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Lord Hailsham PC CH FRS DL
Lord Chancellor
Lord Chancellor's Department
House of Lords
LONDON SW1

30 June 1980

Dear Q

CLAUSE 17 OF THE EMPLOYMENT BILL

The President of the Law Society has written the attached letter to the Prime Minister criticising this Clause. He seems simply to be putting a personal view, not writing in a representative capacity.

His letter is unclear in a number of respects. For example, at one point he seems to confuse picketing (covered by Clause 16) with other forms of secondary action, such as blacking and sympathetic strikes (covered by Clause 17). His 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 he is plainly wrong: the test of "likely effect" in subsection 3(b) is objective, not subjective.

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The enclosed draft of a reply for the Prime Minister attempts to make these points. I should be most grateful for any comments that you may have on Sir John Stebbing's letter and any suggestions for improving the draft reply before I submit it to the Prime Minister. I should like to get it to her quickly so that the reply may go before the Report Stage in the Lords.

I understand that the Chairman of the Bar has also written to the Prime Minister - though I have not yet seen his letter - and I am therefore copying this to the Attorney General. Obviously, I want to do everything I can to set their minds at rest and prevent any impression gaining ground that Clause 17 is unworkable. I am quite prepared to see Sir John Stebbing to explain our position in more detail and if there is anything more that you or the Attorney think that we can and ought to do, please let me know.

May I say how much I appreciate the help you have been giving us with the Bill in the Lords. I know that Grey Gowrie was immensely grateful for your contributions in Committee and I very much hope that you will be able to take part in the debates on Report when, I understand, we can expect a similar attack from the Opposition as well as continuing pressure from our own side.

Yours
Jim

PS

I have now received the letter, referred to above, from the Chairman of the Bar. I enclose a copy. It adds nothing to the letter from Sir John Stebbings and, if you agree, I would propose to advise the Prime Minister to reply to him in the same terms.

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

Thank you for your letter of 18 June on the subject of 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 can 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. 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 secondary picketing - including the use of 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. I am sure that I do not need to point out that it is the present law, whose implications were spelt out so clearly in the MacShane and Duport Steel cases, which confers a virtually unlimited immunity for industrial action, however remote from the original dispute and however slight its connection with that dispute. It is that licence to spread industrial disruption far and wide "in contemplation or furtherance of a trade dispute" which Clause 17 restricts. The clause will enable employers to claim the protection of the law against damaging secondary action if they are not themselves parties to the dispute or in a direct and active business relationship with the employer in dispute. Moreover,

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in future secondary action will have to be targeted directly on business which is actually being carried out with the employer in dispute during the dispute. So even employers who supply goods to or receive goods from the employer in the course of the dispute will be protected against reckless secondary action which is not targeted on their business with the employer in dispute. This represents a very considerable restriction of the present immunity. The drafting of the clause 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 cannot accept therefore 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 restricting secondary action in this Bill. It reflects the outcome of the extensive consultations on the Working Paper on secondary industrial action which preceded the drafting of the clause and which resulted in a considerable strengthening of the original proposals. The principle underlying the clause is clear and straightforward: that industrial action should have immunity only in so far as it is targeted directly on the business of the employer in dispute. It is a principle which is easily understood in industrial terms and it is employers and trade unionists - not the courts - who will have to apply the legislation in the vast majority of cases. We believe that this clause will ensure that there is protection against the reckless and indiscriminate secondary action which has rightly occasioned so much public concern. We have, as you know, undertaken to publish a Green Paper in the autumn on the whole question of trade union immunities and we do not close the door on further legislation if it is found to be right and necessary.

The amendments to Clause 17 which have been tabled by Lords Orr-Ewing, Spens and Renton may be simpler than the present clause, but the policy they embody is quite different from that of the Government. They would in effect restrict

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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 that there would be real danger of a concerted campaign to try to make the Bill unworkable. Nothing is more likely to bring the law into dispute 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 of Clause 17, 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 trade union defendant to ensure immunity merely by declaring that his principal purpose is directly to disrupt supplies going to or from the employer in dispute. Even without the test of "likely effect", the court would have to satisfy itself that the declared purpose was genuine. But this will be reinforced by the need for 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 on 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.

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I cannot therefore undertake that the Government will modify the approach to the restriction of immunity for secondary action which is embodied in Clause 17 or that it will be able to accept the amendments tabled in the Lords which, as I have explained, represent a quite different approach. However, I can assure you 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. The Secretary of State for Employment (to whom you sent a copy of your letter) has asked me to say that he would be very happy to meet you to discuss the points you raise in your letter in greater detail. Could I suggest that you get in touch with his office to arrange an early meeting?