CABINET

INDUSTRIAL RELATIONS BILL

Memorandum by the First Secretary of State and Secretary of State for Employment and Productivity

1. At its meeting on 30 October 1969 (CC(69) 52nd Conclusions, Minute 4), the Cabinet decided that the Industrial Relations Bill should contain the provisions listed in Annex I to this memorandum, subject to further detailed consideration by the Committee on Industrial Relations. The Cabinet also agreed that the Committee should examine the need for legislative provision on 3 other matters - the registration of procedure agreements by employers; anti-trade union rules of Friendly Societies; and the appointment of employee representatives to the boards of undertakings.

2. The Industrial Relations Committee have reviewed the proposed provisions of the Bill and have discussed the controversial issues which have arisen in the course of consultations with the Trades Union Congress (TUC) and the Confederation of British Industry (CBI). A summary of the issues and of the Committee's conclusions is attached at Annex II for the information of my colleagues.

3. So far as the overall shape of the Bill is concerned, the Committee agreed that the Bill should include those provisions decided on by Cabinet in October - with 2 modifications. First, the Committee agreed that it would be inadvisable to seek to restrict the immunity enjoyed by trade unions (under Section 4 of the 1905 Trade Disputes Act) from actions in tort to those torts committed in pursuance of trade disputes. This proposal had been made in the Donovan Commission's Report, and was endorsed in the White Paper "In Place of Strife". But in view of the Cabinet's subsequent decision not to extend the protection afforded by Section 3 of the Trade Disputes Act to cover inducement of the breach of any commercial contract, the Committee thought it necessary to reconsider whether it would be wise to effect any change in Section 4. The effect of the change proposed would be to make it possible to secure damages from unions (and to get injunctions against them) in respect of torts arising otherwise than
"In contemplation or furtherance of a trade dispute". But since there can be situations where strike action is taken in circumstances where the courts judge that no "trade dispute" exists (eg Torquay Hotel v. Cousins and Stratford v. Lindley), a narrowing of the immunity from action for tort could have the effect of putting union funds at risk in some cases where they take industrial action. For this reason, there would be great pressure from the TUC to widen the definition of a trade dispute to cover any industrial or strike action by unions. The Committee felt that on balance it would be preferable to leave Section 4 (and the definition of a trade dispute) as it was.

4. Secondly, the Committee decided that the Bill should prevent Friendly Societies from having rules debarring trade unionists from membership (Annex II, paragraph 6).

OUTSTANDING ISSUES

5. There are 3 issues on which the Committee did not reach a final or agreed conclusion and which I was invited to bring before Cabinet; and there is a fourth I wish to bring to the Cabinet's attention:

a. the application to the Crown of the requirement on employers to disclose information to recognised trade unions;

b. the circumstances in which it would be permissible for an employer to require his employee to belong to a specified, independent trade union;

c. how to ensure that Industrial Tribunals are capable of dealing with the additional load of cases arising from the Industrial Relations Bill;

d. the powers of the Commission on Industrial Relations (CIR).

DISCLOSURE OF INFORMATION BY MANAGEMENT: APPLICATION TO THE CROWN

6. The Industrial Relations Committee were generally agreed on the nature and extent of the requirement on employers to disclose to recognised unions information necessary and relevant to negotiations, and on the various safeguards which the Bill should contain to protect employers from having to disclose information which could be damaging (Annex II, paragraph 2). The Committee did not, however, reach any agreement about the application to the Crown of the disclosure requirements. I was therefore invited to put before Cabinet the various arguments on this question.
7. It was argued by some members of the Committee that there were powerful constitutional and practical reasons for exempting the Government from the disclosure provisions. On the other hand, it was suggested that no new points of principle were involved and that, if the Government sought to avoid the obligation laid on other employers it would find it difficult to insist that employers in the private sector should be subject to the statutory requirements.

8. The main constitutional arguments for Crown exemption are that Ministers are responsible to Parliament for the administration of their Departments and because of the special position of the Government their discharge of that responsibility may on occasion be difficult or even impossible to reconcile with the full requirements of legislation of this kind. In general, therefore, it is preferable for such legislation not to bind the Crown but for the Government to state their intention to abide by its spirit. Exceptions have been made to this principle, but only where there have been compelling reasons for binding the Crown (for example, the Race Relations Act, 1968). Although exemption will be criticised by employers and trade unions, if the Crown was bound there would be likely to be even more serious criticism in particular cases where Ministers found their special position made it impossible to disclose information which other employers were expected to disclose. Departments possess a large amount of sensitive information the disclosure of which could be particularly damaging or embarrassing; it would be impossible to foresee and provide for all situations in which disclosure could cause difficulties, and therefore Ministers should be free of any statutory responsibility on this matter.

9. Against this, it must be emphasised that the principle of independent adjudication or arbitration in matters affecting the Civil Service is nothing new - cf. the Crown Proceedings Act - and that other employers would be unimpressed by an undertaking that the Civil Service abide by the spirit of the legislation, if the question whether this was being observed was not open to independent scrutiny; that scrutiny is after all, exactly what other employers find most objectionable about the proposals. Furthermore, it is not proposed to take away from any Minister the right and responsibility in the last resort to decide whether or not information should be disclosed; nor is it suggested that any refusal by a Minister to disclose information should attract any formal sanction. So far as sensitive information is concerned, the safeguards already proposed (e.g. those relating to national security, to information about individuals, and to confidential information from or about third parties) are very extensive; there will be opportunity to include in the proposed Code of Practice and regulations additional safeguards to those included in the Bill; and in any case, private employers have many of the same problems in regard to disclosure as Government Departments.

10. In my view, there are the strongest political and presentational reasons for applying the disclosure requirements to the Crown. I recommend we should so decide.
The Bill will provide that it should be an implied term of every contract of employment that the employer should do nothing to prevent or deter his employees from belonging to an independent trade union, or to penalise them for doing so. It is no purpose of the legislation to regulate the closed shop, or to give the employee a statutory right to belong to any union he chooses - or to belong to no union at all. The Bill will therefore say nothing about an employer's right to require his employees to belong to a specified union. It will, however, be necessary to make it clear that an employer will not be acting in breach of the statutory provision if he restricts the choice of his employees to a particular independent trade union - i.e., if they choose to belong they must belong to union $x$. The TUC are pressing for the Bill to include a proviso that such a restriction should be permissible only where there is an agreement between the employer and the union concerned - though it is not clear exactly how they would take this to be achieved.

I believe there are considerable risks in adopting the TUC suggestion, which will not in any case secure the results they expect or hope for. I am, however, examining the possibility that employers who recognise and negotiate with trade unions might be permitted to restrict the employees' choice of independent trade union only to the unions - or some of the unions - with whom they negotiate. Employers who do not recognise and negotiate with trade unions would not be permitted to restrict their employees' choice. It seems to me that this will substantially meet the TUC's point and I intend to discuss the proposal with the TUC. Subject to the TUC's reaction, I would propose either to include a provision on these lines in the Bill or to leave the Bill silent about the circumstances where it is permissible for an employer to restrict his employees' freedom of choice.

The main outstanding problem arising from the provision for appeals against unfair dismissals and extension of the jurisdiction of Industrial Tribunals is the capacity of Tribunals to cope with the work. Research has indicated that this may be a problem of considerable magnitude. For that reason I have reluctantly had to introduce certain disincentives and restrictions into the proposals: for example, a qualifying period of 2 years' service for appeal against unfair dismissal (except for trade union membership and activity, where there will be no qualifying period) in the hope that it can be relaxed when the position of the Industrial Tribunals improves. Even so it is estimated that the caseload will be about 25,000 to 40,000 a year and the Lord Chancellor has advised that this would intolerably overload the existing Tribunals. The Committee on Industrial Relations has invited the Lord Chancellor and myself, in consultation with the Chief Secretary, to seek a solution to the
problem and we are considering the adoption of a 2-tier system of a number of local Tribunals and a right of appeal to a superior Tribunal. Moreover, until satisfactory administrative arrangements are devised, the extension of the Tribunals' jurisdiction to disputes arising from the individual contract of employment will need to be delayed. This will not be unwelcome to the TUC and CBI who oppose this provision.

THE POWERS OF THE COMMISSION ON INDUSTRIAL RELATIONS

14. The TUC are not in favour of the proposal to establish the CIR on a statutory basis, but they have not given me any precise reasons, beyond generalities about rigidity and inflexibility and susceptibility to Government influence, which do not seem to me to be well-founded. The Committee on Industrial Relations agreed that a body exercising such important statutory powers should be established and regulated by statute. I therefore propose to go ahead with these provisions.

15. The provisions will give the CIR power to require persons to provide information and give evidence in connection with its inquiries. The question of enforcement arises. I propose that the CIR should have powers, like those given to the National Board for Prices and Incomes (NBPI) under the Prices and Incomes Act, to take proceedings against trade unions and employers' associations, as well as against corporate bodies and individuals, for failure to provide information, etc. It will be remembered that when a similar question arose in connection with the Commission for Industry and Manpower Bill (CIM), it was decided that it would be undesirable to make trade unions liable to proceedings and penalties; the liability was therefore confined to corporate bodies and individuals (who could, of course, be trade union officers). The Committee on Industrial Relations have, however, accepted the view that provisions in relation to the CIR should follow the NBPI rather than the CIM. The penalties are not comparable to the penal sanctions envisaged in the interim Industrial Relations Bill. The CIR by its nature, will be more involved than the CIM in getting information from trade unions and employers' associations, and may therefore need a sanction against refusal to produce it.

TUC AND CBI REACTIONS

16. The foregoing proposals will by and large be welcomed by the TUC as a sound basis for legislation subject to one major reservation. They greatly regret the Government's decision not to extend the protection of the 1906 Act to cover inducement of the breach of any commercial contract. But I am convinced that no developments since last October would justify any modification of the decision then taken by the Cabinet not to yield on this point.

17. The CBI are opposed to the Bill which they regard as one-sided and as mostly involving concessions to the trade unions.
CONCLUSION

18. I invite my colleagues to agree that:-

a. the provisions on disclosure of information by employers should apply to the Crown, but there should be no provision for sanctions against any Minister who refuses to disclose information;

b. I should decide the circumstances in which an employer may restrict an employee's membership to a particular union in the light of further consultation with the TUC;

c. satisfactory administrative arrangements for Industrial Tribunals should be devised by the Lord Chancellor and myself, in consultation with the Chief Secretary;

d. the CIR should be established as a statutory body with powers to take proceedings against trade unions and employers' associations, as well as against corporate bodies and individuals, for failure to provide information relevant to the Commission's work.

B A C

Department of Employment and Productivity SW1

6 April 1970
ANNEX I

PROVISIONS FOR INCLUSION IN THE INDUSTRIAL RELATIONS BILL AS AGREED BY CABINET ON 30 OCTOBER 1969

1. Establishment of the Commission on Industrial Relations as a statutory body.
2. The power to make orders, on the recommendation of the CIR, requiring employers to recognise a trade union.
3. Disclosure of information by management to recognised trade unions.
4. Amendments to the Wages Councils Act.
5. Establishment of a Trade Union Development Scheme.
6. Establishment of a statutory right for employees to belong to a trade union.
7. Safeguards against unfair dismissal.
10. Modification of Section 4(4) of the 1871 Trade Union Act and amendment of the definition of a trade union.

*11. Restriction of the protection trade unions enjoy from actions in tort under Section 4 of the 1906 Trade Disputes Act.

12. Extension of the protection given by Section 3 of the 1906 Act to cover inducement of the breach of a labour-only contract.
13. Requirements for registered trade unions to appoint qualified auditors and to carry out regular valuations of their superannuation schemes.

14. If necessary, provisions to facilitate the appointment of workers' representatives to boards of undertakings (see Annex II, para 11).

* With the agreement of the Industrial Relations Committee, and following consultation with the Attorney-General, the proposal to limit the protection of Section 4 to torts committed in contemplation or furtherance of a trade dispute was not proceeded with. The consultative document on changes in trade union law which was sent to the TUC and CBI made it clear that the Government had decided against limiting Section 4 immunity in the way suggested in the White Paper "In Place of Strife" (see paragraph 3 of the memorandum).
REPORT ON ISSUES RAISED IN THE COURSE OF CONSULTATION ON THE GOVERNMENT'S
LEGISLATIVE PROPOSALS AND ON CONCLUSIONS REACHED BY THE INDUSTRIAL RELATIONS
COMMITTEE

1. RECOGNITION OF TRADE UNIONS
   Complaints of non-compliance with a recognition order.

   The TUC have pressed the Government to modify the procedure under which
   a union may complain if an employer fails to comply with a statutory
   recognition order. Under the Government's original proposals, a complaint
   of this kind would have been referred to the Industrial Court. The TUC believe
   that the CIR would be a more appropriate body for adjudicating on these
   complaints, particularly since the CIR will have made the recommendations on
   which the order would be based. The Industrial Relations Committee accepted
   the force of the TUC's view, and agreed that this change in the statutory
   procedure should be made.

   Position of the nationalised industries

   Representatives of the nationalised industries have expressed some concern
   that the provisions on recognition of trade unions appear to over-ride the
   statutory responsibility laid on nationalised undertakings to establish
   appropriate consultative and negotiating machinery. The Industrial Relations
   Committee agreed, however, that in the event of a reference to the CIR of a
   recognition dispute involving a nationalised undertaking, it was necessary
   to provide that any subsequent statutory recognition order made by the Secretary
   of State should supersede the discretion given under the appropriate
   nationalisation statute.

2. DISCLOSURE OF INFORMATION BY MANAGEMENT

   The TUC have welcomed the proposals, but have suggested that they should
   be extended to require the disclosure of information needed to further the
   participation of employees in the processes leading to the taking of
   management decisions. This phrase seems to cover some aspects of both
   negotiation and consultation.

   The CBI have expressed total opposition to any statutory requirement
   on an employer to disclose to a recognised trade union information which is
   relevant and necessary to negotiations in which they engaged. The CBI believe
   this to be an unreasonable infringement of management's discretion, which
   is not calculated to further the development of satisfactory collective
   bargaining. In order to allay some of the more justified anxieties of
   employers, the Industrial Relations Committee agreed that:

   /s. the statutory
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a. the statutory requirement should be related to negotiations, and not extended to consultation between an employer and trade union officials;
b. more detailed guidance about the requirement should be provided in a Code of Practice, in the preparation of which the CBI and TUC would be consulted. Parliament would be required to approve the Code of Practice before the requirement to disclose information becomes effective;
c. there should be additional safeguards to protect information which it might be unreasonable or damaging for an employer to disclose.

The Industrial Relations Committee did not reach a view whether the disclosure requirement should apply to the Crown (see paragraphs 6-10 of the memorandum).

3. IMMUNITIES AFFORDED BY SECTION 3 OF THE 1906 ACT

Labour-only contracts

The Industrial Relations Committee agreed that the scope of Section 3 of the 1906 Act should be extended to cover contracts personally to execute work as well as contracts of employment or service. This would make it possible for union officials to induce a breach of a contract with a self-employed worker or with a gang of self-employed workers. It would not make lawful any inducement of a breach of a commercial contract between two companies under which one of them agrees to furnish the other with labour to do a particular piece of work.

Ex parte injunctions

The TUC have expressed concern about these injunctions which they claim can materially weaken union action. It is also alleged that union officials sometimes hear nothing about the proceedings taken by the employer until the judge has actually decided to award an injunction. I am in touch with the Lord Chancellor on these allegations. On ex parte injunctions per os, the Industrial Relations Committee did not consider that the comparatively rare occasions on which an ex parte injunction was awarded against trade union officials provided grounds for special protection for unions from these proceedings.

4. EXTENSION OF JURISDICTION OF INDUSTRIAL TRIBUNALS

The TUC and CBI oppose the proposal to extend the jurisdiction of Industrial Tribunals to disputes arising from the individual contract of employment. The Industrial Relations Committee nevertheless agreed in principle
principle that legislation should be introduced but expressed concern about the load on the Tribunals which might result from the proposed extension of their jurisdiction. The Committee therefore invited the Departments chiefly concerned (Lord Chancellor’s Department, Treasury and Department of Employment and Productivity) to consider further the administrative problems which would be involved in implementing the decision previously agreed (see paragraph 14 of the memorandum).

5. SAFEGUARDS AGAINST UNFAIR DISMISSAL

The Committee approved a number of changes proposed in the provisions to safeguard employees against unfair dismissal (in particular, the basis of compensation). The Committee also agreed that the protection against unfair dismissal should not apply to the dismissal of strikers during a strike unless it was found to be for one of the specified unfair reasons (for example, an employer would not be able to use the excuse provided by a strike for dismissing workers on the grounds of colour, race, sex, etc).

6. RULES OF FRIENDLY SOCIETIES

At its meeting in October 1969, Cabinet invited the Industrial Relations Committee to consider further whether it was desirable to legislate to prevent Friendly Societies having rules debarring members of trade unions from membership or benefits of Friendly Societies. The TUC have taken the view that, although the particular society most complained of in the past (the Foremen and Staff Mutual Benefit Society) has repealed its anti-trade union rules, it would be desirable nonetheless to make legislative provision to prevent any other society adopting similar rules in the future. The Industrial Relations Committee concurred and recommended that appropriate clauses should be included in the Bill.

7. REGISTRATION OF PROCEDURE AGREEMENTS

The Industrial Relations Committee agreed that the Secretary of State should have powers, should improve necessary, to make regulations requiring employers to register any written procedure agreements or arrangements.

8. MODIFICATION OF SECTION 4(4) OF 1871 TRADE UNION ACT AND AMENDMENT OF THE DEFINITION OF A TRADE UNION

These provisions will enable agreements between employers’ associations and trade unions to be directly enforceable if there is an express written provision in the agreement to that effect. The TUC have not objected to this.
Employers' associations will in future no longer be defined as trade unions but the political fund provisions of the Trade Union Act, 1913 will continue to apply to them. The TUC attached importance to this and the CBI did not object.

9. TRADE UNION DEVELOPMENT SCHEME

There are clearly different views inside the TUC about this proposal and the TUC's official reaction has been very tepid. On present information they will not oppose it.

10. REQUIREMENTS FOR REGISTERED TRADE UNIONS TO APPOINT QUALIFIED AUDITORS AND TO CARRY OUT REGULAR VALUATIONS OF THEIR SUPERANNUATION SCHEMES

The TUC have not objected to these proposals.

11. APPOINTMENT OF WORKERS' REPRESENTATIVES TO BOARDS OF UNDERTAKINGS

Neither the TUC nor the CBI have expressed great interest in the White Paper proposal that the Government would consider what more needed to be done to facilitate the appointment of employee representatives to management boards. The Industrial Relations Committee noted that a discussion document outlining some of the major issues for consideration has been sent to the TUC, CBI and nationalised industries. This sets out fully the pros and cons of different possible developments in this field. No replies to it have yet been received. Whatever the reactions to it, it was not expected that any conclusions would be reached which would necessitate the inclusion of enabling provisions in the Bill.