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CABINET

MINISTERIAL COMMITTEE ON ECONOMIC STRATEGY

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INDUSTRIAL RELATIONS LEGISLATION

Memorandum by the Secretary of State for Employment

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I seek agreement for my proposals for legislation in the coming Session.

2 The response from industry to the Green Paper on Trade Union Immunities has shown that there is wide support for legislation to redress the balance of bargaining power. I am confident that there is wide support in the country for further action to tackle the more evident trade union abuses and to begin to tackle the uniquely privileged position of trade unions under the law. The unions themselves are currently demoralised and will have difficulty in mounting an effective campaign of sustained opposition.

3 I believe the step-by-step approach is right. The Employment Act 1980 made a good start; it has in practice been broadly accepted. We must however keep up the momentum of change but in doing so we must not go too far in advance

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of industrial and public opinion. Equally, we must beware of being outflanked by the SDP which is hawkish on trade union reform. We must avoid measures which could be rendered ineffective by the concerted opposition of trade unions or the widespread reluctance of employers to seek the remedies provided. Above all our objective must be to make changes which will work and will stick and which can be readily explained and defended on clear grounds of principle.

4 On this basis I propose the following measures.

(i) Closed Shop

5 There is now strong public support for strengthening the closed shop provisions in the Employment Act. This has been reinforced by the recent judgement of the European Court, although it did not find that the closed shop as such was in breach of the European Convention of Human Rights. We cannot yet contemplate outlawing the closed shop, but there are useful further steps to be taken in tackling its abuses and in giving greater protection to individuals who do not want to join a union.

6 I therefore propose:-

(a) Compensation. It is imperative to raise substantially the levels of compensation now payable for unfair dismissal in a closed shop and in particular to establish a minimum level of compensation which approximates to the present maximum to discourage dismissals. Someone on average earnings who asked for reinstatement but was not awarded it could expect under my proposals to receive compensation of more than £20,000. The figure would be over £24,000 if his employer did not comply with an order to reinstate him. (The details of all my proposals are in Annex 1). Enhanced compensation would not apply to the generality of unfair dismissals, but to be even more readily defensible, needs to apply equally to unfair dismissal on grounds of trade union membership or activities.

(b) A right of action against the trade union. At present trade union funds are at risk in cases of dismissal in a closed shop only if the employer "joins" the union in the proceedings. I propose that the dismissed person himself should be able to "join" the union, ie sue the union as well as the employer. In the vast majority of cases it is union pressure which leads to dismissal. Unions should more readily be accountable and higher levels of compensation could act as a significant deterrent to unions in pressing for new closed shops and for the rigid enforcement of existing closed shops.

(c) Interim Relief. I propose to extend the principle of "interim relief", which now applies only in cases of dismissal

for trade union membership or activities, to dismissal for non-membership in a closed shop. This means that an employer could be ordered to continue to pay a dismissed employee until his case is heard by an industrial tribunal.

(d) Periodic Reviews of Existing Closed Shops. I believe that opinion will now support us in directly encouraging periodic reviews to test the support for closed shop agreements. I propose that the provisions in the Employment Act on ballots for new closed shops should be extended (with suitable modifications) to all existing closed shops with effect from 12 months after the legislation comes into effect.

(ii) Union Labour Only Requirements in Contracts

7 These have given rise to increasingly widespread concern and demands for such clauses in contracts to be declared void. Moreover, a number of local authorities have, by different means, adopted the practice of refusing tenders from firms which employ non-union labour. It is essential not only to outlaw such requirements in contracts but also to declare any discrimination in seeking tenders for or awarding contracts on grounds of union membership or non-membership unlawful. Such a provision would almost certainly make pressure - including industrial action - to discriminate in these ways itself unlawful and I propose to make this explicit in the legislation.

8 However, we could not be certain that a refusal of union members to work with non union employees of a contractor would normally be caught by a provision making pressure to discriminate in awarding contracts unlawful. The question is therefore whether we should go further and remove immunity from any industrial action which interferes with the performance of contracts primarily on grounds of union membership or non membership. We need to recognise that industrial action of this kind, though utterly indefensible, is widespread, that it has deep roots in trade union psychology and that a great many employers are readily prepared to tolerate it. Removing immunity will not ensure the eradication of these practices but it could prompt some employers to bring the law into direct conflict with well established union practices in potentially explosive areas such as the docks.

9 As against this, if we do not take this step, we are open to the criticism that all our other proposals on union labour only requirements are mere window dressing. It is a politically dangerous course but some of the dangers could still arise under other of my proposals, eg changing the definition of trade dispute (para 12). On balance therefore I believe it right to take this step.

(iii) Immunity of Trade Union Funds

10 Section 14 of the Trade Union and Labour Relations Act 1974 gives trade unions as such virtually unlimited immunity from actions in tort, even if industrial action is not taken in contemplation or furtherance of a trade dispute. Trade unions cannot be sued for their unlawful acts or for unlawful acts done on their behalf by their officials. This breadth of immunity is unnecessary and indefensible in modern conditions. As long as they are able to shelter behind it, there is no incentive for them - as opposed to their officials - to ensure that industrial action is restricted to legitimate trade disputes and is otherwise lawful (eg in taking secondary action, in picketing). I therefore propose that the Section 14 immunity should be brought in line with the Section 13 immunity. Both immunities would of course be restricted by my proposals on union labour only requirements (para 8-9) and the definition of trade dispute (para 12). Unions will then be liable in the same way that individuals are at present for any unlawful acts which they commit themselves and for those which are committed on their behalf by their officials. I believe however that it is essential to define under what circumstances unions are to be held liable for the acts of their officials as clearly and precisely as possible so as to minimise the risk of confusing and conflicting decisions by the courts.

11 This change will be fiercely and stridently opposed by trade unions on the grounds that it threatens their very existence by returning to the "Taff Vale" position before the Trade Disputes Act 1906. It is the most contentious proposal I make. Unions as such would be exposed to contempt proceedings if injunctions were not observed as well as to the payment of damages. In fact trade unions would be at risk only if they acted in ways which are unlawful for an individual and I believe that public opinion will regard this as entirely reasonable. However, some of the force of the trade union argument can be reduced by providing for limits on the amount of damages which can be awarded against a trade union (as in the Industrial Relations Act 1971) - a necessary step in any case, I believe - thus reducing the risk of a union being bankrupted by a single case. I recognise the industrial and political risks in taking this step now, but the principle is sure, the need is clear and the potential political benefits evident.

(iv) Definition of "trade dispute"

12 I propose the restriction of the definition in a number of ways. First, I propose that disputes must relate "wholly or mainly" to one or more of the items in the definition, rather than being simply "connected with" them as at present, which the courts have interpreted very widely. Secondly, I

propose to remove from the definition disputes between "workers and workers" and disputes which relate to matters overseas. Finally - and most importantly - I propose to provide that there cannot be a trade dispute if an employer is not in dispute with his own employees or former employees dismissed in the course of the dispute; in other words it will no longer be possible for a trade union to claim that there is a trade dispute even though none of the employees of the employer concerned is dissatisfied with his terms and conditions of employment or is otherwise in disagreement with his employer. This will of course effectively remove immunity from an important and often very damaging area of secondary action. It would, for example, make blacking as in the "Nawala" dispute unlawful.

(v) Selective Dismissal in a Strike

13 The present provisions operate unfairly against the employer. Where some strikers have returned to work, the employer now runs the risk of unfair dismissal proceedings if he dismisses those remaining on strike. I therefore propose to amend the provisions so that a tribunal is excluded from hearing claims of unfair dismissal from strikers unless the employer discriminates between employees actually taking part in a strike at the time of dismissal. Thus an employer will be able to dismiss strikers refusing to return to work without the risk of tribunal claims, provided all strikers have an opportunity to return to work. I do not believe that it would be defensible to go further.

(vi) Ballots

14 I propose to extend the availability of funds under the Employment Act to include ballots on wage offers and this would require employers to provide a convenient opportunity for voting at his premises. This requires an affirmative resolution, not main legislation.

15 I believe that the proposals outlined above will all meet the objectives I set out at the beginning of this memorandum. A whole variety of additional proposals for legislation have been put forward. I have considered them all carefully, but my decided judgement is that none should be adopted at this stage. Some I regard as entirely mistaken, others need to be considered for yet further steps when we can be surer that public opinion is readier for them and they have a better chance of working and sticking. I identify such proposals and set out my reasons for not adopting them in Annex 2.

16 In addition, in the context of my legislative proposals, I have had re-examined the possibility of non-strike agreements. My firm conclusion is that there is no immediate prospect of

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securing such agreements at a cost we could or should contemplate. At the very least the price of such agreements would be near guarantees on pay (eg indexation, comparability). Over and above that there would almost certainly be demands for disputes over manning, re-grading, work allocation, redundancy, new machinery and so on to be the subject of status quo provisions and arbitration. Unions would not even then agree to such agreements being legally binding. We can only continue to look carefully for any possible candidates for such agreements case by case. The Megaw Inquiry might provide pointers.

17 After the Queen's Speech and the Debate on the Address, I propose to issue a statement of our agreed proposals and invite comments. Industry expects this. These consultations would be concluded in time to introduce a Bill in January 1982.

18 I seek agreement to my proposals for legislation and that I should offer consultations on them on the timetable proposed.

Department of Employment  
21 October 1981

NT

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PROPOSALS FOR LEGISLATIONCLOSED SHOP(i) Compensation for Unfair Dismissal

1 Compensation for unfair dismissal for an 'inadmissible reason' - eg unfair dismissal in a closed shop or for trade union membership or activities - is currently in three parts:

(i) a basic award of between  $\frac{1}{2}$  week's pay and  $1\frac{1}{2}$  weeks' pay for each complete year of employment (depending on age) subject to a maximum of £3,900 (ie £130 x 30 weeks for a maximum of 20 years service);

(ii) a compensatory award based on loss of earnings in the past and future, loss of pension rights, subject to a maximum of £6,250;

(iii) an additional award of 26 - 52 weeks' pay at the tribunal's discretion (subject to a maximum of £6,760) if the employer refuses to comply with an order for reinstatement.

The maximum award is £10,150 if no reinstatement order is made; and £16,910 if the employer does not comply with a reinstatement order.

2 Under the present system the tribunal has the power to reduce the amount of the basic and compensatory awards "where ... the dismissal was to any extent caused or contributed to by an action of the complainant ...".

3 In deciding whether to make an order of reinstatement the tribunal must take into account three tests:-

(i) whether the complainant wishes to be reinstated;

(ii) whether it is practicable for the employer to comply with an order for reinstatement;

(iii) where the complainant caused or contributed to some extent to his dismissal, whether it would be just to order his reinstatement.

4 It will be noted that under present provisions the amount of compensation for short-service and low-paid employees is likely to be relatively small. It has been estimated for instance that Miss Joanna Harris, if Sandwell Council had refused to comply with a reinstatement order, would have been likely to receive compensation in the area of £2,500 to £5,000.

New proposal

5 Under the new proposal an employee will be differently treated according to whether he seeks reinstatement.

6 If he does not seek reinstatement then the following compensation will be available:

(i) a basic award calculated as now (including the £3,900 maximum) but subject to a minimum of £2,000.

(ii) a compensatory award calculated as now but with the upper limit abolished.

7 If the individual seeks reinstatement, the tribunal shall be required, in deciding whether to make an order for reinstatement, to consider only whether it is practicable for the employer to comply with an order for reinstatement. If it decides that it is not practicable for the employer to comply, compensation will be awarded as follows:-

(i) a basic award calculated as above (ie as now but subject to a minimum of £2,000).

(ii) a compensatory award calculated as now but with the upper limit abolished.

(iii) a special award of  $2\frac{1}{2}$  x annual salary subject to a minimum of £12,000.

8 If the tribunal makes an order of reinstatement which is complied with then the present rules will apply ie any loss incurred between the dismissal and reinstatement will be made good by the employer.

9 If the tribunal makes an order of reinstatement which is not complied with, then the tribunal shall make an additional award of  $\frac{2}{3}$  x the annual salary subject to a minimum of £15,000 (ie in place of the "special award": para 7(iii)).

10 This means that a man on average earnings (about £7,000) could expect total compensation of over £20,000 if the tribunal decided it was not practicable for the employer to reinstate and over £24,000 if the tribunal ordered reinstatement which was not complied with. A senior official in a local authority (earning £15,000 pa) might expect total compensation of over £40,000 if the tribunal decided it was not practicable for the employer to reinstate and about £50,000 if the tribunal ordered reinstatement which was not complied with.

11 These enhanced levels of compensation would apply to dismissals on grounds of non-membership and of trade union membership and activity.

12 The tribunal would have discretion to reduce any of these awards even below the prescribed minimum levels if (but only if) the dismissed person is found to have caused or contributed to his own dismissal. (This will be a significant safeguard against a trouble maker who tries to claim unfair dismissal on grounds of trade union activities or against a trade unionist - perhaps reaching retirement - who leaves his union simply in order to be dismissed and claim the new higher rates of compensation).

(b) Joinder

13 At present an employee who is dismissed for non-membership of a trade union in a closed shop can bring a complaint before an industrial tribunal for unfair dismissal only against his former employer. However, if the employer has come under pressure (ie industrial action or the threat of it) from a trade union to dismiss the non unionist, the employer (but not the dismissed person) can "join" the union in the proceedings but he can do so only at the beginning of the proceedings. The tribunal may then order the union to reimburse the employer for some or all of the compensation awarded to the dismissed person.\*

14 It is proposed to provide additionally for the dismissed person himself to be able to "join" the trade union in the proceedings on the grounds that it had contributed to his dismissal. To satisfy the tribunal that the trade union had contributed to his dismissal, the dismissed person would have to show only that the trade union was a party to the closed shop agreement under which he was dismissed and that it had consented to his dismissal. (The dismissed person would not have to produce evidence of industrial action or the threat of it, as an employer is required to do).

15 It is also proposed that employers should be allowed to "join" the union at any stage in the proceedings.

(c) Interim Relief

16 It is proposed that the principle of "interim relief" which now applies only in cases of dismissal for trade union membership or activities should be extended to dismissal for non-membership in a closed shop.

17 At present an employee who is dismissed for trade union membership or activities can apply to an industrial tribunal for "interim relief" ie for an order requiring the employer to observe the employee's contract of employment until the full hearing of the dismissal complaint. It is proposed to apply the same procedure to dismissals for non-membership of a trade union in a closed shop.

\*In addition, if the cause of the dismissal is expulsion from his trade union, the dismissed person may take proceedings against the trade union for "unreasonable expulsion". In both this case and that of joinder trade union funds are already at risk.

(d) Periodic Review of Existing Closed Shops

18 Dismissal for non-membership of a trade union in a union membership (closed shop) agreement is now regarded as unfair on three grounds, ie genuine objections on grounds of conscience or other deeply held personal conviction; existing employees who are not union members; or, in the case of new agreements, where the agreement is not approved in secret ballot by 80% of those covered.

19 It is proposed that there should be a further ground relating to existing\* closed shops which have not been approved periodically by an overwhelming majority of those affected voting in a secret ballot. In future dismissal for non membership of a trade union in a closed shop would also be regarded as unfair if:

(i) there had been no secret ballot of the employees covered by the agreement within 12 months of the new legislation coming into effect or within a stated previous period (perhaps 3 or 5 years); or

(ii) where there had been a ballot, if it had not shown overwhelming support (80% of those covered or perhaps 85% of those voting) for the continuation of the closed shop.

Further ballots would be required if liability for dismissal was to be avoided, at regular intervals (perhaps every 3 or 5 years). Anyone dismissed for non-membership in these circumstances would qualify for the new enhanced rates of compensation and the interim relief procedure described above.

20 The exact number of years between review ballots and the proportion of employees required to vote in favour for the closed shop to be approved can be the subject of consultation. There should be no exemption, eg Equity, the Merchant Navy, from the balloting requirement.

(ii) UNION LABOUR ONLY REQUIREMENTS

21 Legislation should provide that:-

(i) any clause in a contract for the provision of goods or services requiring in connection with the performance of that contract the employment only of persons who are or who are not (as the case may be) members of a union should be void;

\* ie introduced before the relevant provisions of the Employment Act came into effect on 15 August 1980.

(ii) discrimination in inviting tenders for, offering, placing or making contracts for the provision of goods or services on the grounds that anyone employed in connection with the performance of the contract should or should not be a member of a trade union should be unlawful;

(iii) any pressure - including industrial action or the threat of it - to force someone to include union labour only clauses in contracts or to discriminate as in (ii) above should be unlawful;

(iv) any industrial action which interferes with the performance of a contract primarily on the grounds that those employed to perform that contract are or are not union members should be unlawful.\*

(iii) IMMUNITY OF TRADE UNION FUNDS

22 It is proposed to bring the Section 14 immunity for trade unions into line with the Section 13 immunity for individuals ie to provide that trade unions have immunity for torts only to the extent provided for in Section 13. The Section 14 immunity is virtually unlimited and applies even to action outside a trade dispute. The Section 13 immunity applies to specified torts committed in contemplation or furtherance of a trade dispute.

23 In the case of torts which were clearly committed by a trade union itself it would be treated as if it were a "person" under Section 13. Where torts are committed by trade union officials the trade union will be held vicariously liable:-

(i) if the national executive body of the union has specifically authorised or ratified the action complained of; or

(ii) if the subordinate body or official of the union whose action is complained of had authority for the action under the rules of the union or is acting on instructions from a body or official who has such authority and its or his action has not been repudiated by a more senior authoritative body or official of the union; or

\* ie should have no immunity under S13 of the 1974 Act.

(iii) if it were unclear from the union rules (either because of their silence or ambiguity) that the body or official had such authority and the tort was committed by the body or official while acting in an official capacity\* and a more senior authoritative body or official of the union had not repudiated it.

Under tests (ii) and (iii) verbal repudiation alone would not be sufficient to ensure that the union escaped liability. The legislation would require the actions of the union to be consistent with any verbal repudiation, ie there should be no open or implied encouragement of the unlawful action, no payment of strike pay etc.

24 Trade unions responsible for unlawful action would be liable for both injunctions and damages. Disobedience of an injunction could result in fines at the discretion of the courts. It is proposed to limit the damages which could be awarded against a trade union in any one case according to the size of the union involved as follows:-

fewer than 5000 members	£12,500
5000 - 24,999	£62,000
25,000 - 100,000	£125,000
More than 100,000	£250,000

25 It is proposed that all the funds of a trade union should be liable in the event of an award for damages, except for the union's provident and political funds.

(iv) DEFINITION OF TRADE DISPUTE

26 Four amendments are proposed to the definition of a trade dispute in Section 29 of the Trade Union and Labour Relations Act 1974:-

(i) returning to the 1971 formula that disputes must "relate wholly or mainly to" one of the issues listed in the definition; in the present definition disputes must be "connected with" the issues listed; (Section 29 (1))

(ii) removing disputes "between workers and workers" (Section 29(1))

(iii) removing disputes relating to "matters occurring outside Great Britain" (Section 29(3))

(iv) restricting trade disputes to disputes between an employer and his own employees thus making unlawful disputes between an employer and a trade union when the

\*ie excluding any torts committed by officials acting in an exclusively private capacity.

employer has no dispute with his own employees (sections 29(4) and (6)). It would be necessary to provide that an employer could not avoid being party to a trade dispute simply by sacking any employees with whom he was in dispute.

SELECTIVE DISMISSAL IN A STRIKE

(v) Section 62 of the Employment Protection (Consolidation) Act 1978 removes from the industrial tribunal jurisdiction to hear complaints of unfair dismissal made by employees involved in a strike where the employer has dismissed all those participating in the industrial action (the 'relevant employees'). The tribunals retain jurisdiction, however, to hear complaints from employees on strike where the employer has discriminated by dismissing some but not all of the relevant employees. In 1978 the House of Lords ruled that 'relevant employees' refers to all the employees who have taken part in the industrial action, not merely those on strike at the time of the dismissal. Where, therefore, some strikers have returned to work, an employer runs the risk of unfair dismissal complaints if he dismisses those remaining on strike.

28 This seriously weakens the position of an employer seeking to persuade his workforce to return by threatening dismissal if there is no return to work since, if any employee does respond to the threat, the employer immediately becomes vulnerable to complaints of unfair dismissal from the remaining strikers.

29 It is therefore proposed to amend Section 62 so that the tribunals have jurisdiction only where an employer discriminates by dismissing some but not all of those of his employees actually on strike at the time of the dismissal. This would, however, give employers some scope for manipulation since they could arrange the dismissals in such a way as to rid themselves of unwanted employees, having privately encouraged other employees to return to work. It is therefore proposed that, where the employer is willing to allow strikers to return to work, he should be required to give postal or other effective notice of all employees on strike of his intention to dismiss any who have not returned by the end of the notice period.

(vi) BALLOTS

30 Under Section 1 of the Employment Act 1980 public funds are available for secret ballots for trade union elections and votes on certain other issues, including the calling and ending of strikes. It is proposed that the list of issues for which funds are available should be extended to cover votes on wage offers. This could be done by affirmative resolution.

NT

DEPARTMENT OF EMPLOYMENT  
21 October 1981

OTHER SUGGESTIONS FOR LEGISLATION

A summary of comments on the Green Paper (previously circulated to members of the Committee) indicates the wide range of views on the content and timing of further legislation. The proposals set out in Annex 1 cover the issues on which there is the clearest support for action. Not unnaturally, suggestions for legislation have been made on most of the other topics discussed in the Green Paper but the support they command has varied greatly and in most cases no clear view has emerged on the nature of the legislative changes involved. This Annex identifies those mentioned most frequently and gives the reasons why I do not think we should adopt them, at least at this stage.

(a) Enforceability of Collective Agreements

2 Very few organisations have suggested that substantive agreements should be made legally enforceable. In any case it would affront principle to deem voluntary arrangements to be legally binding. But there has been a measure of interest in the idea of linking immunity to the observance of procedure agreements, if only as a medium or long term measure. This was originally canvassed by the CBI but then dropped by them as a possibility for early legislation. I do not regard this as a practicable proposition for two main reasons:-

(i) most procedure agreements are far too loosely drafted and vague in content to stand judicial examination if observance were to be the condition of immunity for industrial action; in many cases, given the inclusion of statements of pious intention, it would be impossible for the courts to reach a view on such crucial questions as when a procedure was first broken and by whom;

(ii) the most likely result of linking immunity to the observance of procedure agreements would be the withdrawal of trade unions from existing agreements and their refusal to enter into new agreements. It would provide a clear focus for opposition. I do not believe that any of the alternatives which have been suggested in the absence of an agreement (eg conciliation) are practical or would prove effective. Nor do I believe that employers would be prepared - or well advised - to make the sort of concessions (eg status quo provisions) suggested by some organisations as an inducement to unions to remain a party to procedure agreements. In fact, I believe that unions would be found to exploit skilfully the option of conciliation to employers' disadvantage.

3 Legislation based on procedure agreements and their observance would founder on the sheer impossibility of its enforcement.

(b) Secondary Action

4 There have been few instances of secondary action since the Employment Act (no doubt reflecting the general reduction in industrial action) and secondary action did not figure at all prominently in comments on the Green Paper. Amongst those who did comment on it, there was a threefold division between those who think the 1980 Act provisions should be given longer to prove themselves, those who favour removing all immunity for secondary action and those who favour a variety of limitations on secondary action, eg making it subject to a balloting requirement or allowing it only against an employer who gives "material support" to the employer in dispute as in the 1971 Act.

5 My proposals for amending the definition of trade dispute to exclude "disputes" where an employee is not in dispute with his own employer and for tackling industrial action directed at the employment of non union labour will effectively (and unconditionally) remove immunity from some of the most damaging forms of secondary action. In the light of this, I do not propose to go further at the next step.

(c) Picketing

6 Again there have been few instances of secondary picketing since the Employment Act came into effect and in these cases the existing remedies seem to have worked satisfactorily. There has been very little pressure for a further change in the law on picketing and I do not propose any.

(d) Compulsory Secret Ballots

7 The view of the great majority of employers is that the effect of mandatory strike ballots would be at best unpredictable and at worst likely to reinforce union solidarity. They could be a potent weapon in the hands of militants. I believe there is a great deal of substance in the view that strike ballots can help to redress the balance of bargaining power only if the initiative and the timing rests with the employer (as we have seen in the case of British Leyland). This advantage would be lost if ballots became part of the mechanics of securing immunity. It would almost invariably constitute a prudent first tactic by unions making the avoidance or the resolution of disputes the more difficult. Moreover, there would be serious difficulties in ensuring that a provision for mandatory ballots was comprehensive (for example, that it provided adequately for unofficial action and industrial action other than strikes, such as blacking). It could not encompass the "walk out strike" which can take place for reasonable cause, eg injury on an unguarded machine. Any action is for the future.

8 I do not underestimate the extent of popular support for legislation to require all trade union officials to be elected by secret ballots, but again I do not think that it would be sensible to take this step at present because:-

- (i) there are already strong pressures (and counter pressures) on this issue within the trade union movement and these are now inextricably caught up with internal Labour Party politics; whatever the outcome of these pressures - and that must be uncertain - there are political advantages in allowing them to continue to build up rather than focussing them on a new statutory requirement which all but a handful of unions would unite to resist;
- (ii) industrially, the only effective sanction for a balloting requirement would be loss of immunity; and since most unions would - at least in the short run - undoubtedly choose to forgo immunity rather than agree to such "interference in their internal affairs", the result could well be a series of messy legal actions caught against unions engaged in otherwise lawful action (eg primary action in a legitimate trade dispute) without our achieving any real progress in the democratisation of unions;
- (iii) the practical difficulties of legislation on union ballots would be formidable, given the very different structure of unions and the real practical difficulties they would initially face; there would therefore be dangerous scope for frustrating the legislation by legal wrangles over, for example, the exact size of constituencies.

9 I conclude that, although we must keep open the possibility of legislation on union elections, it would be unwise to take this step, certainly at present.

(e) Protecting the Community

10 The consultations have shown that there is a general acceptance of the impracticability of restricting the "right to strike" in particular industries or occupations. Such provisions could in any case hardly do more than require the employees concerned to give a week's notice - or whatever notice their contracts specified - in the same way that legislation covering the employees of public utilities did before 1971. The advantages of this in handling, say, public sector pay negotiations would be at best minimal. Similarly, the idea of the Government being able to impose a statutory cooling off period coupled with a power to require a ballot has not received much support. My own view is that it would be most unwise to take such a power. The public pressures to use it even when (as with the 1972 British Rail ballot) the result was only to strengthen union solidarity would be very hard to resist. Once a device of this kind has been discredited it is very difficult to use it again. Moreover, the effect of using such a power would inevitably bring the Government into the forefront of a dispute and in some cases turn the dispute into a confrontation between Government and the trade unions concerned.

And any union which did not obey an order would probably be at risk to contempt proceedings which the Government itself would need to initiate. The problems could be compounded.

(f) Lay-offs of Employees in a Strike

11 Engineering Employers' Federation (EEF) have put forward two proposals for legislation to enable employers to lay-off their employees without pay, either when their business is disrupted by industrial action by only some of their employees or when a major dispute in a key industry or service (eg coal, railways) affects them. In both cases any contractual or statutory obligations to employees would be removed. Lay-off would be entirely at the discretion of the employer, would need to apply to unionists and non-unionists and could not have regard to whether the employees concerned were in any way involved with the dispute. This would be to give employers extremely wide powers to override individual contracts of employment freely entered into by both parties and to revoke contractual obligations without compensation. It would override many collective agreements. I believe that such draconian legislation could only be justified if the evidence for its need was overwhelming and it is significant that the EEF failed to persuade the CBI or other employer bodies such as the Institute of Directors to adopt their proposals. We should not rule out contemplating legislation of this kind to meet the second of the EEF's proposals in a major national strike when there could be a clear case and need for it with general support from public opinion. In advance of such a situation we would be seen to be preparing for a major confrontation, most likely in the public sector. But to adopt now the first of the proposals would not meet the test of principle. I do not therefore propose to include such provisions in the Bill.

(g) Positive Rights

12 Reactions to the idea of converting the present trade union immunities into a system of positive rights have varied the unenthusiastic to the hostile. Few have seen any advantages in such a change and many see risks in legislating for a "right to strike", however qualified. I do not propose to pursue this idea further.

Department of Employment  
21 October 1981

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