the terms of union membership agreements, and should dissuade them in some circumstances from seeking to bring about the dismissal of an employee. The provisions relating to existing employees and deeply held personal conviction will only have their full effect if unions are aware that if they cause the dismissal of employees in these circumstances they will be liable for compensation. I therefore think that joining at the discretion of the employer - it is he who has subsequently to live with the trade union - should be incorporated in our proposals.

Arbitrary exclusion or expulsion

8. Those in this category, unlike the previous category, wish to belong to a trade union but are either excluded or expelled. Their right of complaint therefore is primarily against the union.

9. I propose that the scope of the new right should be akin to that which we succeeded in incorporating in S5 of the 1974 Act, namely any worker whether in a closed shop or not or whether in employment or not who is arbitrarily or unreasonably excluded or expelled from union membership shouldhave a legal right of complaint. This would be broader than the remit of the TUC's Independent Review Committee (IRC) (which only deals with those dismissed or given notice of dismissal as the result of exclusion or expulsion) but would, I believe, be widely seen as fair, and as a reasonable and moderate attempt to mitigate some of the effects of the pre-entry closed shop. The criticism will be made that such a provision would be difficult to operate in practice. It would pose difficult questions, such as whether it is legitimate for a trade union to restrict union membership when a large number of its existing members are unemployed; and in the case of those who are not in employment compensation would be difficult to assess. Further those not in employment or in a closed shop are unlikely to make much use of the new right (S5 was hardly used by workers in this position). However, none of these arguments in my view, is sufficient reason for not providing a possible remedy for those individuals - however few they may be - who feel aggrieved at their expulsion or exclusion.

joined, this could involve judicial bodies in untangling responsibility in quite confused industrial situations, leading them in the course of their investigations into difficult areas and giving rise to considerable friction. Sequestration of union funds as a last resort could also increase the risk of wider conflict.

7. On the other hand, the mere existence of a joinder provision should encourage unions to adopt a more tolerant attitude in negotiating the terms of union membership agreements, and should dissuade them in some circumstances from seeking to bring about the dismissal of an employee. The provisions relating to existing employees and deeply held personal conviction will only have their full effect if unions are aware that if they cause the dismissal of employees in these circumstances they will be liable for compensation. I therefore think that joining at the discretion of the employer - it is he who has subsequently to live with the trade union - should be incorporated in our proposals.

Arbitrary exclusion or expulsion

8. Those in this category, unlike the previous category, wish to belong to a trade union but are either excluded or expelled. Their right of complaint therefore is primarily against the union.

9. I propose that the scope of the new right should be akin to that which we succeeded in incorporating in S5 of the 1974 Act, namely any worker whether in a closed shop or not or whether in employment or not who is arbitrarily or unreasonably excluded or expelled from union membership shouldhave a legal right of complaint. This would be broader than the remit of the TUC's Independent Review Committee (IRC) (which only deals with those dismissed or given notice of dismissal as the result of exclusion or expulsion) but would, I believe, be widely seen as fair, and as a reasonable and moderate attempt to mitigate some of the effects of the pre-entry closed shop. The criticism will be made that such a provision would be difficult to operate in practice. It would pose difficult questions, such as whether it is legitimate for a trade union to restrict union membership when a large number of its existing members are unemployed; and in the case of those who are not in employment compensation would be difficult to assess. Further those not in employment or in a closed shop are unlikely to make much use of the new right (S5 was hardly used by workers in this position). However, none of these arguments in my view, is sufficient reason for not providing a possible remedy for those individuals - however few they may be - who feel aggrieved at their expulsion or exclusion.

10 Statutory and Voluntary Machinery

The right of complaint could be either to the High Court or to the industrial tribunals. I am strongly inclined towards the High Court. Our commitment is to give a right to go to "a court of law" and I would propose to adhere to that both (a) because of the affinity of what I propose to the long-standing principle of the Common Law that a man should not be prevented from practising his trade or selling his labour and (b) to highlight the difference between this and such other redress as a man may have say under the statutory code relating to unfair dismissal or the voluntary procedures which may be available to him through the TUC's IRC.

Further, I think that it is of such importance that a man should have as effective a right of this nature as we can give, that we should mark the importance of that right by making it a right to go to the High Court.

11 It follows from the above that I do not see my proposal as being in any way in conflict with the continued existence of the TUC Independent Review Committee. On the contrary, I believe that there is much value in the existence of voluntary procedures of conciliation and arbitration for seeking just settlements of problems in this area. I hope therefore that the TUC will continue with its experiment and with its efforts to make its procedures as effective as possible so that between us we may provide a man with a worthwhile choice between the voluntary procedures provided by the TUC, on the one hand, and the statutory safeguard which we propose to introduce, on the other.

12 Secret Ballot

The Manifesto proposes a Statutory Code to ensure that where closed shops are established this is in accordance with best practice and "only if an overwhelming majority of workers involved vote for it by secret ballot". The CBI have recently suggested that the requirement to hold a secret ballot should be stated in primary legislation. I think they are probably right. Primary legislation could provide that a new union membership agreement (UMA) could only furnish an employer with a defence against unfair dismissal where it had been introduced following a secret ballot of those to whom it was to apply in which a substantial majority voted in favour of the UMA. The Code could cover such detailed though controversial matters as constituencies, machinery, majorities and perhaps also periodic reviews.

13 Code of Practice

Unlike the TUC Guide on picketing, the TUC Guide which deals with the closed shop, whilst it contains some valuable guidance, eg on the flexibility of UMAs, in extolling the value of the closed shop starts from a different premise from our own. In the first instance we might ask ACAS but in case they should fail or refuse we should ensure that there is power for the Secretary of State to draw up the Code himself.

SUPPORT FROM PUBLIC FUNDS FOR UNION BALLOTS

1. In the debate on the Queen's Speech the Prime Minister reaffirmed our commitment to provide public funds for postal ballots for union elections and other important decisions and said that every trade unionist should be free to record his decision without others being able to watch or take note. (Hansard 15 May col 83).

Postal Ballots

2. To fulfil this undertaking I propose that the legislation should be framed to enable any independent union to seek reimbursement of the postal costs of conducting any secret ballot conducted in accordance with union rules. This should provide substantial financial encouragement for unions to adopt secret postal ballots to ascertain opinion and would cover ballots concerned with elections as well as ballots on pay offers, strikes etc.

Non-Postal Ballots

3. But some unions (notably the NUM) conduct secret ballots at the workplace - a method which involves no major postal costs but which may involve considerable administrative costs (for example, the fees of the Electoral Reform Society). It would be desirable, in my view, for any scheme for reimbursement to enable a substantial proportion of such costs to be met from public funds.

Administration of the Scheme

4. The Certification Officer (CO) would be the most appropriate person to administer the scheme. Reimbursement of the appropriate costs would be made if the relevant expenditure were certified by the authorised trade union officer and came within the terms of the scheme. I do not consider that the CO should be given the duty of enquiring into the propriety of a ballot which was challenged. This degree of public supervision would reduce the willingness of unions to take advantage of the scheme and damage its effectiveness. Any ballot would, of course, have to be in accordance with the rules of the union and union members would have the usual right of recourse to the courts in the event of a breach of the rules. I do not propose either that there should be any appeal from a decision of the CO against reimbursement, other than an informal appeal to the Secretary of State. This would mirror the absence of appeal where schemes of aid to industry are concerned.

Cost

5. Unions are unlikely to move swiftly to encourage secret ballots on a larger scale. But even if they did and claimed reimbursement of costs on the basis I have proposed above, the expenditure would be unlikely to be more than £2-£4m and would probably be considerably less. There would be no significant public manpower implications.

13 June 1979

CONFIDENTIAL