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SECRETARY OF STATE FOR EMPLOYMENT

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Tim Lankester Esq
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Dear Tim,

EMPLOYMENT BILL: CLAUSE 17

You asked for comments on the letters from Sir John Stebbings (18 June), Mr Peter Taylor QC (25 June) and Mr Thomas Morison QC (25 June) on this subject and for draft replies for the Prime Minister to send.

The letters from Sir John Stebbings and Mr Taylor make the same points. They appear to have been written in a personal, not a representative, capacity. They are unclear in a number of respects. For example, both letters seem to confuse picketing (covered by Clause 16) with other forms of secondary action, such as blacking and sympathetic strikes (covered by Clause 17). Their criticism of Clause 17 takes the same line as several recent letters to the Times and presents the case for a quite different policy (namely, limiting immunity to primary action alone) as if it were simply a matter of producing a clearer draft of the Clause. On one point the letter from Sir John Stebbings is plainly wrong; the test of "likely effect" in subsection 3(b) is objective, not subjective. Both letters, while disclaiming any wish to comment on matters of policy, endorse the amendments tabled at Committee Stage in the Lords by Lord Orr-Ewing and others, the effect of which would be to cut immunity back to primary action alone.

The draft reply to Sir John Stebbings has been approved by the Lord Chancellor and incorporates amendments suggested by him. As Mr Taylor's letter makes no additional points, it is suggested that the Prime Minister should reply to Mr Taylor in the terms of the attached draft, enclosing a copy of her letter to Sir John. The draft letter to Sir John Stebbings also takes account of comments just received from the Law Officers.

The letter from Mr Morison contains more detailed points, but he has already raised most of these with Ministers here at earlier stages in the preparation of Clause 17 and we do not believe that his criticisms are well founded. However, the Secretary of State has asked Mr Mayhew to arrange an urgent meeting with Mr Morison to discuss the points in his letter. Accordingly, I enclose a shorter draft reply for the Prime Minister to send to Mr Morison.

The Secretary of State has also asked Mr Mayhew to meet Sir John Stebbings and Mr Taylor later this week in order to explain the Government's approach in this Clause in greater detail before the Report Stage in the Lords next week. So if the Prime Minister approves the draft replies it would be helpful if they could be despatched quickly.

I am sending copies of this letter to the private secretaries to the Lord Chancellor, the Attorney General and the Lord Advocate.

Yours ever

Richard Dykes

R T B DYKES
Principal Private Secretary

DRAFT LETTER FROM THE PRIME MINISTER TO SIR JOHN STEBBINGS, PRESIDENT OF THE LAW SOCIETY

Thank you for your letter of 18 June on Clause 17 of the Employment Bill. This is a very difficult but vitally important matter and I am glad to have this opportunity to explain the policy the Government have adopted towards limiting secondary action and how we expect Clause 17 to operate in practice. Perhaps I may take the points in your letter in the order in which you make them.

First, you refer to the law being held up to public ridicule in the sphere of picketing. I imagine that you are referring in particular to the excesses of secondary picketing which accompanied the strikes of the winter of 1978-79 and of which the more recent Steel and Isle of Grain disputes have afforded further examples. Much that was seen to occur on these occasions was, and remains, contrary to the criminal law already. But it is not the case, as your letter seems to suggest, that the Employment Bill does nothing to tackle secondary picketing. On the contrary, Clause 16 of the Bill specifically withdraws immunity from all picketing which does not take place at the picket's own place of work. It thus effectively makes all picketing other than at the picket's own place of work - including flying pickets - unlawful. Clause 17 is concerned primarily with other forms of secondary action - particularly blacking and so-called "sympathetic" strikes.

Secondly, you ask whether Clause 17 is intended to grant rights or limit immunities. The rights are already available at Common Law provided the immunities are successfully restricted. I am sure that I do not need to point out that it is the present statutes whose implications were spelt out so clearly in the MacShane and Duport Steel cases, which unfortunately confer a virtually unlimited immunity for

industrial action, however remote from the original dispute and however slight its connection with it. It is that licence to spread industrial disruption far and wide "in contemplation or furtherance of a trade dispute" which is restricted by our Clause 17. The clause will enable employers to claim the protection of the law against damaging secondary action if they are not themselves parties to the original dispute or in a direct and active business relationship with the employer in that dispute. Moreover, in future, secondary action will have to be directed at business which is actually being carried out during the dispute with that employer. Thus, even employers who supply goods to or receive goods from the employer in the course of the dispute will be protected against secondary action which is not targeted on their actual business with the employer in dispute. This represents a very considerable restriction of the existing immunity. The drafting is unavoidably (though not unusually) complex, but the Parliamentary debates on the Bill and the reports of recent trade union conferences have indicated that the full extent to which clause 17 draws back the present immunity is being more widely recognised. I therefore cannot accept that it "endorses the right to indulge in secondary action of the widest nature".

Clause 17 represents the Government's considered view of how far it is right and practicable to go in this Bill in restricting secondary action. It reflects the outcome of the extensive consultations on the Working Paper which preceded the drafting and resulted in a considerable strengthening of the original proposals. The principle is clear and straightforward. Industrial action should have immunity only in so far as it is aimed directly at the business of the employer in the original dispute. This is a principle easily understood in industrial

terms and in the vast majority of cases it is employers and trade unionists - not the courts - who will have to apply the legislation. We believe that as drafted this clause will ensure that there is adequate protection against the reckless and indiscriminate secondary action which has rightly occasioned so much public concern. As you know, we have undertaken to publish in the autumn a Green Paper on the whole question of trade union immunities and we do not close the door on further legislation if it is found to be necessary.

The amendments to Clause 17 which have been tabled by Lords Orr-Ewing, Spens and Renton may indeed be simpler than our draft but the policy they embody is quite different. The Government have stated in the House of Lords that in their view this would in effect restrict immunity to industrial action by employees of a party to the dispute, that is, to primary action alone. Whatever may be argued for that - and the Green Paper will enable an informed debate - there is no doubt that a total ban on secondary action would directly conflict with the strong tradition of sympathetic action and would give rise to a real danger of a concerted campaign to make the Bill unworkable. Nothing is more likely to bring the law into disrepute than for it to be flagrantly disobeyed or if the remedies it provides are not used by those people it is designed to help, as happened with the 1971 Act.

Turning to your specific criticisms, you fear that it will easily be evaded and suggest that the tests of purpose and of likely effect in subsection 3 are both "subjective", in the sense that the courts will simply rely on the honest belief of the trade union defendant. In fact, the test of "likely effect" has been drafted so as to make it clear that it is to be treated objectively. It will not be possible

for a defendant to ensure immunity merely by declaring that his principal purpose is directly to disrupt supplies going to or from the employer in dispute. And the test of "likely effect" will require the court to reach an objective view of the likely effects of the action. The operation of the clause therefore depends on the interaction of the tests of "purpose" and "likely effect".

It is, of course, quite common for the courts to have regard to the likely effects of a particular course of action when deciding whether to grant an interim injunction. Indeed the granting of an injunction often depends (as in the recent case of Express Newspapers v Keys) on the court's assessment of what damage would otherwise be caused to the plaintiff. We do not believe that Clause 17 will be easily evaded or that it will set the courts an impossible task or ask them to decide questions which are different in kind from those they have been asked to decide in the past.

I conclude that it would be an error to modify the approach which is embodied in Clause 17 or to accept amendments which, as I have explained, represent an approach basically inconsistent with ours. However, I can give you the assurance that all these issues will be thoroughly explored in the Green Paper.

I hope that I have been able to set at rest your fears about the way in which Clause 17 will operate in practice. Jim Prior (to whom you sent a copy of your letter) would very much welcome your discussing the points raised in your letter in more detail with Patrick Mayhew, who will be getting in touch with you to arrange this.

DRAFT LETTER TO MR PETER TAYLOR QC FROM THE PRIME MINISTER

Thank you for your letter of 25 June about Clause 17 of the Employment Bill.

I enclose a copy of the letter that I have written to Sir John Stebbings explaining the Government's approach to this issue and why we believe the fears expressed about the drafting and effectiveness of Clause 17 are misplaced. I hope that this explanation will allay the concerns you mentioned in your own letter.

Jim Prior would very much welcome your discussing the points raised in your letter in more detail with Patrick Mayhew, who will be getting in touch with you to arrange this.

DRAFT LETTER TO MR THOMAS MORISON QC FROM THE PRIME MINISTER

Thank you for your letter about Clause 17 of the Employment Bill on secondary action.

This is a very difficult but vitally important matter and I am glad to have this opportunity to explain the policy the Government have adopted towards limiting secondary action and how we expect Clause 17 to operate in practice. Clause 17 requires secondary action which interferes with commercial contracts to be targeted very precisely on the supply of goods or services going to or from the employer in dispute. It provides no immunity for secondary action beyond the employees of the customer or supplier who has a current contract with the employer in dispute at the time of the dispute; and even action by employees of such first customers and suppliers must have as its principal purpose and likely effect directly preventing or disrupting the supply of goods or services during the dispute between the employer in dispute and his customer or supplier.

The Clause is not therefore intended to allow secondary action whose purpose is to give moral support to the employees in dispute or to prevent the making of a contract. Such action would fail the test of principal purpose set out in subsection (3) of Clause 17 and, if it interfered with commercial contracts, would have no immunity. Our advice is that the courts are very unlikely to take as narrow a view as you suggest of whether the test of "purpose" has been satisfied. But even if they did, the test of "likely effect" should ensure that they look beyond the test of "purpose" and consider objectively, on the facts before them, whether that purpose is likely to be achieved.

Nor in our view will someone organising sympathetic strikes or other supportive action at second, third or fourth suppliers be able to avoid liability under the clause because of any difficulty in establishing the connection between secondary action and interference with commercial contracts. Most secondary action has as one

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of its main aime interference with the commercial business of the employers concerned.

The amendments to Clause 17 which have been tabled by Lords Orr-Ewing, Spens and Renton may indeed be simpler than our draft, but the policy they embody is quite different. For all practical purposes they would remove immunity from all but primary action. Whatever may be argued for that - and the Green Paper will enable an informed debate - that is not the policy that the Government have decided to adopt in this Bill.

I conclude that it would be an error to modify the approach which is embodied in Clause 17 or to accept amendments which, as I have explained, represent an approach basically inconsistent with ours. However, I can give you the assurance that all these issues will be thoroughly explored in the Green Paper.