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6 June 1984

CABINET

MINISTERIAL GROUP ON COAL

THE COAL DISPUTE

Note by the Secretaries

The attached minute dated 4 June from the Attorney General to the Prime Minister is circulated for the information of the Group.

Signed ROBERT ARMSTRONG
P L GREGSON
J A J BUDD
J F STOKER

Cabinet Office
6 June 1984

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PRIME MINISTER

COAL DISPUTE

As requested by Misc 101 I have carried out a review of:-

> "any means of increasing the effectiveness of the enforcement of the criminal law to counter violence and intimidation; and the possible role of the civil law in restricting the effectiveness of the strike".

The Home Office, Department of Employment, Department of Energy and Scottish Departments were consulted but it has not been possible in the time available to obtain concurrence of their Secretaries of State in this report which is therefore submitted in my name only.

In considering the effectiveness of the criminal law we worked on the assumption that the principal objective, as always, must be the prevention of disorder (particularly that which precludes or attempts to preclude citizens from going to work) and of the commission of criminal offences; the prosecution and punishment of offenders will play an important role in achieving this objective but they must be viewed essentially as means of law enforcement and not an end in their own right. Every situation is different and an assessment of what approach is likely to be most effective in terms of the maintenance of law and order can only be made by the police officer who is in operational command at the scene. When dealing with groups of people assembled on a large scale there will frequently be difficult judgments for the police to make on whether their effort is best devoted to the detection and prosecution of offences or to containing disorder and preventing it from building up further. Our review has therefore comprised an examination of all aspects of the law enforcement machine

in order to identify any deficiencies which might impair the effectiveness of the police effort. For this purpose we commissioned official papers from the Home Office (Appendix 'A'), the Scottish Office and Crown Office jointly (Appendix 'B') and the Department of Employment (Appendix 'C'). We have also taken account of the information contained in the minute by the Lord Chancellor to the Prime Minister of 16 May 1984 (Appendix 'D'). For convenience our comments and conclusions are set out under 4 headings:- The adequacy of the criminal law; the adequacy of police powers; police action of a preventive nature; and prosecution as a means of enforcement.

We start with the general comment that, although the Home ~~Office has~~ Departments have overall responsibility for the criminal law, many aspects of the daily operation of the criminal justice system are managed at local level and are not easily susceptible to central influence, even if that were desirable. We should not lay ourselves open in any way to a charge of interfering with the administration of justice.

THE ADEQUACY OF THE CRIMINAL LAW

Neither Scottish nor English law confers any immunity upon those who offend the criminal law in the furtherance of an industrial dispute. Broadly speaking the scope of the law in either country is the same. The authorities in Scotland have the benefit of a rather wider judicial interpretation of the term "breach of the peace" but, in the present circumstances, this seems to have no practical significance.

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We believe that in both jurisdictions the scope of the criminal law is sufficient to embrace all the mischiefs which have hitherto manifested themselves. An important procedural distinction exists between the common law offences relating to public order in Scotland and those in England and Wales. In Scotland these offences are triable either on indictment or summarily whereas the English offences of riot, unlawful assembly and affray are all purely indictable. The usefulness of offences of this nature lies in circumstances where a group of persons acting in concert have been responsible for violent and intimidating conduct but where there is little evidence as to which individuals were responsible for particular acts (eg a barrage of missiles) thus rendering individual prosecutions difficult or impossible. Unlawful assembly (defined as an assembly of 3 or more persons with intent to commit a crime by open force or with intent to carry out any common purpose in such a manner as to give firm and courageous persons in the neighbourhood reasonable grounds to apprehend a breach of the peace) has a particularly wide scope. In both jurisdictions prosecutions for these offences are regarded by the courts as appropriate only in relation to the most serious and violent disorder. Particularly in England where the purely indictable nature of the offence results in trial, often in a blaze of publicity, a substantial time after the offence; such prosecutions in the kind of situation which now faces us may merely create martyrs.

These difficulties are not peculiar to the present situation and the need for provisions covering conduct broadly equivalent to that covered by the offence of unlawful assembly but capable of being more readily invoked in cases

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of a less serious character and also being dealt with expeditiously in the magistrates court was recognised in the recommendations of the Law Commission in England with regard to offences against public order published on 25 October 1982 (Appendix 'E'). The relevant pages are annexed. It is recognised that any change in this area needs to be considered in the context of the law relating to public order as a whole and that in any event there seems to be no possibility of effecting primary legislation in the near future. It remains however a long term option relevant to situations of this nature generally. It must also be viewed in the context of the practical difficulties which arise in the context of attempts to make widespread arrests in circumstances of serious public disorder.

POLICE POWERS

There have been no suggestions that the police, either in England or in Scotland, lack the powers necessary to deal with the problems which the dispute in the mining industry has produced. Some controversy has been generated by the extensive use of the common law power of the police to stop people travelling to the scene of an actual or apprehended breach of the peace. The views which I expressed to the House in my Written Answer on 16 March were based upon the application of well-established principles of the common law to contemporary conditions. It is understood that a test case on this point will be *heard in early June in a magistrates court in Nottinghamshire and that, whatever the result of that hearing, the case will proceed on appeal to the Divisional Court. My officials are in touch with the prosecuting authorities in Nottinghamshire

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* Today, I have learned.

on an informal basis and are monitoring the situation. An adverse ruling by a senior court on the point of law involved would have serious implications for the effectiveness of police action and only controversial primary legislation could restore the position. For my part I am confident of our position as regards the issue of principle although a limited number of cases may occur in which the court concludes as an issue of fact that the circumstances surrounding the particular arrest did not justify the apprehension of the arresting officer of an immediate breach of the peace. Whilst such decisions would provide useful propaganda for the NUM they would not seriously affect the police effort. It is for consideration whether we should take contingency steps for the event of an adverse ruling on the central issue of law.

PREVENTIVE ENFORCEMENT OF THE LAW

There is no doubt that the police effort so far in the present dispute has achieved a greater degree of success than in any previous similar situation. The principal tasks for the police during the dispute have been to enable those who wish to go to work to do so and to police the picketing of other establishments to prevent disruption of the transportation of coal or other fuels. But the success in achieving these objectives has been costly both in financial terms and in terms of injuries sustained by police officers. The key to this success has been the deployment of thousands of additional police officers in the areas concerned. In England this has been achieved under the "Mutual Aid Scheme" provided for by s.14(1) of the Police Act 1964. Our information is that individual chief officers have not lacked the

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manpower which they have thought necessary and there is no impairment of the effectiveness of law enforcement arising from lack of resources.

A particular problem arising only in England has been the degree of intimidation suffered by families of miners who have continued to work. On 17 May the Home Secretary announced to the House of Commons a range of measures which individual chief officers have taken to assist in the prevention and detection of such acts. In essence the steps were the adaption of customary procedures for the prevention and detection of offences and identification of offenders to the particular circumstances prevailing. So far they appear to have been reasonably successful. No similar problem has come to notice in Scotland.

In spite of the factors indicated above, coupled with the recent increase in violence as demonstrated at Orgreave, at present we see no scope for increasing the effectiveness of the preventive police action.

PROSECUTION AS A MEANS OF ENFORCEMENT

This is the aspect of the present situation which requires most careful consideration. The major difficulty which always arises in large scale disturbances is in identifying the wrong doer. Evidential problems of this kind are almost insurmountable eg who threw the brick that fractured the picket's skull last week? Because prosecution is usually a sequel to arrest and detention, this must be taken into account by a police officer in a public disorder situation who must decide whether to seek to effect arrests or to contain the situation. Those considerations go beyond the

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immediate situation for, once an arrest is effected and a prosecution initiated, there are further resource implications in the attendant administrative procedures, the preparation of evidence and the subsequence attendance of officers at court. The figures appended to the paper prepared by Home Office officials indicate that extensive use has been made of prosecution as a means of law enforcement although in terms of the overall situation the numbers remain quite modest. Account must also be taken of the extent to which police attitudes and prosecuting policy may themselves have implications for the maintenance of public order. We would therefore regard as a pre-requisite to any initiative (whether formal or informal) on the part of central Government cogent evidence that chief officers of police regarded the present situation as unsatisfactory and impairing the effectiveness of the police effort. At the present no such indications have been received.

The Government has no control over the decisions whether to prosecute or the offences to be charged. Equally the Government has no influence over the sentences passed. We understand that most of the sentences have been small fines (usually paid by the NUM).

There can be some assistance given to magistrates courts to help with a large list and the work of the Crown Court, which will try the more serious cases, can be adjusted to ease the backlog. We must also try to avoid long delays to cases unconnected with the dispute.

There may be some manning difficulties if the strike goes on and large numbers of police officers have to attend

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court as witnesses.

We are therefore agreed that the Government must not, in any way, seem to be interfering in the administration of justice. But local factors can be properly taken into account and assistance for the effective and speedy disposal of cases cannot be criticised.

THE ROLE OF CIVIL PROCEEDINGS

The paper prepared by officials of the Department of Employment summarises the relevant law. The strike itself is legal insofar as the members of the NUM are merely on strike and in this respect the civil law can offer no remedy. But the fact that a significant proportion of the miners have continued to work coupled with the two legal actions recently brought by working miners against their Union leaders makes it possible that, if the unlawful picketing of NCB premises by NUM members were terminated, some miners would return to work. This would undoubtedly render the strike less effective but to what extent cannot be predicted.

The NCB have already obtained an injunction against Yorkshire NUM and local hauliers have obtained two injunctions against Wales NUM. Neither injunction has been obeyed and there is no reason to suppose that further injunctions against other NUM areas would command greater respect. Further enforcement is by way of application by the NCB (or the hauliers) based on the NUM's contempt and, if successful, this would eventually lead to sequestration of union assets. There is no reason to doubt the ability of the court to effect sequestration but whether such action would result in

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compliance with the injunction would depend solely on the attitude of the Yorkshire NUM. Proceedings of this nature are intended for the protection of private rather than the wider public interests and hence any decision by the NCB as to enforcement of the injunction will depend upon its assessment of the likely reaction of the miners (and they have a far better understanding of this) and the likely impact on the possibility of a settlement. Misc 101 may wish to give consideration to whether civil proceedings would be likely to stop the secondary picketing, encourage more miners to return to work and bring a speedier end to the dispute. But it is finally for the NCB to judge the stage at which, if at all, the pressure which enforcement proceedings would bring to bear on the NUM would outweigh any damage to the prospects of a settlement. I understand that the chief constables consider that invoking the civil law at this stage will not help them in enforcing the criminal law.

SUMMARY OF CONCLUSIONS

1. The substantive criminal law is adequate but we should give further consideration to the creation in English law of a summary offence similar in scope to unlawful assembly.

2. Police powers appear adequate but it is for consideration whether contingency plans should be made for an adverse ruling on law as to the right of police to require those journeying to a picket to turn back.

3. There appear to be no further steps available to the police by way of preventive enforcement of the law.

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4. As regards prosecutions policy and the handling of cases by the courts, overt intervention by central Government would be inappropriate. Our proper role is to ensure that the responsible authorities have all the support they need to deal effectively with the situation in their area.

5. It is impossible to predict the likely effect of further civil proceedings on the industrial action. Whatever advice Government may give, the final decision is one for the NCB.

M.H.

LAW OFFICERS' DEPARTMENT

4 June 1984

Appendix 'A'.

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INDUSTRIAL ACTION IN THE COAL INDUSTRY: THE USE OF THE CRIMINAL AND CIVIL LAW

NOTE BY THE HOME OFFICE

Introduction

The Attorney General has been asked by MISC 101 to review and report upon "any means of increasing the effectiveness of the enforcement of the criminal law to counter violence and intimidation; and the possible role of the civil law in restricting the effectiveness of the strike".

2. This note concerns the criminal law aspect of this remit, so far as England and Wales is concerned (a separate note is available on the position in Scotland).

3. Since it is the effectiveness of the enforcement of the criminal law which is under consideration, it is assumed that questions concerning extensions or amendments to the law are largely outside the remit. In any event, such questions are secondary to that of whether the present law is adequate or could, with more effective enforcement, be made so; and, even if the review were to conclude that changes in the law were desirable, there appears to be no possibility of effecting them within a relevant time-scale. Accordingly, this note deals only with the law as it stands, except to mention the following. First, a review of the Public Order Act 1936 and related legislation is looking at whether the current law strikes the right balance between the right to demonstrate and the rights and freedoms of others who may be affected by demonstrations. Work on the review is being expedited following the Libyan Embassy incident, but it is not possible to predict precisely when it will be completed. Secondly, an inter-departmental review is studying areas of the law relative to terrorism and incitement to terrorist activity, to see if there

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are ways in which the treatment of incitement or other offences might be made more effective.

4. Hereafter, therefore, this note is divided into three parts: the present criminal law as it appears relevant to the subject under discussion; the action taken to enforce it, including prosecutions (this seems to be the major question for consideration); and, for completeness, some material on how cases have so far been handled by the courts.

The present criminal law

5. The basic principle is that the fact that a trade dispute is in progress confers no exemption from any of the normal provisions of the criminal law. A very wide range of offences is liable on occasion to be breached by picket strikers or others as a means of increasing the effectiveness of industrial action, or in connection with it (for example, the figures which the police have provided show a number of charges of burglary and theft). The offences principally under consideration, however, can be grouped into (i) violence against the person and intimidation; (ii) obstruction and (iii) "public orde offences.

6. Any unlawful infliction of violence against the person is a criminal offence either under the Offences against the Person Act 1861 or at common law, or both. At common law, it is an offence to commit an affray (an unlawf physical assault involving such a degree of violence that persons of reasona firm character are likely to be terrified). There are special provisions fo protecting police officers: section 38 of the 1861 Act makes it an offence t assault with intent to resist arrest, and assault upon a constable is an of under section 51 of the Police Act 1964.

7. As to intimidation, it is an offence to threaten to murder; to use or threaten violence to secure entry to premises; to use threatening or abusive words or behaviour with intent to provoke a breach of the peace; to utter menaces over the telephone; and to threaten to damage or destroy property.

8. Section 7 of the Conspiracy and Protection of Property Act 1875 makes it an offence, with a view to compelling a person to do any act which he has a legal right to abstain from doing, or to abstain from doing anything which he has a right to do, to intimidate him or his wife or children; to persistently follow him about; to hide his tools or clothes; or to "watch or beset" his house, place of work, etc.

9. Offences of obstruction may not of themselves amount to violence or intimidation, but may be the means by which violence or intimidation come to be exerted. It is an offence wilfully to obstruct a constable in the execution of his duty, wilfully to obstruct free passage of the highway and wilfully to cause an obstruction in any public footpath or thoroughfare.

10. The remaining common law "public order" offences are of unlawful assembly (defined as an assembly of three or more persons with intent to commit a crime by open force or with intent to carry out any common purpose in such a manner as to give firm and courageous persons in the neighbourhood reasonable grounds to apprehend a breach of the peace) and riot (defined as a tumultuous disturbance of the peace by three or more persons who assemble with intent to assist one another against any who oppose them in an enterprise and to execute the enterprise in a violent and turbulent manner).

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11. Although it is not an offence in itself simply to commit a <u>bre</u>
<u>of the peace</u>, a constable may arrest someone who is doing so or who
reasonable apprehends may do so, and a court may bind a person over
keep the peace.

12. <u>Incitement</u> to commit an offence is, by common law, an offence
itself. It is committed by anyone who threatens, encourages, induc
requests or exhorts someone else to commit a criminal offence. The
persuasion may be implicit or explicit, oral or in writing. (Shoul
the other person assent to the plan in question, however, a charge
<u>conspiracy</u> may be more appropriate.)

13. The conclusion which seems to emerge from the summary above is
that probably anything which ought to be a criminal offence is so.
Certainly, the most obvious manifestations of violence and intimida
are well covered, in some instances to the extent of duplication.
suggestion has been made by the police that there is any need for f
criminal offences to be created.

14. Limitations on the effectiveness of the enforcement of the law
thus likely to arise not so much from the extent to which objection
behaviour amounts to a criminal offence, or from the way in which o
are drawn, as from the difficulties (which affect the prosecution o
criminal offences to greater or less degree) of apprehending the of
and of gaining evidence that will stand up in Court. In some cases
difficulty may be that of being certain, in a mêlee, of the identit
of an offender; in others, such as of criminal damage to a "blackle
home or telephone threats, the difficulty will lie in ascertaining

was responsible or of persuading the victim to confide his suspicions. There may be difficulty, even when it is clear what someone has done, in proving the intent necessary for the establishment of an offence. Above all, however, in dealing with groups of people assembled on a large scale, there will be difficult judgments for the police to make on whether their effort is best concentrated on the detection and prosecution of offences or to containing disorder and preventing it from building up further.

The policing operation: context, scale, powers, arrests, offences and procedure

15. The principal task for the police during the dispute has been to enable those who wish to work (primarily miners in Nottinghamshire, Derbyshire, Staffordshire, Leicestershire, Warwickshire and in Lancashire, where the pits come within either the Greater Manchester or Merseyside force areas) to do so. Broadly, this has involved either preventing would-be pickets from reaching pits, or deploying sufficient officers at pits to prevent pickets blocking the way to working miners. The scale and character of the picketing have varied from place to place and from day to day. On most days, the highest number of pickets at any one site has been below 1,000, although on one day, at Haworth colliery, there were an estimated 10,000 outside the pit or in the local village. There are also commitments to the policing of picketing at non-colliery sites (eg wharves and ports through which coal or oil is being imported) and in respect of intimidation in mining towns (which is dealt with more fully below). There has also been a number of major demonstrations organised by the NUM, in, for example, Sheffield and Nottinghamshire. On 14 May, upwards of 12,000 supporters of strike action took part in a march and

rally in Mansfield. Between 2,000 and 3,000 did not attend the rally, bu went drinking. In the afternoon, numbers of them attacked local inhabitants, property and the police. Of those arrested, 57 have bee charged with riot.

16. The scale of the policing operation has been considerable. Section 14(1) of the Police Act 1964 provides that one chief officer of police may, on the application of another, provide him with constables or other assistance "for enabling the other force to meet any special demands on its resources". This assistance is known as "mutual aid". Since the dispute began, all forces in England and Wales without working pits in their areas have provided aid to the ch officers of areas with pits. The aid is provided in police support units (PSUs),each of 23 men. In the first week of the dispute a tota of 424 PSUs (ie some 9,700 mutual aid officers) were deployed in Nottinghamshire alone, in addition to local officers. Up to 18 May, 10,971 mutual aid PSUs (252,000 officers) had been deployed in total. In recent weeks, the average daily mutual aid deployment has been abo 190 PSUs (about 4,000 men). The numbers and duties of officers to be deployed on any particular operation are matters for the chief offic of the area concerned (on arrival, mutual aid officers come under the command of the local chief officer). But the meeting of requests for aid has been facilitated by the National Reporting Centre (a clearing house for requests, headed by the President of the Association of Ch Police Officers) and there is no general indication that individual chief officers have lacked the manpower which they have thought nece This may be pertinent, to the extent that the effective enforcement the law depends on the availability of adequate police resources.

Police powers

17. As far as the Home Office are aware, and subject to the points made in paragraph 14 above, the police are employing the powers of prevention, arrest and prosecution available to them. In particular - and this has given rise to some controversy - some chief officers, notably the Chief Constable of Nottinghamshire, have made extensive use of the common law power of the police to stop people travelling to the scene of an actual or apprehended breach of the peace. Attached is a copy of a Written Answer on 16 March in which the Attorney General explained the nature of that power in the picketing context. The use of this power is a matter for the police, but the Home Office is satisfied that chief officers generally are aware of it. There is no evidence on which to doubt that they are also aware of any other powers which may prove relevant, although, of course, a policing operation on the current scale may identify problems (and confusions, if not excesses) which may take time to emerge.

Intimidation

18. Much publicity has been given to alleged acts of intimidation against miners who are working, their wives and families, and against their homes and other property. On 17 May, the Home Secretary told the House of Commons of a range of measures which individual chief officers had taken and were developing to try to assist in the prevention and detection of such acts. Variously, these measures include increasing the number of officers deployed in towns and villages which have been the scene of offences, including plain clothes officers, together with members of the Special Constabulary (who know the local people and areas well); turning back people who might be likely to commit offences; liaison with leaders in the communities, including local miners' leaders, to encourage the reporting of and other information about acts of intimidation; emphasizing the willingness and

capacity of the police to assist in their prevention, or to apprehend and prosecute offenders; and local publicity for the potential police involvement and role.

Other police procedures

19. It is primarily for the police to adapt their customary procedures for the prevention and detection of offences and the identification and prosecution of offenders as may be necessary in the particular circumstances prevailing. The Home Office has not conducted a general survey of these matters among chief officers, but some incidental information is available. For example, at least one force has a streamlined arrest procedure, under which people arrested are held in a large police vehicle which leaves the scene only when it is full, and an 'instant' photograph is taken, on the spot, of each arresting officer and the person arrested. This economises on vehicle use and, because the arresting officer does not have to leave the scene of the operation, on police manpower. In addition at least one force has produced, with legal advice, a standard opening to any statement introduced in support of a prosecution dealing with the failure of a person to comply with a request to discontinue his journey (whilst the arresting officer has discretion whether to use the standard form of words, its provision has been criticised by the Parliamentary Opposition, and in the Police Federation magazine). Perhaps inevitably in operations on the current scale, which have their own novelty, there is the suggestion of some raggedness at the edges. For example, there were allegations that in March a number of miners detained on a particular day at Mansfield police station were asked 'political' questions, eg wh

they had voted for Mr Scargill in the election for the Presidency of the NUM, or how they would vote at a General Election at which the only candidates were of the Conservative and Communist parties. These allegations are now the subject of a formal complaint against the police which is being investigated under section 49 of the Police Act 1964. But it is the case that, early in the dispute, interviewing officers of the force concerned were provided with a standard list of questions, one of which was "Are you a member of any political organisation?" The Chief Constable has acknowledged that this was unfortunate. Its purpose was to assist in filling out information about the organisation of picketing, and the motivation of those involved. It seems to have been a bad example of a generally good police practice, viz the gathering of information to enhance preventive operations.

Arrests and charges

20. From 14 March to 20 May inclusive, there were 2,431 arrests in England and Wales in relation to events connected with the disputee. Table 1, attached, shows the numbers of arrests and charges by police force area. Table 2 shows the numbers of charges brought for particular offences.

Conclusion

21. In summary, it does not seem evident that the police are lacking in essential resources, are unaware of their powers or of relevant offences, are failing to adapt to the circumstances or are lacking in investigative initiative. The general line on allegations that the police have exceeded their powers, or have otherwise misbehaved, is that it is open to anyone to make a formal complaint, which will be investigated under the statutory procedures under section 49 of the Police Act 1964 and the Police Act 1976,

and that action by the police may also be challenged in the courts.

The handling of cases by the courts

22. Police reports indicate that, from 14 March to 20 May inclusive, 332 cases had been dealt with by the courts. 20 of the defendants were found not guilty. Table 3 summarises the pentalties imposed in the remaining cases. It is, of course, possible that the more serious cases are generally taking longer to come on and thus that the penalties so far awarded may not prove wholly typical.

23. Enquiries of the courts suggest that there are, for example, someth approaching 1500 cases now awaiting proceedings in magistrates' courts i Nottinghamshire. A survey of the position in the 4 magistrates' courts most closely concerned indicates, however, that they appear at present t be coping with the extra weight of cases: they report that the length of time for which a person pleading "not guilty" must wait before trial is longer than is normal in those areas, or elsewhere. Extra courts have been held. It is open to the benches concerned to seek the temporary appointment of a stipendiary magistrate to assist in coping with the current workload. The approach would be made to the Lord Chancellor and the most hard-pressed courts have been especially reminded by the Lord Chancellor's Department of this possibility. It would not seem appropri to suggest to the courts that they give particular priority to cases ari from picketing activity. Such cases could, of course, be expedited only the expense of other cases awaiting a hearing, many of which may be thou as deserving of early conclusion as the cases involving pickets.

24. The overwhelming majority of pickets charged and brought before the court are being remanded on bail. The Bail Act 1976 permits a court whe granting bail to impose conditions designed to ensure that the accused

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surrenders for trial, that he does not commit an offence while on bail and that he does not obstruct the course of justice. The most recent general condition being attached by, for example, Mansfield magistrates' court is "that [the defendant] shall not visit any premises or place for the purposes of picketing or demonstrating in connection with the current trade dispute between the National Union of Mineworkers and the National Coal Board otherwise than to peacefully picket or demonstrate at his usual place of employment". Recent newspaper reports suggest that more restrictive conditions, including ones of reporting to the police, residence at normal place of abode and overnight curfew, have been applied in cases where very serious charges have been laid against individual pickets.

Home Office
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London SW1

Written Answers to Questions

Friday 16 March 1984

ATTORNEY-GENERAL

Picketing (Criminal Law)

Mr. Steen asked the Attorney-General whether, in view of the recent activities of pickets, he will make a statement on the criminal law on picketing.

The Attorney-General: The statement that I made to the House on 19 February 1980 still applies in all its essentials, though there have, since that date, been certain changes in the relevant civil law which I shall explain later in this answer.

So far as the criminal law is concerned, the position is, as it always has been, that the criminal law of the land applies to pickets as it does to anybody else. Picketing is permissible, in terms of criminal law, only if it is peaceful picketing, that is to say, it is carried out for the purpose of peacefully obtaining or communicating information or peacefully persuading another person to work or not to work. The freedom to picket is not a licence to obstruct or intimidate.

This reflects the fundamental proposition of our law that each of us has the right to go about his daily work free from interference by anybody else. Each one of us is free, as an individual, to come and go as he pleases to his place of work. The law specificially protects our enjoyment of this right. If any one tries to deter us from exercising it by violence or intimidation or obstruction, he is breaking the law and may be punished. The freedom to picket does not confer or imply any right to stop vehicles: still less do pickets have the right to stop people going about their lawful business. Pickets have no right to link arms or otherwise prevent access to the place that they are picketing.

If pickets by sheer numbers seek to stop people going to work, they are not protected by the law since their purpose is to obstruct rather than persuade. The courts have recognised that the police may limit the number of pickets in any once place where they have reasonable cause to fear a breach of the peace. This may involve not only asking some of those present to leave but also preventing others from joining the pickets. In this connection, the code of practice which was issued under the Employment Act 1980, with the approval of both Houses of Parliament, indicates that in general the numbers of pickets should not exceed six at any entrance to a workplace. The 1980 Act itself provides that the provisions of the code of practice may be taken into account in proceedings before a court.

It is, of course, primarily the duty of the police to uphold and enforce the criminal law. It is for them to decide, consistently with that duty, what action any particular situation requires them to take. But there is no doubt that if a constable reasonably comes to the conclusion that persons are travelling for the purpose of taking part in a picket in circumstances where there is likely to be a breach of the peace, he has the power at common law to call upon them not to continue their journey and to call upon their driver to take them no further. Any person who fails to comply with a police request in those circumstances will be committing the offence of obstructing a police officer in the course of his duty.

Turning now from the criminal to the civil law, it is and always has been a civil wrong to persuade someone to break his contract of employment or to secure the breaking of a commercial contract. However, the Trade Union and Labour Relations Act 1974, as amended, gives immunity from liability in respect of such a civil wrong to pickets who are acting in contemplation or furtherance of a trade dispute. But, since the Employment Act 1980, this immunity operates only for the benefit of a person who is attending a picket at or near his own place of work or for the benefit of a trade union official attending a picket at or near the place of work of a union member whom he is accompanying and whom he represents; and in either case only if the purpose of the picket is peacefully to obtain or communicate information or peacefully to persuade any person to work or not to work. Since the Employment Act 1982, trade unions themselves may be held liable for organising picketing which involves the commission of a civil wrong.

I hope that this re-statement of the legal position, which the Lord Advocate agrees reflects the main principles of the law of Scotland also, will serve to remove any doubts that might remain in any quarter about the strict limits within which pickets may seek to press their views on their fellow-citizens. As I said in my earlier statement to the House, it is the function of the law to protect the right of every person to make his own decision, free from violence or any other form of intimidation, on whether or not to work. The law permits no interference with that right and recognises no privilege or immunity vested in any person, merely because he is engaged in picketing, to act in a way which constitutes a criminal offence. That has always been the law and I am sure that those responsible for enforcing it will have the support and encouragement of the vast majority of the people of this country in ensuring that it is indeed enforced vigorously and without fear or favour.

E.R.

TABLE 1

ARRESTS AND CHARGES IN RELATION TO THE MINERS' DISPUTE, 14 MARCH TO 20 MAY 1

Police force area	Number of arrests	Number charged
Cleveland	5	5
Derbyshire	221	212
Durham	133	132
Essex	205	157
Greater Manchester	16	15
Hampshire	7	7
Humberside	3	2
Kent	48	47
Lancashire	8	4
Leicestershire	29	23
Merseyside	41	39
Northumbria	40	40
North Wales	14	13
Nottinghamshire	1143	1051
South Wales	60	60
South Yorkshire	180	176
Staffordshire	189	134
Warwickshire	83	68
West Yorkshire	6	2
TOTALS	2431	2187

Note: The cases where no charges have been brought are accounted for by arrests for breach of the peace which is not, of itself, an offence (though the arrested person can be brought before the courts to be bound over to keep the peace); cautions; people released on police bail prior to a charge being brought at a later stage; cases where the police will proceed later via summons; and cases where the statio

officer considering the evidence of the arresting officer has decided that no charge should be brought.

E.R.

TABLE 2

CHARGES (ENGLAND AND WALES) 14 MARCH TO 20 MAY 1984

Offence	Number of charges brought
Riot	57
Section 5 of the Public Order Act 1936 (behaviour conducive to a breach of the peace)	1081
Obstruction of a police constable	794
Obstruction of the highway	337
Criminal damage	97
Assault on a police officer	94
Assault occasioning actual bodily harm	48
Grievous bodily harm	3
Theft	52
Resisting arrest	8
Offensive weapons	6
Conspiracy and Protection of Property Act	6
Burglary	1
Handling stolen property	1
Drug offence	1
Breach of the peace (cases where the arrested person is to be brought before the court to be bound over)	13
Breach of bail conditions	4
Attempted criminal damage	3
Other offences	29
	2635

Note: The fact that this Table shows more charges than people charged in Table 1 is accounted for by cases involving more than one charge against an individual.

E.R.

TABLE 3

PENALTIES IMPOSED BY COURTS IN CASES OF DEFENDANTS FOUND GUILTY, 14 MARCH TO 20 MAY 1984

Sentence	Number of persons sentenced
Fines: Under £10	3
£10 - £24	33
£25 - £49	2
£50 - £74	68
£100 - £149	14
£150 - £199	22
£200 and above	20
No figure available	93
Bound over to keep the peace	139

Note: The total of the penalties imposed exceeds the number of persons who have been found guilty (see paragraph 22 of the paper). Some of the persons fined were also bound over to keep the peace.

Appendix 'B'

SECRET

INDUSTRIAL ACTION IN THE COAL INDUSTRY - WORKING GROUP ON THE USE OF THE CRIMINAL AND CIVIL LAW

NOTE BY THE SCOTTISH HOME AND HEALTH DEPARTMENT AND CROWN OFFICE

INTRODUCTION

1. This note concerns the Scottish criminal law aspect of the Working Group's remit. It deals with the position in Scotland under approximately the same heads as the note by the Home Office.

THE PRESENT CRIMINAL LAW

2. In Scotland, as in England, the basic principle is that the fact that an industrial dispute is in progress does not confer any privilege or immunity in relation to the application and operation of the criminal law.

3. The range of criminal offences available to deal with objectionable conduct in the course of industrial picketing is substantial and is considered to be sufficient. It includes such common law offences as mobbing and rioting, assault (aggravated or simple), threats, malicious damage, and breach of the peace; and such statutory offences as possession of an offensive weapon (contrary to the Prevention of Crime Act 1953 Section 1), vandalism (contrary to the Criminal Justrice (Scotland) Act 1980 Section 78), criminal trespass (contrary to the Trespass (Scotland) Act 1865 Section 3), and obstructing a police constable in the execution of his duty (contrary to the Police (Scotland) Act 1967 Section 41). Section 7 of the Conspiracy and Protection of Property Act 1875 is also available.

4. Description of all the above-mentioned offences is considered unnecessary but reference to certain of them may be relevant.

SECRET

5. Mobbing is the assembly of a number of people acting together for a common purpose which is illegal, or which is to be achieved in an illegal manner, to the alarm of the lieges. According to the author of one standard textbook on Scottish criminal law, cases of mobbing "generally present features of violence and criminality of heinous description, but the crime is complete wherever there are concourse, illegal combination, and the production of alarm". This offence has recently been little used - partly at least as a result of a High Court decision in an appeal case in 1981. But the offence is available, and may be apt, to deal with the most serious disturbances at a picket line. There is some authority for the proposition that mobbing may also be committed before the mob have begun to carry out their purpose of tumult or intimidation, the crime being completed once the mob have assembled in order to carry out their illegal purpose, or at least as soon as they have begun to make their way to the place where they intend to carry it out, even if they are intercepted and prevented from creating any disturbance, or give up their purpose on finding unexpected difficulties in the way of its fulfilment. It is doubted, however, whether the Courts in Scotland would approve the use of the offence to deal with persons travelling to join a mass picket, unless the actings of those persons were in themselves sufficiently tumultuous and intimidating to constitute mobbing without reference to the mass picket. It is not envisaged that proceedings for this offence would be undertaken by the Crown in the present situation except to deal with extreme cases.

6. Breach of the peace and obstruction of police constables in the execution of their duty (contrary to Section 41 of the Police (Scotland) Act 1967) are the offences most likely to be of use in dealing with mass picketing. In the incidents with which the police have had to deal to date these have been the offences most commonly charged by the police and proceeded with by procurators fiscal. A breach of the peace is a public disturbance, such as brawling or fighting in public,

shouting and swearing in the street, or any general tumult or interference with the peace of a neighbourhood. The High Court in Scotland has fairly recently held that there is no limit to the kind of conduct which may give rise to a charge of breach of the peace. All that is required is that there must be some conduct such as to excite the reasonable apprehension that trouble might ensue, or such as to create disturbance and alarm to the lieges in fact. Conduct which appears calculated to provoke an actual disturbance of the peace itself constitutes the crime of breach of the peace. The actions of mass pickets will often constitute a breach of the peace. So far as the Police (Scotland) Act offence is concerned, obstruction of police officers in the execution of their duty may require an element of physical obstruction. This would seem to be a likely element of the behaviour of pickets (actual or intending) in the present circumstances, however.

7. Section 7 of the Conspiracy and Protection of Property Act 1875 has been used on two occasions in recent years in Scotland to deal with strike picketing activities. In one case a conviction was obtained and upheld on appeal in a case concerning persistent following of civil servants carrying out their official duties by other civil servants who were on strike. In the other case the Crown successfully appealed against a decision of a Sheriff acquitting five accused persons who had occupied an Area Health Board Laboratory in the course of a strike and prevented medical staff from entering and using the laboratory. The Court held that the Sheriff's acquittal of the accused proceeded on an error of law since it was based on the incorrect view that Section 13 of the Trade Union and Labour Relations Act 1974 conferred immunity from prosecution in the circumstances in question. The Court held that the Section provided protection only against civil suits and not against prosecution for acts which are in themselves criminal or wrongful acts which form the essential ingredients of a criminal offence. The Section 7 offence is considered to be most apt for use in situations where the use of such common law offences as assault, mobbing and rioting, and breach of the peace is doubtful - for example, where there is harassment but no violence or intimidation, or occupation of premises but no

disturbance of the peace. The offence is therefore considered to be something of a fall-back and its use is unlikely to be considered necessary or appropriate in the present circumstances.

8. As in England limitations on the effectiveness of the enforcement of the law are likely to arise from evidential problems, rather than because of the lack of approriate offences. Reports received by procurators fiscal to date do not suggest serious evidential problems in relation to incidents at the actual scene of picketing. Cases involving the stopping of miners en route to join a mass picket may present such problems, for example in relation to proof of their destination and intentions. However, the first such case which has been reported by the police appears to be fairly strong and the prospects of successful prosecution are considered to be reasonably good. Another such case which is currently under consideration may present greater difficulty.

9. So far as the form of proceedings which may be taken is concerned, all common law offences may be prosecuted either by summary complaint or on indictment in Scotland. This includes breach of the peace. Statutory offences such as obstructing the police (contrary to Section 41 of the Police (Scotland) Act 1967) are summary offences but may be prosecuted on indictment along with another offence in respect of which indictment proceedings are competent (under the Criminal Justice (Scotland) Act 1980 Section 8). This allows a degree of flexibility in relation to the decisions as to the offence or offences to be prosecuted. The decision as to the offence with which the accused person is charged at the time of the incident is a decision for the police, of course, but it is for the procurator fiscal or Crown Counsel to decide on the appropriate offence for criminal proceedings.

SECRET

THE POLICING OPERATION

10. As in England, the principal task for the police during the dispute, especially in its early stages, was to enable those who wished to go to work to do so: at a later stage, and after there had been a general close-down of work at collieries, the main task became keeping the way clear for the passage of lorries carrying coal from Hunterston to Ravenscraig. In carrying out their task, as the Secretary of State has recently emphasised to a deputation of Scottish Labour Members of Parliament, the police have been entirely impartial: their concern - and duty - is confined to upholding the law and preserving public order. Chief Constables are not subject to instructions from Ministers, and none have been given to them.

11. The main difference between the police operation in Scotland and that in England and Wales has been the absence of any requirement for mutual aid, and, therefore, the absence of any requirement for day-to-day co-ordination on the model of the (England and Wales) National Reporting Centre.

12. As in England and Wales, the scale and character of the picketing have varied from place to place and from day to day. Until early May, picketing at collieries and elsewhere, including power stations, opencast coal sites and some industrial premises, was relatively light. There followed a short period of mass picketing of the Ravenscraig steel mill and the Hunterston terminal, in response to which upwards of 1,300 police officers belonging to the Strathclyde force were deployed. With the resumption of rail deliveries to Ravenscraig this has again dropped to token levels. Between 14 March and 17 May a total of 514 arrests were made. Action has been taken, where appropriate, to stop busloads of miners travelling to the scene of picketing, and bus operators were warned that they might be breaking the law and of the possible consequences.

Police Powers

13. The power of the police to stop miners travelling to the scene of a mass picket where a breach of the peace is occurring or is likely to occur has yet to be tested in the courts. Authority for such police action may be found in the statutory duty imposed on the police under Section 17 of the Police (Scotland) Act 1967 to "guard, patrol and watch so as to prevent the commission of offences, to preserve order, and to protect life and property". Proceedings are likely to be instructed shortly in the first case reported to procurators fiscal involving the stopping of a bus by the police and the subsequent alleged obstruction of the police by the persons who had been travelling on the bus. As noted above, the Crown is reasonably confident as to the successful outcome of such proceedings but is more doubtful (on the basis of the information presently available) as to the other case which has been recently reported involving the stopping of a number of buses a considerable distance from the mass picket which was their apparent destination.

14. As far as the Scottish Office are aware, the police are employing their available powers fully but prudently; and, in particular, they have taken account of the Written Answer on 16 March in which the Lord Advocate lent his support to the Attorney General's explanation of the nature of the police powers in the picketing context.

Intimidation

15. There have been no formal complaints of acts of intimidation against miners who are working (for example on safety duties), their wives and families. It has therefore been unnecessary to mount special protection arrangements of the kind announced by the Home Secretary in the House on 17 May.

16. In short, the Scottish police lack neither the necessary resources nor powers to deal with the problems which the dispute in the mining industry has produced.

The Handling of Cases by the Courts

17. The volume of cases which has so far required to be dealt with in Scotland has not yet caused any disruption to normal court timetables. As in England, pleas of not guilty have been tendered in almost all the cases which have so far called in court. Proceedings in the Sheriff Court have been considered appropriate, rather than in the District Court. Trials have been fixed in the picketing cases in just the same way as in the other cases going through the courts at the same time - that is, in late August/September for bail cases. One case in which the accused was remanded in custody has already been disposed of - after a trial which lasted for a full day and resulted in conviction on a charge of breach of the peace and a fine of £80. Custody cases require to be brought to trial within 40 days from first appearance in court, but almost all the cases are, and are likely to be, bail cases. An extra condition additional to the conditions imposed under the Bail etc (Scotland) Act 1980 has been imposed as a standard practice, requiring the accused to agree to stay away from the scene of mass picketing. It has not yet proved necessary to operate special courts, for example on Saturdays, or to use additional temporary Sheriffs. Some assistance from temporary Sheriffs may be necessary in due course to deal with trials.

SHHD
Crown Office
May 1984

Appendix 'C'

SECRET

THE CIVIL LAW AND THE MINERS DISPUTE

The Strike

1. The strike of NUM members itself (and the national overtime ban which preceded it and is still in force) is lawful because it is primary action undertaken in furtherance of a dispute between NUM members and their employer and is "wholly or mainly" about the "terms and conditions of employment" - ie jobs and pay - of the strikers themselves (s.29 of the 1974 Act as amended by s.18 of the Employment Act 1982 provides the definition of "trade dispute"). No civil proceedings could therefore be taken against the union or its officials on the grounds that the strike is unlawful by the NCB or by customers - such as the CEGB - who cannot obtain coal simply because it is not being mined. The strikers themselves have, however, inevitably broken their contracts of employment and are subject to dismissal without any legal redress or compensation under statute or common law.

2. It is a different question whether the actions taken by the NUM and its Areas - which are separate trade unions - in the course of the dispute are in accordance with union rules. Union rules constitute a contract between the members and their union and if the executive breaks the rules it can be challenged in the same way as any other breach of contract (ie without any reference to statute law). Two injunctions have been granted to union members on these grounds., The first concerns the 5 year suspension from membership of members of the North West Area for ignoring union instructions not to cross picket lines. The second concerns a purported official strike call and instructions not to cross picket lines in the Nottingham Area (which have been largely ignored in practice) and is also, no doubt intended to prevent working miners being disciplined by their union. The first of these injunctions is now the subject of an appeal and both cases are due to go to a full hearing in due

course. Given the sometimes unclear drafting of union rules, the outcome of such cases can never be forseen with certainty but there seems a strong likelihood that the NUM Areas concerned will be found to have acted in conflict with their rules. More importantly, the injunctions stand until a court decides otherwise. There is also the - probably remote - possibility of contempt proceedings, if (eg) the North West Area persists with its suspension of members.

3. The immediate effect of the injunctions will be to strengthen the determination of those NUM members who have defied union "instructions" and continued to cross picket lines and work. The fact - if it so proves - that the NUM leadership have broken the rules is likely to help to foster the view of other miners that they have been manipulated into a strike. The willingness of disaffected NUM members to challenge their leaders in the courts undoubtedly indicates how deep the divisions within the union have become.

The picketing

4. The vast majority of picketing by NUM members is and has been unlawful by virtue of s.16 of the Employment Act 1980 because it has been taking place away from the pickets' own place of work - at other pits, steelworks or the docks. On these grounds injunctions have already been granted to the NCB against the Yorkshire NUM and to 2 firms of coal hauliers against the South Wales NUM (by virtue of s.15 of the 1982 Act). Although in both cases picketing continued, contempt proceedings were not instituted. The funds of the NUM Areas concerned in organising unlawful picketing and - since the "special conference" on 19 April - probably also the funds of the NUM nationally remain at risk to these and other possible civil proceedings.

Other secondary industrial action connected with the dispute

5. Industrial action by employees outside the mining industry (eg railway workers refusing to move coal) is unlawful secondary action by virtue of s.17 of the 1980 Act) unless the employers of the employees concerned have existing contracts with the NCB and the action is aimed directly at disrupting the performance of those contracts. In fact it is understood that contracts for the carriage of coal are normally between British Rail and the customer (eg CEGB) rather than the supplier (NCB). It seems probable, therefore, that industrial action to prevent the movement of NCB coal is unlawful. Any action to stop imported coal is almost certainly unlawful secondary action. The regional "days of action" in support of the miners strike are also likely to constitute unlawful secondary action. Given the public expressions of support from the leaders of the unions' concerned for such secondary action as there has been, there is little doubt that the funds of the unions concerned (eg ASLEF) are at risk.

Remedies

6. Any person or firm suffering or threatened with economic loss as a result of unlawful interference by a union or its officials with a commercial contract to which he is a party - eg any customer or supplier of the NCB or anyone whose goods are "blacked" or whose employees are induced to break their employment contracts by unlawful picketing - is likely to have a cause of action. His remedy is to sue the union and/or its officials for an injunction and damages. If a union defies an injunction it is likely to have its assets sequestrated (in itself a costly process for the union) until it satisfies the court that it has abandoned the use of unlawful industrial action. There is always the risk that individual union officials will be able to attract penalties by personal acts of contempt but the process of sequestration (which has been

proved to be effective) avoids the problems of identifying individuals who are acting unlawfully (eg pickets and picket organisers) and the need to pursue particular union officials who may be both "men of straw" and willing "martyrs".

7. The fact that despite the unlawful nature of much of the industrial action, few employers have made use of the civil law remedies available to them in this dispute may well reflect the tactical judgements they have made and the ineffectiveness of the NUM's efforts to prevent the movement of imported coal and of the coal which is still being mined in Nottinghamshire and elsewhere.

FROM: Appendix D

THE RT. HON. LORD HAILSHAM OF ST. MARYLEBONE, C.H., F.R.S., D.C.L.

2.A.4

HOUSE OF LORDS,
SW1A 0PW

CONFIDENTIAL

Prime Minister

I understand that as a result of a recent Ministerial meeting, you would like information about the manner in which magistrates' courts in Nottinghamshire are dealing with defendants brought before them charged with offences arising out of picketing. I have made enquiries. The position, as at noon yesterday, was as follows.

Mansfield Petty Sessional Division has been used as "the clearing house", and all defendants in police custody are brought to that courthouse. So far 881 persons have appeared before a court of summary jurisdiction which in some cases has sat as late as midnight. A further 75 persons were to appear yesterday afternoon. The majority of individuals are charged either with breach of section 5 of the Public Order Act 1936 or with obstructing police, section 51(3) Police Act. These are summary offences. Additionally some are charged with assault and with criminal damage which are "either way" offences giving either party, effectively the defendants a right of jury trial.

As you will have read in today's press a further 60 defendants were to appear last night charged with riot. This is triable only on indictment and I understand committal proceedings cannot be contemplated for at least 3 months. If those proceedings are protracted and the lay justices require help, I will see that a stipendiary magistrate is appointed to deal with the committal.

By arrangement the cases have been divided between the Nottinghamshire courts as follows:-

Nottingham City - 115 cases

28 appeared on 14th May, 27 defendants pleaded Not Guilty and were adjourned to 3rd and 10th July. One defendant pleaded Guilty and was fined £5.

27 are to appear today, 25 on 21st May and 10 on 23rd May.

Newark - 42 cases

All are to be contested with staggered dates of hearing in June, July and August.

/...

Nottingham County and Bingham - 113 cases

All these cases are likely to be contested with dates of hearing on and after 20th June.

Worksop and East Retford - 245 cases

158 at pre-trial review stage and remainder to appear in June. 4 have pleaded Guilty, 3 fined £75 and £30 costs, the other £50 and £5 costs.

Mansfield - 312 cases

All are expected to be contested. Various dates have been fixed on and after 5th July.

There is a discrepancy in the calculations because some courts have relied on police figures rather than counting court register entries.

In addition, 200 defendants arrested on the Nottingham/Derby borders are to appear before the Chesterfield justices.

I understand the Chief Constable has expressed reservations about the quality of some of the evidence upon which arrests have been made, and for this reason is not anxious for dates of trial to be fixed too soon. Doubts have been expressed about the power of the justices to "transfer" cases to other courts, to remand (as opposed to "adjourn") purely summary offences; and hence to apply bail conditions. There is to be a test case on 4th June involving four defendants which, I understand, is likely to be taken for Judicial Review under RSC Ord. 53 whatever the result. The decision of the Divisional Court will affect the course of similar cases elsewhere, and I understand the Judicial Review could be dealt with by the Divisional Court before the end of June. Additionally a point of jurisdiction may arise where coaches have been stopped well away from the pitheads and arrests made, and the defendants then taken to Mansfield.

All the defendants who have so far pleaded not guilty are represented by the same firm of solicitors. This is an important factor which will need to be taken into account by the courts when fixing the hearing dates, although it may be diminished in its impact by information which I have just received indicating that the solicitors concerned are making arrangements to distribute some of the cases to agents. A further factor is that many police witnesses will be coming from outside the Nottinghamshire area.

There is nothing to indicate that the courts need immediate help. They have made sensible arrangements to share staff and courtrooms as and when required. Magistrates assigned to one Petty Sessional Division within a county can sit in another court if required.

The courts are aware that if their business justifies it they may apply to me for acting stipendiary appointments and where necessary I shall be ready to make such appointments.

At this stage any overt intervention by central government would be inappppropriate, and probably ineffective.

I am copying this to the Home Secretary (to whom I have spoken briefly) and to the Attorney General who will wish to know about the probable proceedings under RSC ord 53.

H: of S: M
16 May 84

* The position with regards to evidence is not as stated in the body. The Chief Constable is anxious lest delay causes the quality of the evidence to deteriorate.

APPENDIX 'E'

EXTRACT FROM LAW COMMISSION (ENGLAND) REPORT RELATING TO OFFENCES AGAINST PUBLIC ORDER DATED 25 OCTOBER 1982

Unlawful assembly

4. At common law, and under the Working Paper proposals, unlawful assembly would be capable of penalising behaviour falling short of threats: it requires no more than a gathering whose purpose is to use threats. The Commission now takes the view that any offences which replace unlawful assembly should not penalise conduct unless it breaches the threshold, currently specified by section 5 of the Public Order Act 1936, of "threatening, abusive or insulting words or behaviour". This criterion is therefore an element of the offences now recommended to deal with threatening behaviour (paragraph 7, below).

5. Another feature of unlawful assembly at common law is that it can be charged both when a group are threatening to use violence or are provoking others to use violence and when a group are actually engaged in acts of violence. The offence proposed in the Working Paper covered both these situations. However, that definition was complex (it had to cover a common law offence of substantial complexity) and the Commission felt that it was seeking to cover and penalise with one penalty types of conduct which were different both in their nature and their degree of criminality. Furthermore, the Commission considered that there was a lack of an offence dealing with public disorder falling short of riot which referred explicitly to actual violence as an element of the offence. Accordingly the Commission now recommends that distinct offences should be created to cover the use by a small group of (a) actual violence (whether against persons or property) and (b) threatening or provoking behaviour. Threatening conduct which is intended to provoke or cause others to fear violence is different in degree from conduct which is merely likely to have that effect and accordingly threatening behaviour is subdivided into two different offences distinguished only by the absence of a mental element in the second.

6. The three offences derived from unlawful assembly should, in the Commission's view, be triable either way, since some of the conduct which they cover may be fairly trivial in character. In this connection, the Commission has been impressed with the comments of the Circuit Judges, the Justices' Clerks' Society and the D.P.P. upon the need for offences of this character to be capable of being dealt with expeditiously in the magistrates' courts.

7. The three offences would have the following elements:-

First offence

A person would be guilty of an offence if, without lawful excuse, he intentionally or recklessly uses acts of violence against persons or property while acting together with two or more others in a public or private place who themselves are using unlawful acts or threats of violence, provided that the conduct of the defendant and those others is such as would have caused any other reasonable person, if present, to be put in fear of his personal safety. It would be triable either way with a maximum penalty on indictment of 5 years' imprisonment and a fine.

Second offence

A person would be guilty of an offence if, with two or more others acting similarly and with similar intent, he uses without lawful excuse threatening, abusive or insulting words or behaviour in a public or private place with intent to cause any other person to fear imminent violence against persons or property, or to provoke the immediate use of such violence by any such person. It would be triable either way with a maximum penalty on indictment of 3 years' imprisonment and a fine.

Third offence

A person would be guilty of an offence if, with two or more others acting similarly, he uses without lawful excuse threatening, abusive or insulting words or behaviour in a public or private place which are likely to cause any other person to fear imminent violence against persons or property, or

No intent

to provoke the immediate use of such violence by any such person. It would be triable either way with a maximum penalty on indictment of 12 months' imprisonment and a fine.

Affray