

THE DRAFT REGULATORY REFORM (PRISON OFFICERS) (INDUSTRIAL ACTION) ORDER 2005

STATEMENT BY THE HOME OFFICE

INTRODUCTION

This statement is laid before Parliament in accordance with section 8 (5) of the Regulatory Reform Act 2001 (“the 2001 Act”) together with the draft of the Regulatory Reform (Prison Officers) (Industrial Action) Order 2005 (“the draft Order”) for approval by each House under section 4 (2) of the 2001 Act.

PROPOSAL

1. The purpose of the draft Order is to amend section 127 of the Criminal Justice and Public Order Act 1994 so that it ceases to apply in relation to prison officers in England and Wales and in Scotland. Section 127 provides that a person owes a duty to the Secretary of State not to induce prison officers, custody officers and prisoner custody officers to withhold their services or to commit a breach of discipline. Loss or damage caused to the Secretary of State by a person who breaches this duty is actionable by the Secretary of State against that person. The reason for this disapplication of section 127 is that legally binding collective agreements are in place with the relevant trade unions which prevent prison officers in England and Wales and Scotland from inducing strike action. This is not the case for prison officers in Northern Ireland or for custody officers or prisoner custody officers throughout the United Kingdom. Amendment of section 127 will re-instate the full statutory trade union rights of prison officers in Great Britain, thereby honouring a pre-election pledge from the Government that goes back to 1997.

BACKGROUND

2. In accordance with section 6 of the 2001 Act, a document was laid before Parliament on 18th October 2004 in the form of a draft Order and an explanatory document. Reports were subsequently made to Parliament by the Regulatory Reform Committee of the House of Commons (Third Report of Session 2004-05) and the Select Committee on Delegated Powers and Regulatory Reform of the House of Lords (Second Report of Session 2004-05).

BURDENS TO BE REMOVED OR REDUCED

3. Section 127 is a burden within the meaning of section 1 (1) of the 2001 Act because it affects the carrying on of trade union activities by being a restriction (preventing particular action) or a requirement (not to act in a particular way). The draft Order removes that burden. It does not re-enact or create any new burdens.

NECESSARY PROTECTION

4. Section 3 (1) (a) of the 2001 Act provides that an Order may only be made if the Minister making the Order is of the opinion that the Order does not remove any necessary protection. The Department consider that the draft Order does not remove any necessary protection because there are legally enforceable collective agreements in place with the relevant trade unions in England and Wales and in Scotland that provide equivalent protections to section 127.

PARLIAMENTARY REPORTS

5. Both the House of Commons Regulatory Reform Committee and the Select Committee on Delegated Powers and Regulatory Reform of the House of Lords reported on the draft Order.

6. Both Committees were satisfied that the draft Order removed a statutory burden within the terms of the 2001 Act, that it would not prevent any person from continuing to exercise any right or freedom and that there had been adequate consultation.

6. The House of Commons Regulatory Reform Committee considered that the consequential amendment in article 3 (2) was misguided as the definition which it purported to amend had been repealed.

7. The Select Committee on Delegated Powers and Regulatory Reform of the House of Lords concluded that the proposal did not in its present form maintain all the necessary protection. They reached this view because of their concern that, in the event of an existing collective agreement being terminated and not re-negotiated in time to continue the necessary protection provided by the agreement, the necessary protection provided by section 127 would not be available. However the Committee thought it might be possible for the Department to modify its proposal to maintain that protection, for example, by suspending the operation of section 127

as respects a union so long as it has a current agreement with the Secretary of State not to induce, authorise or support industrial action by any of its members employed in the Prison Service.

8. The Regulatory Reform Committee of the House of Commons considered that, although the proposal did not maintain existing protections, it was appropriate in the circumstances to leave it to the Secretary of State to determine whether the protection it provided was adequate.

DEPARTMENTAL RESPONSE

9. The Home Office accept that the consequential amendment in article 3 (2) was misguided for the reasons given by the Regulatory Reform Committee of the House of Commons. The Department undertake to amend the draft Order before it is laid before Parliament.

10. The Home Office have given detailed consideration to the recommendation by the Select Committee on Delegated Powers and Regulatory Reform of the House of Lords that, in order to provide necessary protection, the draft Order should suspend the operation of section 127 as respects a union so long as it has a current agreement with the Secretary of State not to induce, authorise or support industrial action by any of its members employed in the Prison Service.

11. However the Department, having consulted Parliamentary Counsel, see the following difficulties. If the Order provides for the suspension of section 127 then it must be clear in what circumstances the section is re-triggered or re-applied. Otherwise the suspension of section 127 will not provide a necessary protection. We have considered three possibilities for giving effect to the Committee's recommendation but none of them, in the respectful submission of the Department, seems satisfactory.

12. The first approach would be for the Secretary of State to make a new Order under the 2001 Act reapplying section 127 in the event that a trade union gave notice to terminate a collective agreement in circumstances where a further agreement was not possible. However, section 1 (3) of the 2001 Act requires any Order made under that section to include provision made by virtue of section (1) (a), ie. removing or reducing a burden. This would not be the case in respect of a further Order re-applying section 127 to prison officers in England and Wales and/or

Scotland. So primary legislation would, in any event, be needed to re-apply section 127.

13. The second approach would be for the Order providing for suspension itself to specify a procedure governing re-instatement. In this way the requirement in section 1 (3) of the 2001 Act would be satisfied. The Order might, for example, specify that section 127 is to be suspended in respect of any union specified in the Order which is a party to an agreement with the Secretary of State under which the union undertakes not to induce industrial action. The Order would, additionally, describe the procedure governing re-instatement, for instance, to the effect that section 127 was to apply again in respect of one or more of the named unions if, in the Secretary of State's view, the conditions surrounding the suspension were no longer satisfied and he gave notice to this effect to the affected union. Such provision might be argued to be supplementary or incidental provision under section 1 (6) of the 2001 Act.

14. The difficulty with this second approach is that it enables the Secretary of State effectively to "turn section 127 on and off" merely on the basis of his assessment of whether the conditions surrounding the suspension continue to be satisfied. It seems very doubtful that an Order under the 2001 Act can give the Secretary of State this amount of flexibility as regards the application of primary legislation. What if his view about the inadequacy of a collective agreement is unfounded? And if the Secretary of State could re-instate section 127 on this basis then how would anyone know whether the section did or did not apply at any particular moment? Specifying the unions in the order also carries with it the danger of hybridity.

15. The third approach that the Department has considered is for the Order to disapply section 127 only in certain circumstances, ie. where a legally binding and enforceable collective agreement exists. It should be noted that this approach is not strictly a "suspension" of section 127 at all because the section would continue to apply to prison officers in England and Wales and Scotland where no such collective agreement was in force. But it would nevertheless be a "reduction" of a burden in terms of section 1 (1) (a) of the 2001 Act.

16. The difficulty is how such an Order could ever adequately identify the type of agreement that needs to be in force for it to apply to certain officers. To provide the necessary protection it would have to specify a collective agreement that was legally binding and enforceable. But there

may often be uncertainty as to whether a collective agreement is legally binding and enforceable. Moreover, it may be possible for one party to argue at any time that it has been discharged from performance under the agreement because of the actions of the other party. But no-one will know whether the agreement is enforceable until a court, and possibly an appeal court, rules on that question. There may also be uncertainty in certain situations about who is covered by a collective agreement.

17. It seems to the Department that an Order under the 2001 Act could never provide sufficient certainty on these issues for a person to know whether an agreement of the sort described in the Order existed and therefore whether section 127 applied or not.

18. For these reasons, the Department concludes that it has not been able to identify a viable means of giving effect to the Committee's recommendation.

19. However, the Department respectfully submits that the option of reapplying section 127 by primary legislation in the event of a collective agreement being terminated would provide adequate necessary protection even if it did not maintain existing protection. The Department is prepared to undertake that a Bill would be introduced to reapply section 127 as quickly as possible in the event of a collective agreement being terminated in circumstances where it was clear that the protections provided by the agreement could not be replaced by a new agreement.

REPRESENTATIONS MADE DURING THE PERIOD OF PARLIAMENTARY CONSIDERATION (section 8 (5) (a) of the 2001 Act)

20. No representations were made during the period of Parliamentary consideration.

CHANGES MADE TO THE DRAFT ORDER

21. The draft Order has been amended to omit the consequential amendment made by article 3 (2) having regard to the fact that the definition which it purported to amend in the Disability Discrimination Act 1995 had recently been repealed.

PUBLICITY STRATEGY

22. The Home Office Press Office will issue a formal Press Release in the event of dis-application of s.127 CJPOA.

The Home Office
6th January 2005