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Chancellor's (Lawson) Papers:
Green Paper on the Reform of the
Legal Profession.

DD's : 25 Years

24/1/96.

PO CH/NL/0426 PT.B

iae.st/Ke/050

FROM: R D KERLEY
DATE: 10 January 1989

1. MR BURR
2. FINANCIAL SECRETARY

cc Chancellor
Chief Secretary
Paymaster General
Economic Secretary
Sir P Middleton
Mr Anson
Mr Monck
Mr Burgner
Mr P Russell
Mr Sharples
Ms Young
Mr Call

LEGAL PROFESSION GREEN PAPER - APPROACH TO COMPETITION RESTRICTIVE TRADE PRACTICES AND THE PROFESSIONS

Lord Young copied to E(CP) colleagues his letter of 20 December 1988 to the Chancellor seeking agreement on certain aspects of the new restrictive trade practices regime so as to ensure that the legal Green Paper properly reflected the Government's thinking on restrictive trade practices (RTP) and the professions generally. We recommend that you write to Lord Young supporting his approach.

Background

2. The Green Paper on restrictive trade practices was published in March 1988. It proposed that the coverage of UK law in this area should be defined in terms of the effects on competition of agreements and concerted practices, rather than their legal form, thus bringing the scope of the law into line with its purpose. This would have the added benefit of aligning UK law with EC competition law. Agreements with anti-competitive effects would not be allowed with the prohibition modelled on Article 85(1) of the Treaty of Rome. As Lord Young says, this would prohibit agreements and practices which affect trade and which have as their object the prevention, restriction or distortion of competition. There would also be an exemption modelled on Article 85(3) which would permit the operation of a anti-competitive practice only if it improved efficiency or promoted technical or economic progress while allowing consumers a fair share of the resulting benefits. On the professions, specifically, the Green Paper proposed that the current exemptions in

the RTP Act would not automatically be carried across into new legislation without the merits of each exemption having been established afresh.

3. Quite separately so far as the legal profession is concerned, E(CP) agreed at its meeting on 5 October 1988 that the Lord Chancellor should produce a Green Paper on the work and organisation of the Legal Profession (as well as two others, one on Conveyancing by Authorised Practitioners and the other on Contingency Fees) setting out the Government's proposals for reform. It was also agreed that this Green Paper should be published by the end of January 1989. However in order to avoid leaving the RTP position unclear, Lord Young is now seeking agreement to his proposals for the professions so that they may be fully reflected in the legal Green Paper. His letter does not prejudge any other matters relating to the RTP legislation.

Lord Young's proposals

4. As indicated above the RTP Green Paper proposed that current exemptions for the professions should not automatically be carried across into new legislation. Lord Young now proposes that the professions should be subject to the same prohibition and exemption test as the rest of the economy (ie Article 85(1) and 85(3)). However any professional agreement expressly authorised in statute would not breach the prohibition, although the competition authority foreseen in the RTP Green Paper could still offer its view on the economic effect of the restriction.

5. During the consultation process many professions argued that Article 85(3) did not provide wide enough public interest criteria for exemption. Lord Young's view is that any wider public interest test in the legislation could open the Government to considerable pressure to use it in all sorts of circumstances, with the danger that this would seriously weaken the legislation. Moreover, many professional rules would pass an exemption test modelled on Article 85(3); and, where professional rules have anti-competitive effects which are not offset by benefits to consumers, they should face the same treatment under RTP legislation as other sectors of the economy.

Analysis

6. Lord Young's proposals are in line with the position we have taken on the RTP review. He has maintained, and even strengthened, the proposals in the RTP Green Paper, despite strong lobbying from professional bodies. As Lord Young says, there is no reason why the professions' rules and practices should be subject to any less stringent competition criteria than the rest of the economy.

7. Lord Mackay is content with Lord Young's proposals, subject to some minor points of clarification with which we see no difficulty (his letter of 9 January), and the current draft of the Legal Green Paper attached to the Lord Chancellor's Private Secretary's letter of 30 December, on which HE1 are providing advice, fully reflects the position as set out in Lord Young's letter.

8. The Prime Minister is also content (her Private Secretary's letter of 6 January).

Recommendation

9. We therefore recommend that you write to Lord Young supporting his proposals that:

(i) There should be no exclusion for the professions in the new RTP legislation.

(ii) Professional rules, not expressly authorised in statute which infringe the prohibition under Article 85(1) should be subject to examination using the same exemption test, Article 85(3), as the rest of the economy.

(iii) The legal Green Paper should reflect this policy.

I attach a draft letter.

10. This submission has been agreed with HE1.

Ross Kerley

R D KERLEY

DRAFT LETTER FROM THE FINANCIAL SECRETARY TO LORD YOUNG

LEGAL PROFESSION GREEN PAPER-APPROACH TO COMPETITION RESTRICTIVE TRADE PRACTICES AND THE PROFESSIONS

In your letter of 20 December 1988 to the Chancellor of the Exchequer you sought E(CP) colleagues' agreement to the approach we should adopt to the professions in the forthcoming restrictive trade practices legislation.

As you say, we cannot leave the position we will adopt on the professions under the new RTP legislation vague in the Legal Green Paper and it is therefore important to settle our position on the professions now.

I am in full agreement with your approach on the substance. We should take this opportunity to put the professions on an equal footing with the rest of the economy and subject them to the same rules of prohibition and exemption as other sectors.

I therefore support your view that there should be no special treatment for the professions in the new RTP legislation and that their rules and practices should be subject to exemption and prohibition tests along the lines of Article 85(1) and 85(3) of the Treaty of Rome. I also agree that this policy should be reflected in the Legal Green Paper.

I am copying this letter to the Prime Minister, member of E(CP), James Mackay, Peter Walker, Malcolm Rifkind, Tom King and Patrick Mayhew, and to Sir Robin Butler.

NORMAN LAMONT

pmr.lg/docs/2.11.89JB

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PWP

FROM: J A BARKER
Date: 11 January 1989

1. DAME ANNE MUELLER

2. PAYMASTER GENERAL

cc: Chancellor
Chief Secretary
Sir Peter Middleton
Mr Anson
Mr Monck
Mr Phillips
Mr Butler
Mrs Case
Mr Harris
Mr Kelly
Mr Gieve
Mr Jordan
Mr Spencer OMCS
Mrs Harrop
Mr Flitton

Ch/PMG is apparently strongly in favour of Treasury control over this press briefing. Are you content? JIS.

ANDREW REPORT: PUBLICITY

We have been giving further thought to how we should handle press publicity for the publication of Sir Robert Andrew's Report on the Government Legal Services.

2. The Report is to be published on Thursday 19 January and the Government's response will be announced in a written answer by the Prime Minister that day. Our proposals for publicity are as follows:

a. a general press notice covering the Government's response to be issued, probably, by the Treasury Press Office;

b. a Press Briefing by the Attorney General and the

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Treasury Solicitor for selected legal correspondents to be held at 3.45pm on 19 January. The Treasury's Press Office propose to support the Attorney in this;

c. general enquiries to be directed to the Treasury Press Office because of the likely major concern with pay and personnel management;

d. copies of the Report to be given to those attending the press briefing and to be made available to other media people on request.

3. It would be helpful to know if you are content with these proposals. In particular, do you have any objection to the slightly unusual feature of the Treasury handling a press briefing by the Attorney on a report published by the Cabinet Office?

J A BARKER
PM

The circumstances are somewhat unusual but there seem to be the most sensible arrangements to make

AJ
11/1

CONFIDENTIAL

FROM: P RUSSELL
DATE: 11 JANUARY 1989

1. MRS CASE
2. FINANCIAL SECRETARY

cc: Chancellor
Chief Secretary
Paymaster General
Economic Secretary
Mr Monck
Mr Burgner
Mr Odling-Smee
Mr Mortimer
Mr Culpin
Mr Dickson
Mr Kerley

Mr J B Unwin
Sir A Battishill

Ch/ I am sparing you the actual draft Green Pps., which are gargantuan. The PM has written, endorsing LA Mackay's approach (copy behind).

RESTRICTIVE PRACTICES IN THE LEGAL PROFESSION

The letter of 30 December from the Lord Chancellor's private office covers the draft of three Green Papers on which comments are invited from other members of E(CP) Committee in the hope of achieving an agreed text in correspondence. Any substantive issues remaining unresolved at this stage will be discussed at E(CP) on 19 January. There are three separate papers, viz:-

(a) Work and Organisation of the Legal Profession;
(b) Conveyancing by Authorised Practitioners; and
(c) Contingency Fees.

These are considered individually in the following paragraphs which have been compiled in collaboration with FIM Division.

Line to take

2. You are advised to welcome the general thrust of all three papers and to seek to make only small amendments to meet particular points as detailed below and in the attached draft letter.

Background

3. Lord Mackay inherited Lord Hailsham's commitment to put a paper to E(CP) on restrictive practices. At an E(CP) discussion in January 1988 he set out a number of restrictive practices on

which he seemed disposed to take a somewhat defensive line. He undertook to provide a further paper in the light of the Marre Committee's report. Marre, when it emerged in the spring, was a predictably unhelpful response as might be expected from a group commissioned by the two arms of the legal profession and seen mainly as a delaying tactic. Its report was rightly dismissed by the Lord Chancellor in October in E(CP)(88)15 which proposed a Green Paper that would suggest legislation on a number of topics relating to removal of lawyers' restrictive practices.

4. The background on conveyancing is somewhat different. Steps were taken following Mr Austin Mitchell's House Buyers Bill in 1984 to break the conveyancing monopoly of solicitors in England and Wales by allowing licensed conveyancers to compete. So far, however, only 150 have taken up the challenge. In the meantime, Schedule 21 to the Building Societies Act has allowed the Lord Chancellor to make rules to recognise institutions for conveyancing purposes. However, lack of progress with the necessary Regulations was raised in E(CP) in January 1988. The Lord Chancellor's Department produced a paper in July that propounded some not very compelling arguments about conflict of interest. The Lord Chancellor subsequently offered to E(CP) in October 1988 an altogether more liberal approach - and a fundamental change from Lord Hailsham's previous position - favouring self-regulation through a Code of Conduct and allowing conveyancing by a wide variety of institutions.

5. The subsequent drafting of all three Green Papers has been supervised by an inter-departmental working party of senior officials on which not only the Treasury was represented but also the Department of Trade and Industry and the Office of Fair Trading.

(a) **The Work and Organisation of the Legal Profession**

6. This is much the longest paper of the three, running to 14 chapters and 5 Annexes. Basically, it identifies the objective of ensuring that the general public has the best possible access to legal services of the right quality for the particular needs of the client. The paper then states the Government view that this objective can best be achieved by ensuring that (i) a market providing legal services operates freely and efficiently so as to give clients the widest possible choice of cost-effective

services; and (ii) the public can be assured that the services are supplied by people who have the necessary expertise. The paper also reflects general acceptance of Lord Young's proposals for Restrictive Trade Practices legislation which envisage no exclusions for the professions and challenges to rules of professional bodies that may infringe the prohibition on anti-competitive agreements (IEA 3 Division is advising separately on Lord Young's recommendations which now have the approval of the Prime Minister).

7. The significant thing about the paper is its critical tone which is both welcome and surprising. The paper in effect is a radical and open-minded look at the widespread restrictive trade practices in the legal profession from the standpoint of the Government's policies on competition and the supply side. The Green Paper largely reflects the current Lord Chancellor's robust view of the profession's need to shed its cloak of restrictive practices.

8. The draft Green Paper deals adequately with virtually all of the restrictive or inefficient practices picked up in the earlier E(CP) papers, including direct access to counsel, attendance on counsel and the archaic organisation of the Bar. Where these practices rest on statute or Government attitudes, the Green Paper proposes action for immediate change. This is shown, for instance, in the chapter on multi-disciplinary practices which advocates suitable amendments to the Solicitors Act 1974. Elsewhere, as in the case of rules set by the Bar or Law Society (for instance, governing professional conduct and standards), the draft gives a strong steer towards change. Our earlier worries that the Lord Chancellor's concern to have genuine consultation with the judiciary would inhibit him from giving a sufficiently strong steer have not been borne out in practice.

9. The only issue in this Green Paper which prompts any continuing doubt is rights of audience (Chapter 5). The concern relates to the present practice of Inland Revenue and HM Customs to use their own (non-lawyer) staff to prosecute in the courts. The Lord Chancellor's Department have assured me that the paragraphs (5.9-5.12) on lay advocacy and employed lawyers do <u>not</u> outlaw those Departments' present procedures. But the paragraphs do require unspecified tests of competence and also give precedence to the principle propounded by the Royal Commission on

Criminal Procedure (the Philips Report) that there should be a clear separation of responsibility for the conduct of the prosecution from the conduct of the investigative process. The Royal Commission however also recognised that non-police agencies undertaking criminal prosecutions do so in very different circumstances, often as a last resort after all other measures have failed. Moreover, the Keith Committee (which post-dated the Philips Commission) examined the practices of Inland Revenue and HM Customs and concluded that they were not inconsistent with the Philips principle. We need to put down a marker to safeguard the present prosecuting procedures of Departments such as Revenue and Customs - not least because of the possible implications for running costs - and this is taken up in the attached draft letter.

10. Expenditure implications. As an Annex to the paper shows, relaxation of current restrictions on rights of audience in respect of lawyers employed by the Crown Prosecution Service, Inland Revenue, Customs & Excise and other Government bodies could bring some savings of £1 million or more per year. Proposals for a strengthened Advisory Committee on Legal Education and Conduct and a Legal Services Ombudsman could have some small, as yet unspecified, cost implications for LCD though these could possibly be absorbed within that Department's current provision. For once, however, expenditure is not the primary concern; it is the Government's supply side policies that are more important in this context.

11. The Lord Chancellor has faced opposition from the Attorney General who tabled a number of late wrecking amendments to the previous draft. We understand that the Attorney General may not be disposed to push his views further in E(CP) debate. If that proves to be so, you can expect most other Ministers to be strongly in favour of the Lord Chancellor's approach. In places the paper has been rather delicately worded in order not to provoke the over-sensitive (in their own interests) legal profession unnecessarily. It is the present Lord Chancellor's style to place all his cards on the table and not to hold items for subsequent horse-trading. However, the steel is beneath the velvet glove and many of the expressed "hopes" are in practice seen by the Lord Chancellor as firm intentions, to be secured - if the profession proves recalcitrant - by the application of RTP legislation.

(b) **Conveyancing by Authorised Practitioners**

12. The Lord Chancellor's separate consultation paper on conveyancing sets out his proposal to legislate to permit banks, building societies, other institutions and individuals to provide conveyancing services to clients subject to appropriate safeguards. The proposals will substitute for those already contained in schedule 21 to the Building Societies Act 1986. The Lord Chancellor believes that the schedule 21 conditions were too bureaucratic.

13. The new system will provide for the authorisation of practitioners who will be required to comply with a set of strict conditions. These will include abiding by a code of conduct, employing sufficient solicitors or licensed conveyancers to supervise or provide the service and belonging to a recognised ombudsman scheme. The Lord Chancellor has dropped his predecessor's opposition to lending institutions providing conveyancing to their borrowers.

14. The consultation paper has been the subject of some considerable negotiation between the Lord Chancellor's Department, ourselves, the Building Societies Commission and the Bank of England. Our object was to ensure that competition, by the major institutions most likely to provide it, was not stifled by over-regulation. The result is a two-tier system of authorisation. Banks and building societies will not need to establish that they are run by fit and proper people, conducting the business in a prudent and competent manner. They already meet these criteria in order to carry out their main, deposit taking business. They will be allowed to operate as authorised practitioners provided that they certify that they can comply with all the other requirements.

15. Others wishing to become authorised practitioners will be required to submit themselves to the supervision of an authority which can satisfy the Lord Chancellor that it is able to impose and enforce the necessary requirements set out in his paper. Some, such as surveyors, valuers and insurance brokers may be already regulated by authorities which will be able to enforce the requirements. Others, like estate agents, may find it necessary to set up new authorities, or a single new authority, on the lines of a self-regulatory organisation. All intending practitioners

must belong to an ombudsman scheme, obey a code of conduct and provide financial protection for clients.

16. There may be complaints from intending practitioners about the burden imposed by such conditions. Smaller organisations, such as estate agents, may complain that the banks and building societies are being given an unfair advantage. The Lord Chancellor is slightly unhappy about the different treatment of banks and building societies, but is, so far, willing to accept it. The major lending institutions, however, are those which are likely to provide the greatest competition, and those most likely to provide the one-stop property shop favoured by the consumer. For these reasons, we believe the different treatment is worth supporting.

17. Remaining problems. There are two remaining problems in the conditions proposed in the Lord Chancellor's paper; both were included by the Lord Chancellor against the advice of his officials. The first is a suggestion that authorised practitioners might be required not to subsidise conveyancing services from their other activities and to prove that they were doing this to the satisfaction of their auditors. A similar requirement could be placed on solicitors. We believe that this requirement is unnecessary and unenforceable. It will lead to accusations of protectionism by the respondents. It will, generally, only be economic for lending institutions to provide conveyancing services in areas of high population density. They are more likely to sell this to prospective customers as an additional service rather than as a loss leader. The Office of Fair Trading have pointed out that it is virtually impossible to prove cross-subsidisation. They have also conducted a recent survey of lenders which showed that lending for house purchase is extremely competitive and there was little evidence of any tying-in of other services or restrictive practices. The survey will be published some time in the next few months and will be used by the respondents to argue against this suggestion. There seems, therefore, little point in including the suggestion in the paper.

18. The second problem is the suggestion that lenders should offer to include the cost of conveyancing in the house purchase loan, and should do so whether the borrower has used their service or that of an independent solicitor. We strongly oppose this

suggestion. It should be at lenders discretion whether he lends additional money (to cover the conveyancing fees) to any borrower. For sums below £30,000, the additional loan would not qualify for MIRAS treatment and will have to be granted as a separate loan. In practice, most existing home owners use some of the equity from their sale to pay the conveyancing and other fees. In the case of first-time buyers, the lender may be reluctant to increase the mortgage further. The suggestion does not make practical or commercial sense and will be strongly opposed by most lenders. Again, we can see no reason for its inclusion in the paper.

(c) **Contingency Fees**

19. This paper considers the possibility of allowing the procedure, common in the United States, whereby a lawyer agrees to pursue a client's case on the basis that he receives no payment if the case is lost but takes an agreed percentage of whatever award is made by the court if the case is won. Currently, such agreements are prohibited by professional rules of conduct in England and Wales. Arguments against contingency fees have largely been based on US experience of excessively high damages and a degree of "ambulance-chasing" by some lawyers. But the paper firmly points in favour of some form of contingency fee arrangement in the spirit of the Government's policy for more deregulation generally and easier access to justice. This too is welcome if not of great immediate interest to the Treasury.

Conclusion

20. You are recommended to give a general welcome to the Lord Chancellor's draft consultation papers but to raise a few particular points of contention as set out in the attached draft letter.

Russell

P RUSSELL

DRAFT LETTER FOR THE FINANCIAL SECRETARY TO SEND TO THE LORD CHANCELLOR

FORTHCOMING GREEN PAPERS

Your Private Secretary's letter of 30 December, covering copies of your draft Green Papers on the Work and Organisation of the Legal Profession, Conveyancing by Authorised Practitioners, and Contingency Fees sought written comments, in advance if possible of E(CP) discussion.

2. I very much welcome the tone and general thrust of the papers which strongly reflect the Government's policies on competition and deregulation. I understand that the full version of paragraph 1.8 of the major paper on the profession will now go forward in the light of colleagues' agreement to the proposals in the letter of 20 December from the Secretary of State for Trade and Industry about Restrictive Trade Practices and the Professions generally.

Work and Organisation of the Legal Profession

3. I remain concerned about the effects of Chapter 5 on the way that Government Departments such as Inland Revenue and HM Customs & Excise carry out their prosecution responsibilities. I understand that the paragraph on lay advocacy (5.9) seeks to draw a distinction between those who offer their services for reward (eg patent agents) and others, such as the employees of various Government bodies. I accept that in the case of the former it would be advisable to require particular qualifications that would indicate to a potential customer that the individual was well versed in the relevant subject on which he would be representing his client. But the paragraph as it is drafted may give the impression that staff with particular knowledge and experience who

prosecute on behalf of Inland Revenue and HM Customs need to acquire certain outside qualifications. I am sure that it is not the intention but the point may perhaps be clearer if "persons" were to replace "specialist practitioners" in line 17 and the word "the" deleted from line 20.

4. A similar issue arises in paragraph 5.12. I do not in any way wish to dispute the general principle spelled out in the Philips report that there should be a clear separation of responsibility for the conduct of the prosecution from the conduct of the investigative process. At first blush, this would seem to pose greatest problems for the Serious Fraud Office which was set up with a specific aim to involve the prosecutors at an early stage. I assume that the Attorney General is satisfied that the SFO operates in a way that is consistent with the Philips principle. If so, there would seem little doubt that the present procedures of Revenue and Customs are also fully satisfactory in that respect. I understand that you do not envisage any change in the future - indeed any such change could have serious implications for running costs - and I think this understanding would be clearer if the last 4 lines of paragraph 5.12 were to be omitted. I also wonder if we should not be more forthright on the general approach to the widest possible rights of audience and omit "appear to" from the last sentence of paragraph 5.11.

Conveyancing by authorised practitioners

5. I very much welcome your proposals to allow a wider choice of conveyancing services to the consumer while affording them sufficient protection. Having moved away from the rather bureaucratic procedures in schedule 21 to the Building Societies

Act, I hope that the resulting system will be attractive to those wishing to become authorised practitioners The new system should provide for sufficient regulation but not over-regulation.

6. There are, however, two proposals in your paper which may lead to accusations of over-protection of solicitors. The suggestion that practitioners should establish that they are not providing a cross-subsidy strikes me as being unworkable. There is little evidence to suggest that lenders would wish to provide a subsidised conveyancing service to their borrowers. They are more likely to market the service on its convenience rather than cost terms. I doubt whether they will also find it economic to provide the service outside the main urban centres. There may, therefore, be little threat to the independent solicitor providing a wide range of services in areas outside major cities. There is little evidence to suggest that lenders engage in any form of restrictive practice, at present, and they will strongly oppose this suggestion. I can see little point in its inclusion in your paper.

7. You also make the suggestion that a lender should offer to include the conveyancing fee as part of the loan, and should do so whether the borrower uses his conveyancing service or an independent solicitor. I believe strongly that it should be up to the lender whether he wishes to advance an additional amount to any borrower. He may be reluctant to do so to first-time buyers where the advance may be a high ratio of the properties value. In the case of former owners, the additional loan is often unnecessary. If the loan is below £30,000, the resulting tax complications will discourage a further advance of conveyancing fees. In short, I believe the suggestion is unnecessary and takes

away the lenders discretion in making his judgement of the borrower's ability to repay. These points will be repeated by the respondents to your consultation and, again, I believe it should be dropped from the paper.

8. I am copying this letter to the recipients of Ms Smith's letter of 30 December.

Robert 02.11.1.89

cc. PPS, CST, PMG, EST
MR. Monck
MR. Burgner
MR. Odling-Smee
MRS. Case
MR. Mortimer
MR. Culpin
MR. Dickson
MR. Kerley
MR. P. Russell
MR. J. UNWIN
SIR. A. BATTISHILL

Treasury Chambers, Parliament Street, SW1P 3AG

The Rt Hon Lord Mackay of Clashfern
Lord Chancellor
Lord Chancellor's Department
House of Lords
SW1A 0PW

11 January 1989

FORTHCOMING GREEN PAPERS

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I am copying this letter to the recipients of Ms Smith's letter of 30 December.

NORMAN LAMONT

Susan 07.09.1.89

CC: CHANCELLOR, 2
CHEIF SECRETARY, PAYMASTER GENERAL, ECONOMIC SECRETARY, SIR P MIDDLETON, MR ANSON, MR MONCK, MR BURGNER, MR P. RUSSELL, MR SHARPLES, MS YOUNG, MR BURR, MR R.D. KERLEY, MR CALL.

Treasury Chambers, Parliament Street, SW1P 3AG

The Rt Hon Lord Young of Graffham
Secretary of State for Trade and Industry
Department of Trade and Industry
1-19 Victoria Street
London SW1H QET

11 January 1989

Dear David

LEGAL PROFESSION GREEN PAPER - APPROACH TO COMPETITION RESTRICTIVE TRADE PRACTICES AND THE PROFESSIONS

In your letter of 20 December 1988 to the Chancellor of the Exchequer you sought E(CP) colleagues' agreement to the approach we should adopt to the professions in the forthcoming restrictive trade practices legislation.

As you say, we cannot leave the position we will adopt on the professions under the new RTP legislation vague in the Legal Green Paper and it is therefore important to settle our position on the professions now.

I am in full agreement with your approach on the substance. We should take this opportunity to put the professions on an equal footing with the rest of the economy and subject them to the same rules of prohibition and exemption as other sectors.

I therefore support your view that there should be no special treatment for the professions in the new RTP legislation and that their rules and practices should be subject to exemption and prohibition tests along the lines of Article 85(1) and 85(3) of the Treaty of Rome. I also agree that this policy should be reflected in the Legal Green Paper.

I am copying this letter to the Prime Minister, member of E(CP), James Mackay, Peter Walker, Malcolm Rifkind, Tom King and Patrick Mayhew, and to Sir Robin Butler.

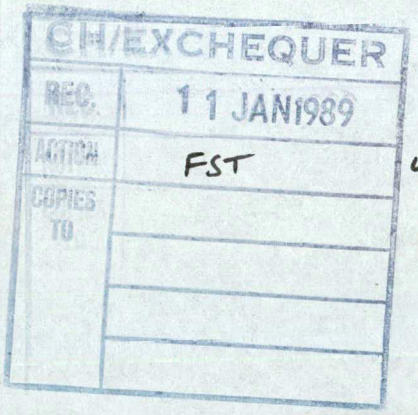
Yours ever

Norman

NORMAN LAMONT

MAFF

Ministry of Agriculture, Fisheries and Food
Whitehall Place, London SW1A 2HH



11/1

From the Minister

The Rt Hon Lord Young of Graffham
Secretary of State for Trade and Industry
Department of Trade and Industry
1 Victoria Street
LONDON
SW1H OET

11 January 1989

Dear David,

LEGAL PROFESSION GREEN PAPER - APPROACH TO COMPETITION RESTRICTIVE TRADE PRACTICES AND THE PROFESSIONS

Your letter of 20 December to Nigel Lawson asked for urgent views of E(CP) colleagues on your RTP proposals, in so far as these concern the professions, so that these can be reflected in a forthcoming Green Paper on the legal profession.

Though there are one or two detailed points which can be pursued between our respective officials, I am content that, subject to suitable provision being made for agreements expressly authorised in statute, there should be no exclusion for the professions from the requirements of the new RTP legislation. I also agree that this principle should be reflected in the draft Green Paper on the legal profession.

I am copying this letter to the Prime Minister, members of E(CP), James Mackay, Peter Walker, Malcolm Rifkind, Tom King, Patrick Mayhew and to Sir Robin Butler.

Yours ever,

JG

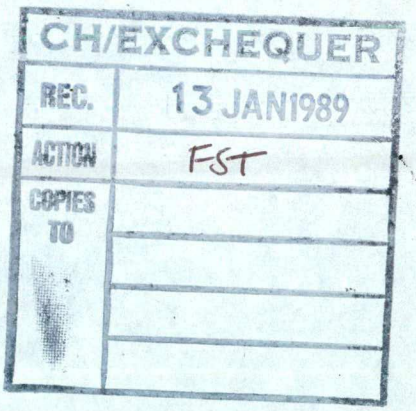
JOHN MacGREGOR

ATTORNEY GENERAL

01-936 6201

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

11 January 1989



13/1

The Rt Hon Lord Young of Graffham
Secretary of State for Trade and Industry
1 Victoria Street
LONDON S W 1

Dear David:

LEGAL PROFESSION GREEN PAPER - APPROACH TO COMPETITION, RESTRICTIVE TRADE PRACTICES AND THE LEGAL PROFESSIONS

Thank you for copying to me your letter dated 20 December 1988 to the Chancellor of the Exchequer.

I agree with the views expressed by the Lord Chancellor in his letter to you dated 9 January, on the need to protect ethical and qualification requirements. Subject to this I am content with the approach you propose in your letter.

I am copying this letter to the Prime Minister, the Lord Chancellor, members of E(CP), Peter Walker, Malcolm Rifkind, Tom King and to Sir Robin Butler.

Yours ever,
Patrick

fim1.ma/Graeme/144

RESTRICTED

FROM: G F DICKSON

DATE: 11 JANUARY 1989

1. MR ODLING-SMEE

2. FINANCIAL SECRETARY

cc PS/Chancellor
PS/Chief Secretary
PS/Economic Secretary
PS/Sir P Middleton
Mr Monck
Mrs Case
Mr Burr
Mr P Russell
Ms Young
Mr Kerley
Mr Tyrie
Mr Call

COMPETITION IN THE LEGAL PROFESSION: CONVEYANCING IN SCOTLAND

Mr Rifkind wrote to the Chancellor on 20 December about his proposals for a review of conveyancing services in Scotland following the remit he had been given by E(CP) on 5 October. The Lord Chancellor wrote to Mr Rifkind with his comments on 9 January. Mr Taylor's minute of 4 January recorded the Chancellor's view that at the end of the day Scotland should march in step with England and Wales. Although Mr Rifkind proposes to adopt the same timescale as the Lord Chancellor's proposals for England and Wales, the substance of his proposals is somewhat different.

Background

2. The Lord Chancellor's consultation paper on conveyancing in England and Wales will be published this month, at the same time as a Green Paper on the reform of the legal professions. The paper will give a clear commitment to legislate to permit banks, building societies and other institutions and individuals to provide conveyancing services for clients. It will set out a number of conditions for those who wish to become authorised practitioners. They will also be subject to a strict Code of Conduct and to an Ombudsman scheme.

3. Mr Rifkind's letter presents his proposals for consultation in Scotland. The public interest argument will be set out in

terms of financial safeguards for the purchaser, in his certainty of the title to his property and in regulation of conveyancing which is sufficient, but no more than sufficient, to secure these results.

4. He will ask for comments on the public interest and for respondants to indicate their preference among five illustrative options and any others they may identify. The options are:

i. complete deregulation;

ii. complete deregulation only in the case of non-domestic property;

iii. conveyancing by practitioners to be authorised when the practitioners are shown to be competent and able to provide financial safeguards necessary to protect client funds. The practitioners would initially have to employ solicitors;

iv. as option iii, but including conveyancers who were not fully qualified solicitors, and who had undertaken a prescribed course of study and training;

v. the status quo, to be justified on the argument that the existing Sasines Register is too complicated for non-solicitors to undertake.

5. The Lord Chancellor commented in his letter to Mr Rifkind that he favoured options (iii) to (v) and that Mr Rifkind should make similar provisions for financial institutions to those proposed for England.

Discussion

6. Although they may allow free and wide ranging public debate, Mr Rifkind's proposals suffer from two drawbacks. Firstly, they

are out of step with the narrower and more detailed proposals to be published in the Lord Chancellor's paper which will give a clear indication of the Government's intention. Secondly, they suggest that maintaining the status quo is a possible outcome. This may encourage strong resistance to change from the Scottish legal profession.

7. There is in fact less of a case for protecting solicitors in Scotland than in England and Wales. Scottish solicitors have long played a major part in providing estate agency services. They are therefore in contact with potential clients at an early stage, and are likely to continue to take advantage of this to provide conveyancing services. It would be best not to present the status quo option in the Scottish consultation paper, especially as it is not in the draft England and Wales paper. It is not clear why the Lord Chancellor agreed, in his letter to Mr Rifkind, that the status quo should be retained as an option for Scotland.

8. The public interest argument in Mr Rifkind's letter are very similar to those expressed by the Lord Chancellor. His option (iii) is broadly the same as the proposals in the Lord Chancellor's consultation paper. It would be unfortunate if the outcome of the Scottish consultation resulted in a different system from that in England. The cost of complying with a different conveyancing system in Scotland might discourage national institutions from offering the service there, thereby reducing competitive pressures.

Recommendation

9. I recommend that you write to Mr Rifkind expressing the view that his proposals should indicate an approach preferred by the Government. This approach should be close to options (iii) and (iv) in his letter. They could be expanded to follow more closely the Lord Chancellor's proposals for England and Wales. His consultation may be more wide ranging but it should make clear that, unless strong arguments are received to the contrary, the

resulting Scottish system will be similar to England and Wales. You may also wish to suggest that the matter is discussed at E(CP) on 19 January if Mr Rifkind disagrees with your suggestions. A draft letter is attached.

10. HE are content.

GRAEME DICKSON

RESTRICTED

DRAFT LETTER FROM FINANCIAL SECRETARY TO THE RT HON MALCOLM RIFKIND QC MP, SECRETARY OF STATE FOR SCOTLAND, DOVER HOUSE, WHITEHALL, LONDON SW1

COMPETITION IN THE LEGAL PROFESSION: CONVEYANCING

You wrote to Nigel Lawson on 20 December about your proposals for a review of conveyancing services in Scotland. I have also seen James Mackay's response of 9 January.

2. As you are aware, James Mackay proposes to publish his consultation paper on conveyancing by authorised practitioners in England Wales this month. The paper will give a clear commitment to legislate to permit a system to be implemented for banks, building societies, other institutions and individuals to provide conveyancing services for their clients. Those who comply with the proposed conditions will become authorised practitioners.

3. I can appreciate your desire to stimulate as wide ranging a public debate as possible. But unlike James Mackay's paper, you are not planning to indicate the Government's preferred approach. A wide range of options is not necessary to meet the public interest: your intermediate options which fall short of both complete deregulation and maintaining the status quo are satisfactory in this respect. Options (iii) and (iv) in your letter would lead to a scheme very similar to that proposed by James Mackay for England and Wales.

4. As well as setting out clearly the Government's approach, it would be desirable for the main options to be identifiably similar to those proposed for England and Wales. Although the

consultation in Scotland may be on a different basis, I believe that, at the end of the day, it makes considerable sense to have Scotland, England and Wales all adopt a broadly similar system. This is the best way to encourage national institutions to operate in all countries, thus increasing the competition for provision of conveyancing services.

5. If you have any problems with my suggestions, perhaps we can discuss them at E(CP) on 19 January. I am copying this letter to colleagues on H and on E(CP), and to James Mackay, Kenny Cameron and Sir Robin Butler.

NORMAN LAMONT

CONFIDENTIAL

HOUSE OF LORDS,
LONDON SW1A 0PW

12 January 1989

FINANCIAL SECRETARY	
REC.	13 JAN 1989
ACTION	Mr Kerley
COPIES TO	PPS, CST, PRIG, EST, Sir P. Middleton, Mr Anson, Mr Mondt, Mr Burgner, Mr Burr, Mr Scholar, Mr Call.

Dear John,

Green Paper on the Work and Organisation of the Legal Profession

Thank you for your letter of 10 January 1989.

As you say, paragraph 5.11 of the Green Paper endorses the principle of the Philips Report that there should be a clear separation of responsibility for the conduct of the prosecution from the conduct of the investigative process. Although Philips' direct recommendations were concerned with the relationship between the proposed Crown Prosecution Service and the police, the Report makes it clear (paragraph 7.41) that there are similar arguments of principle for the Crown Prosecution Service taking on other prosecutions. Philips plainly saw the validity of the principle of a separation of responsibility between the investigation and prosecution functions as extending beyond police work.

It seems to me, however, from what you say in your letter, that your arrangements already follow this principle. You indicate that those of your lawyers who conduct prosecutions, under the present arrangements, are not responsible for carrying out the investigations nor for making the initial decision to prosecute. I am obviously unaware of the detailed arrangements you operate, but, if your lawyers are organised as you indicate, I would not have thought the Green Paper carried any implications for you of the kind you mention.

.../continued

The Rt Hon John Moore MP
The Secretary of State
for Social Security
Richmond House
79 Whitehall
SW1A 2NS

You also refer to the prosecutions currently carried out by your non-professional departmental staff. Several other departments have similar arrangements. As paragraph 5.39 says, the intention is that all those who already had limited rights of audience when the new arrangements were introduced would be entitled to retain these; and I envisage asking the Advisory Committee to advise as an early priority on the details of the appropriate continuing arrangements for ensuring that advocacy certificates are granted to practitioners of these kinds after the new arrangements come into force.

Copies of this letter go to the Prime Minister, Kenneth Baker, Lord Belstead, Douglas Hurd, Tom King, Patrick Mayhew, Malcolm Rifkind, David Waddington, John Wakeham, Members of E(CP) and Sir Robin Butler.

Yours ever,

James.

LORD CHANCELLOR

FINANCIAL SECRETARY	
REC.	13 JAN 1989
ACTION	Mr P. Russell
COPIES TO	PPS, CST, PMG, EST, Mr Monck, Mr Burgner, Mr Odling-Smee, Mrs Case, Mr Mortimer, Mr Culpin, Mr Dickson, Mr Kerley, Mr T. Unwin - C&E, Sir A. Battishill - IR.

2

HOUSE OF LORDS,
LONDON SW1A 0PW

12 January 1989

Dear Kenneth,

Forthcoming Green Papers

I have seen your letter of 11 January 1989 to my Private Secretary.

I am sure that the reconstituted Advisory Committee, when it comes to consider this area, would want to hear your views on the proposals in paragraph 3 of Annex C of the main Green Paper about the list of core subjects in the academic stage of legal training. Plainly, anything you have to say about the time and resource constraints facing higher education institutions would be very relevant to its deliberations.

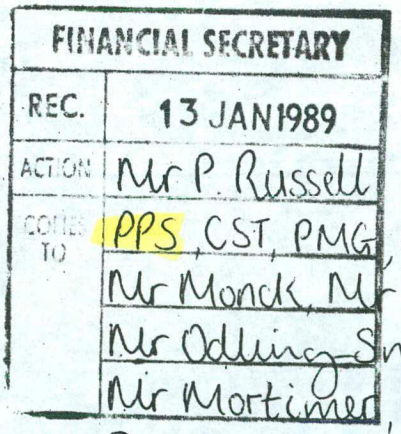
I am grateful also for your kind offer to provide an assessorship to the Committee from Her Majesty's Inspectorate. It is obviously far too soon for me to make any detailed arrangements in respect of the composition of the new Committee, but, when I do, I will come back to you about this suggestion, if I may.

Copies of this letter go to the Prime Minister, to members of E(CP), to the Home Secretary, the Secretaries of State for Scotland and Northern Ireland, the Attorney General, the Leaders of both Houses, the Chief Whip, the Director General of Fair Trading, and Sir Robin Butler.

Yours ever,

James.

Rt Hon Kenneth Baker MP
Secretary of State for
Education and Science
Elisabeth House
York Road
London SE1 7PH



2

HOUSE OF LORDS,
LONDON SW1A 0PW

12 January 1989

Dear David,

Forthcoming Green Papers

Thank you for your kind letter of 11 January 1989. I am glad to know you find the approach I propose so welcome.

I quite agree with your general point that any criteria adopted should be the minimum necessary to achieve desired standards. This applies both to the question of granting advocacy licenses and to the proposed codes of professional conduct. It is my intention that the Advisory Committee should have this well in mind when they begin their work.

Multi-Disciplinary Practices

I take the point you make about this. I will have paragraph 12.11 redrafted to remove the requirement that all members of an MDP should be members of a professional body.

Employed Lawyers

I am glad to know that you consider the DTI already observes the Philips principle. I should, however, point out that paragraph 5.12 is drafted in terms of making changes in rights of audience. It does not suggest that departments must observe the Philips principle, if they are to continue with their own prosecution work. Indeed paragraph 5.39 makes it clear that all those who already had limited rights of audience, when the new arrangements were introduced, would be entitled to retain these. There are several Government departments whose non-legally qualified staff have such rights of audience. I envisage asking the Advisory Committee as an early priority to advise me on the appropriate continuing arrangements to ensure that advocacy certificates continue to be granted to practitioners of these kinds after the new arrangements come into force.

.../continued

The Rt Hon The Lord Young of Graffham
The Secretary of State for
Trade and Industry
Department of Trade and Industry
1-19 Victoria Street
London SW1H 0ET

Conveyancing

I attach considerable importance to demonstrating that the Government is concerned to see that the many independent solicitors and licensed conveyancers throughout the country can compete with the big lending institutions on a fair basis. The proposals in paragraph 1.3 of the Conveyancing Paper about subsidization are intended to demonstrate that concern. Solicitors may suggest that, in the absence of this sort of provision, the big institutions would use artificially low prices to drive them out of the conveyancing business. They might go on to suggest that that would affect the availability of legal advice services generally throughout the country. I am concerned that such a line of argument might lessen the welcome these proposals would otherwise receive from our supporters throughout the country and in the party generally. Like you I believe the right approach to be to see what views emerge from the consultation process. If that process shows that this proposal is feasible and acceptable, then well and good; if, however, it proves that the proposal would be either very difficult to implement or pointless, then that would be a good reason for not taking it forward. The proposal would, however, demonstrate our concern to ensure fair play as far as we can.

Copies of this letter go to the Prime Minister, to members of E(CP), to the Home Secretary, the Secretaries of State for Education and Science, Scotland and Northern Ireland, the Attorney General, the Leaders of both Houses, the Chief Whip, the Director General of Fair Trading and Sir Robin Butler.

Yours ever,

James.

CONFIDENTIAL

Ch/ We received these papers just as the PMG was meeting the A-G this a.m. Outcome of meeting was to make amendments shown to Annexes B & C

FROM: C W KELLY
DATE: 12 JANUARY 1989

PAYMASTER GENERAL

cc Chancellor
Sir Peter Middleton
Dame Anne Mueller
Mrs Case
Miss Seammen
Mr Barker

Yes. Do you agree that the adequately preserve our position? DIS.

PWP

ANDREW REPORT: PAY

You will recall that you and the Attorney were asked at the Prime Minister's meeting on Andrew before Christmas to sort out your remaining differences and report back.

2. I had hoped to fix this without troubling you again. But I fear that I was over optimistic.

3. We have, however, succeeded in narrowing down the immediate point at issue to one of drafting.

4. I attach three pieces of paper (top copy only) - the draft Government Statement in the form of a written PQ, (Annex A) a message to legal staff from Mr Nursaw in his new role as Head of the Government Legal Service, (Annex B) and a draft letter to Establishment Officers explaining how the new arrangements will be operated in more detail. (Annex C)

5. The draft announcement is not in dispute. If you are content we will give it to the Prime Minister for her approval over the weekend.

6. The difficulty has arisen about the paragraph in Mr Nursaw's message about pay. You will see that in the middle is a statement to the effect that the Treasury expect to apply the criteria for selectivity rigorously and selectively. The Attorney wants us to say instead that departments should "apply scrupulously the criteria for selection".

7. This may seem a small change. But the Attorney regards it as important; and so, I think, should we.

8. The Attorney can hardly object to the word "selectively" since that is what Andrew is all about. But his contention is that the word "rigorously" carries the wrong implications and is inconsistent with the assurances which the Chancellor gave at the pre-Christmas meeting that the arrangements would be applied flexibly and without a quota. This last claim is manifest nonsense. We have already offered to write precisely these words into the previous sentence in an attempt at compromise. You could offer again to do so. What the Attorney is really about is trying to use words which sound as soft as possible so as to ensure that as many lawyers as possible get personal pay points.

9. The important points as we see them, which we have already made to the Attorney, are as follows:

(i) No-one expects us to be anything other than "rigorous" where pay is concerned. Nor should we be.

(ii) Our words will not stop any department which has a reasonable case from putting proposals to us for award of as many personal pay points as they think fit. His words, if they have any effect on this at all, will simply make it more difficult for departments to defend their decisions to those of their lawyers they leave out.

(iii) There is a real management point here. It is our expectation that only a minority will get personal pay points across the service as a whole. This is not because we have made up our minds in advance. It is because we did a quick check before the Ministerial meeting of what departments thought they were likely to want to do, and that is the sum total of what they told us. There are large groups of lawyers, including the CPS and the Revenue departments, where only a handful of awards are likely, to counterbalance a few, principally the DTI, where a majority might get them. That being so, we do not do anyone a service if we allow expectations to be raised which have only to be subsequently dashed. We could end up with a worsening of morale among lawyers rather than an improvement.

(iv) There are also other audiences to bear in mind. Explaining to other groups at this level why lawyers should be singled out for exceptional treatment is not going to be easy. In a small way, the reference to rigor and selectivity is intended to help in this respect. Applying the criteria "scrupulously" does not have anything like the same ring about it.

10. I am sorry to have to bring this apparently small point to you. But I do not think we can concede the Attorney's point. We have already gone some way to try to help him, and I do not think we should go any further. I fear that a meeting will probably be necessary. Your office are trying to set one up for tommorrow morning.

11. Depending on the outcome of your discussion, there may need to be consequential changes to the draft of the guidance to Departments.

12. There is a further point about the statement which I ought to draw to your attention. We have begun consultations with the TSRB about the proposals affecting grades 2 and 3 but have not completed them. The draft refers to this and says simply that the Government will delay responding to this report until the consultations are complete.

13. This could take a little time. The TSRB have taken umbrage about the fact that we did not take them into our confidence at an earlier stage, and some at least of them feel that the scale of what we are proposing on lawyers casts doubt on some of the recommendations in their current report. At one state there was a possibility that report would be delayed, and rewritten. It appears that we have averted that. But there are some fences to be mended.

14. The Attorney is aware of this background and is not making any difficulties. But we will have to come back to it.

C W KELLY

ANNEX A

DRAFT WRITTEN ANSWER

No changes proposed

Last year I asked Sir Robert Andrew to undertake a Review of Government Legal Services and to make recommendations on what legal services the Government needs, how they can be provided most effectively and economically and what changes are needed in the management of legal staff so as to make best use of them. Sir Robert's report is being published today. Copies have been placed in the Library of the House.

2. Sir Robert Andrew concludes that the Government continues to need a wide range of legal services provided to a high standard and that the need for them is likely to go on increasing. He considers it likely that the bulk of these services will continue to be provided within Government, but departments should decide on cost-effectiveness grounds whether to meet their needs in government or outside. He suggests that some of the bodies providing services of a legal nature direct to the public might become executive agencies and that the relocation of some work out of London should prove cost-effective. The Government accepts these conclusions.

3. The Report proposes some adjustments in organisation to improve the effectiveness of legal services. In the light of these recommendations, I have decided to make the following changes in England and Wales. Under the ministerial direction of the Attorney General, the Treasury Solicitor will become the Head of the Government Legal Service. As Head of Profession he will advise on the personnel management of lawyers across Departments, and will be supported in this by a new Lawyers' Management Unit.

The present Law Officers' Department will be renamed the Legal Secretariat, and the legal departments for which the Attorney General is the ministerial head (the Treasury Solicitor's Department, the Legal Secretariat, the Crown Prosecution Service, and the Serious Fraud Office) will be know collectively as the Law Officers' Departments. The Lord Chancellor's Department will take over responsibility for the Statutory Publications Office from the Treasury Solicitor's Department.

4. The Report makes a number of recommendations aimed at improving the management of lawyers. The Government accepts these recommendations and agrees that greater effort needs to be put into recruitment and that the areas of recruitment should be broadened. It believes that the Government Legal Service as a whole will benefit from more coordinated personnel management and from improved training and career management. The new Lawyers' Management Unit will have a key role in helping the Treasury Solicitor as Head of Profession work with Departments in implementing the report's recommendations.

5. Sir Robert Andrew also makes a number of recommendations to improve the pay of lawyers. The Government welcomes his emphasis on the need for selectivity in considering special pay treatment for lawyers, which is consistent with the Government's policies on pay [in the public services]. It also recognises the Government's comparatively greater difficulties of recruiting and retaining lawyers in London, which have already led to the establishment of special London pay scales for lawyers at grades 6 and 7 from April 1988.

6. Lawyers at grades 2 and 3 form part of the Senior Open Structure, whose pay is decided by the Government on the recommendation of the Top Salaries Review Body. The Government is consulting the TSRB about the recommendations which affect these grades and will respond to this part of the report when it has received the TSRB's views.

7. Subject to consultations with the unions, the Government proposes to respond to the recommendations on the pay of grades below the Senior Open Structure as follows.

8. Around £2,500 a year will be added to the pay of all lawyers in grades 4 and 5 working in London. For grade 5 this will take the form of two points on the pay scale. Staff at grade 4 will receive a £2,500 allowance.

9. In addition, it is proposed that up to three points on the scale should be made available as personal pay points for certain grade 5 lawyers selected on the basis of their skills, experience, marketability and value to the department.

10. The Government regards it as important that all at grade 5 should be eligible for performance pay. For lawyers (including those in London) without personal pay points, up to four performance points will continue to be available. For those on the highest personal point, it is proposed that two should be available. Broadly similar treatment will be applied to grade 4.

11. Lawyers in grades 5 to 7 are covered by the long term pay agreement of July 1988, under which these grades will receive pay

increases of 4 per cent from 1 April 1989, and further increases on 1 August 1989 under a settlement informed by a survey of pay levels in the private sector.

12. The Government does not propose to make personal pay points available at grades 6 and 7. But grade 6 lawyers in London will receive an additional scale point, worth around £1,000.

13. It is proposed to make these changes to pay in response to Sir Robert Andrew's recommendations from 1 April 1989.

12 January 1989

ANNEX B
Changes shown

A MESSAGE TO GOVERNMENT LAWYERS FROM THE HEAD OF THE GOVERNMENT LEGAL SERVICE

Sir Robert Andrew's Report on his Review of Government Legal Services

Sir Robert Andrew's Report has been published today, 19th January, and the Government's response to his recommendations has been announced by the Prime Minister in her Answer to a PQ. A copy of that Answer is attached. Each Department has been sent three copies of the Report, which runs to over one hundred pages, and further copies can be obtained from HMSO.

Sir Robert was asked to undertake a Review with these terms of reference:-

"to consider:

1. what legal services are needed by the Government;

2. how these services can most effectively and economically be provided and organised, taking accounting of the Government's policies of privatisation and of contracting out;

3. what changes are needed in the management of legal staff in Government service, including their recruitment, retention, training, deployment and remuneration, so as to make best use of them;

and to make recommendations."

He devoted nearly eight months to the Review and consulted widely (the list of those he saw takes up over seven pages of the Report). It is greatly to the credit of government lawyers that he was able to write "I heard much praise for the quality of service provided by government lawyers and comparatively little criticism. I conclude that for the most part they provide a very good service at low cost." He added, however, this warning, "But there are not enough of them to cope with the increasing workload and there are worries about whether quality can be maintained in future." (Para 12.4).

I set out below a brief summary of Sir Robert's principal recommendations and the Government's response to them.

Organisation

The bulk of the Government's legal work will continue to be done within the Service. Departments are encouraged to consider contracting work out if the necessary expertise is not available within the Service, or the Service could not do the work without undue delay or it is more cost-effective to use the private sector. Departments which have their own legal teams will continue to have them and the Treasury Solicitor's Department will continue to provide teams for the other Departments but moving to a repayment basis. Departments are to consider agency status where appropriate and relocation outside London where this would be cost-effective.

Sir Robert made some recommendations about the organisation of Legal Departments. In response to these the Government have decided that the Departments for which the Attorney General will have Ministerial responsibility are to be known as the Law Officers' Departments (these are the Treasury Solicitor's Department, the Law Officer's Department - to be known in future as the Legal Secretariat to the Law Officers - the Crown Prosecution Service and the Serious Fraud Office). The Government has not

accepted Sir Robert's recommendation to add to this list Parliamentary Counsel's Office and the Office of the Northern Ireland Director of Public Prosecutions.

Personnel Management

Sir Robert recommended that the Treasury Solicitor should become Head of the Government Legal Service and the Government has accepted this recommendation. As Head of Profession I shall be required to advise on the personnel management of lawyers across Departments in order to improve succession planning, bring about better career management and provide the ability to negotiate staff transfers between Departments to cope with changing priorities and fluctuating workloads. I believe that this can be done without damaging the present arrangements under which many lawyers join the staff of a particular Department because the work appeals to them and they wish to make their career there. It should, however, provide opportunities for others to broaden their experience. To support me in this work I shall need a Lawyers' Management Unit which will for convenience be housed in Queen Anne's Chambers. It will be headed at Grade 5 by Margaret Harrop who will be seconded from the Treasury. She will begin this work next month and I believe that we are fortunate to have secured the services of someone with wide experience of personnel management. She will be involved in the selection of further staff for the Unit.

One important role for the Unit will be to carry forward Sir Robert's recommendations on recruitment, training and career development. We all have a part to play in ensuring that we recruit the reinforcements that we so much need. Advertising campaigns must be supported by our own efforts to tell young lawyers about the interesting work that is done by lawyers in the Government Service. Sir Robert reveals a sad story of misunderstanding about our work - the majority do not know of our existence, while many think that the work is boring and not for the able lawyer. We know better but we

must not let modesty make us keep this knowledge to ourselves.

Further details about how the Lawyers' Management Unit will operate will be circulated to Departments later.

Job Satisfaction

Sir Robert made a number of recommendations aimed at improving job satisfaction for lawyers. Those about rights of audience will have to be considered later in the context of wider issues discussed in the Lord Chancellor's forthcoming Green Paper on the Legal Profession. However, any movement forward on this must improve the overall quality of work and hence job satisfaction for many Government lawyers. This is not the only aspect of making better use of lawyers on which Sir Robert has commented. In particular, he notes that the quality of legal services is best where lawyers and administrators work closely together, with the lawyers being brought into discussions at an early stage. In policy areas this is already encouraged and Permanent Secretaries are being urged to seek further integration of lawyers and administrators. As Sir Robert remarked, there should not be two separate cultures, but he warned against using the scarce skills of lawyers on tasks that could equally well be done by administrators.

Pay

Chapter VIII of the Andrew Report is about pay. Sir Robert stated that "Those who join the Government Legal Service do not expect to match the highest financial rewards attainable in the City or at the Bar. They have probably been attracted by other features, such as the interest and variety of the work; and they recognise that some allowance must be made for the greater stability and security of the public service" (Para 8.10) but concluded that if the gap between the private and public sectors becomes

too wide, sufficent good quality recruits will not come forward and an increasing number will leave in mid-career. The Government's response to his recommendations on pay is contained in the Prime Minister's statement. As Sir Robert anticipated (Para 8.33) the recommendations about Grades 2 and 3 are the subject of consultation with the TSRB and nothing further can be said about them at this stage. At lower levels it is proposed that all lawyers in Grades 4 and 5 working in London will receive an increase of around £2,500. Lawyers in these Grades across the country will be eligible for one, two or, in some cases, three additional personal pay points on a selective basis related to their skills, experience, marketability and value to their department. It is expected that there will be considerable variation between departments in the proportion of individuals awarded personal points. The Treasury does not propose to impose any rigid quotas but intends that departments should apply the criteria rigorously and selectively. Lawyers in these grades will continue to be eligible for performance pay. The Government proposes that lawyers in Grade 6 working in London should receive an additional "spine point" worth around £1,100. It is intended that these changes should take effect from 1 April 1989.

These are personal pay points and the usual Treasury principles about the application of criteria for selection will apply. There will however be no departmental quotas and it is expected that there will be considerable variation between departments.

The Future

Sir Robert Andrew has signposted the road to a better future for the Government Legal Service. The Government has welcomed his report and made proposals for improving pay. It is now up to us to do what we can to ensure that the Service of the future is even better than that in which we have been proud to serve.

ANNEX C

DRAFT OF 9.1.1989
Changes shown

CONFIDENTIAL

DRAFT DEO LETTER

LAWYERS' PAY: PERSONAL PAY POINTS

1. The Government's response to the recommendations on pay in Sir Robert Andrew's report on the Government legal service (copy attached) accepted that there should be up to three spine points available for selective pay increases for Grade 5 lawyers, [and that there should be greater use of personal pay points on a selective basis for grades 2 and 3]. This letter gives further details of how these arrangements should be operated.

Basis of Awards

2. Decisions about personal pay points should be taken by the head of department, on the advice of the PEO, and require the prior approval of the Treasury. The basis of the award should be the employing department's need to retain and motivate particular individuals. Decisions will therefore reflect the ability, skill and specialised experience of the individual and the demands of the job, in the context of the department's needs at the time and the availability of staff to meet those needs.

3. There is no rigid departmental quota on the award of personal pay points. Experience across departments is likely to vary considerably. But departments should be

CHANGE AGREED: strict in applying

~~as rigorous as possible in applying~~ the criteria and should bear in mind that the intention is that the new arrangements should be applied selectively. The Treasury expects that this implies that only a minority will be affected across the service as a whole.

4. Three personal points will be available for each of grades 2 to 5. It is expected that the award of two points will be less frequent than of one, and of three less frequent than of two.

5. Personal points are awarded on the basis of existing salary scales. They can be removed on a mark time basis in the event of subsequent adjustment of these scales.

6. Account should be taken of promotions. It would be unusual, particularly at senior levels, for personal points to be awarded immediately on or soon after the promotion of an individual. But further payments might be made after an interval, reflecting the increasing value of the individual to the department.

7. Personal pay points will be pensionable. They will be portable on a mark time basis if the individual concerned ceases to meet the criteria under which the personal pay point or points were originally awarded. Personal points can be withdrawn if performance falls below satisfactory standards.

Performance Pay

8. Performance pay will continue to be available to all those in receipt of personal pay points on a modified basis as follows.

Grade 5

9. For Grade 5 lawyers in London a maximum of two performance points will be available to those in receipt of three personal pay points. Grade 5 lawyers in London with one or two personal pay points and those outside London in receipt of one, two or three personal pay points will be eligible for three additional performance points. The effect, as shown in the following table, will be that lawyers without personal pay points will be able in time through good performance to achieve salaries not that far below those benefiting from them.

Points available on top of basic scale

(i) In London

2 London	2 London	2 London	2 London
3 personal	2 personal	1 personal	0 personal
2 performance	3 performance	3 performance	4 performance
7	7	6	6

(ii) outside London

3 personal	2 personal	1 personal	0 personal
2 performance	3 performance	3 performance	4 performance
5	5	4	4

10. In each case where personal points are awarded the criteria for the award of performance points will be as for the upper points in the normal grade 5 range, ie eligibility will be determined by one box 1 marking received after spending 12 months on the maximum of the scale, or three consecutive box 2 markings all received after being on the top of the scale for at least 12 months, with the final performance point only available to those in receipt of box 1 markings. Those already in receipt of performance points when these new arrangements are introduced will continue to hold them.

11. The relevant part of the grade 5-7 spine, which will be extended with effect from 1 April 1989 to take account of these new arrangements, is shown at Annex A. [The new points 23-25 will not form part of the normal range for grade 5.]

Grade 4

12. There is, at present, no comparable spine for grade 4. But proposals for similar treatment for grade 4 lawyers analogous to those for grade 5 can be put forward by departments to the Treasury.

[Grades 2 and 3

13. All three existing discretionary pay points can be used as personal pay points at grades 2 and 3. The existing scales as at 1 October 1988 are shown at Annex B. To ensure that at least one performance

related point is available in principle to everyone, an additional point will be added to the top of both grade 2 and grade 3 scales for this purpose only with effect from 1 April 1989. (This point will be available to all in the Senior Open Structure, not just to lawyers.) The new scales will be determined in the light of the recommendations of the report from the TSRB expected shortly. Those in receipt of personal pay points can continue to be considered for discretionary increments in the normal way and subject to the normal procedure.]

Promotion

[14. Reference to starting pay on promotion.]

Procedure

15. Decisions about the payment of personal pay points require the prior approval of the Treasury. Proposals should be made to the head of the Pay Group, copied to the Head of the Government Legal Service. In the case of lawyers at Grade 5 it will be sufficient for departments to indicate the overall approach they intend to adopt, its justification, and the numbers who would consequently be expected to be awarded single points or multiple points respectively. Departments will also need to provide an annual return of the number of points awarded. All proposals affecting Grades 2, 3 and 4 need to be approved individually.

Monitoring and Running Costs

16. The Treasury will continue to monitor the application of the arrangements to ensure that, as it

develops, the criteria are rigorously and consistently applied and that the overall cost is contained within what can be afforded. Costs are to be met from within running costs limits.

Timing

17. The operative date for the payment of all personal pay points, as for the increases in respect of London at Grade 5 and Grade 6, is 1 April 1989.

Confidentiality

18. The award of personal pay points should be regarded as confidential to the recipient. No information about the scale of awards in individual departments should be made available. Information about the overall scale of awards across the service will be made available centrally in due course. There will be no special arrangements for appeals against non-award.

ANNEX A: GRADE 5 PAY SPINE AS AT 1.4.89

	Spine point	Salary
Grade 5 minimum	15	28,170
	16	29,280
	17	30,425
Normal scale maximum	18	31,602
	19	32,826
New normal scale maximum in London	20	34,095
	21	35,415
	22	36,766
New scale maximum in London with maximum selectivity	23	38,210
	24	39,688
New range maximum in London	25	41,225

ANNEX B: GRADES 2 AND 3 PAY RATES AS AT 1.10.88

	£
Grade 2	45,800
	48,000
discretionary	50,600
increments	53,800
	57,000
Grade 3	35,800
	37,400
	39,000
discretionary	41,100
increments	43,200
	45,300

LORD CHANCELLOR

HOUSE OF LORDS,
LONDON SW1A 0PW

CH/EXCHEQUER

REC.	13 JAN1989
ACTION	FST
COPIES TO	

12 January 1989

Ch / To be aware. Other letters from Ld. Mackay on separate strings, behind.

Dear Norman,

The Forthcoming Green Papers

Thank you for your letter of 11 January 1989.

Work and Organisation of the Legal Profession

(a) Lay Advocacy

The paragraph on lay advocacy (5.9) deals with rights of audience for lay representatives and for those who are specialist practitioners in a particular field, but who are not lawyers (for example, patent agents). It does not, however, draw any distinction, as you suggest, between those who offer their services for reward and those who do not, although the Advisory Committee may wish to address this point when they come to consider this area. Your particular concern seems to be to safeguard the existing rights of audience enjoyed by some Government officials, even though they do not possess legal qualifications. Such staff are covered not by paragraph 5.9, but by paragraph 5.39, which it was decided at the last meeting of the inter-departmental working party should be changed to make it clear that all those who already had limited rights of audience (which includes Government officials), when the new arrangements were introduced, would be entitled to retain these. I envisage asking the Advisory Committee to advise me as an early priority on what should be the appropriate continuing arrangements to ensure that practitioners of these kinds continue to be granted advocacy certificates after the new arrangements come into force.

.../continued

The Rt Hon Norman Lamont MP
The Financial Secretary to the Treasury
Treasury Chambers
Parliament Street
London SW1P 3AG

(b) Employed Lawyers

Paragraph 5.12 was changed after the last meeting of the inter-departmental working party so as simply to state the need to satisfy the Philips principle, which you endorse, without attempting to indicate at this stage whether any particular Government Department's arrangements satisfied that principle. It may be that the departments you mention do satisfy the principle, but I do not think it is necessary to try to settle that question in respect of each and every department at the moment. The last four lines of the paragraph are intended only to offer another option to any department, which wishes to extend its rights of audience, but finds it impractical to order its own business in such a way that it can meet the Philips principle.

The words "appear to" do not appear in the last sentence of paragraph 5.11; and I think you rather have in mind paragraph 5.10. I would, however, prefer to retain these words, since this change will be very controversial in some quarters. We ought therefore to be seen to be consulting on this issue.

Conveyancing by Authorised Practitioners

The proposal contained in paragraph 1.3 of this Green Paper to invite views on whether authorised practitioners might be required not to subsidize the provision of conveyancing services from their other activities was agreed at official level after considerable discussion. As that paragraph makes clear, I think we need to demonstrate our concern to see that the many independent solicitors and licensed conveyances spread throughout the country can compete with the big lending institutions on a fair basis. The many small firms of solicitors and licensed conveyancers throughout the country will be particularly anxious for reassurance that they will not be at risk from predatory pricing, and from artificial loss leaders from the big institutions, which are designed to drive them out of the conveyancing business so that the institutions can have the field to themselves. They will suggest that, if this were to happen, the availability of legal advice and legal services generally on a local basis would be put at risk. That in turn would, in my view, substantially diminish enthusiasm for these reforms among our supporters in the country and, indeed, in the party generally.

You do not explain why you believe this proposal to be unworkable, but, if this is the case, it will surely become apparent as an outcome of the consultation process. In that situation it would then appear more reasonable for us not to pursue this idea. You mention several reasons why lenders are unlikely in any event to want to provide a subsidized conveyancing service to their borrowers. If that is the case, and if the proposal is in fact a feasible one, they ought not significantly to oppose a condition whose imposition they would not in truth find to be a real constraint.

For these reasons, particularly that of ensuring a good reception for these proposals among our supporters, I wish this consultation proposal to remain in the paper on the lines already agreed.

My final proposal is much narrower than you have suggested. I do not propose that a lender should be required to offer to include the conveyancing fee as part of the loan. What our officials have agreed should be included in paragraph 1.3, as a point for consultation, is the suggestion that, where a lending institution has already declared itself willing to offer the borrower the opportunity to include the conveyancing fee as part of the loan, that facility should be available, whether the borrower then chooses to use that lending institution to carry out the conveyancing work or an independent conveyancer. Again I wish to include this to demonstrate our view that there should be a level playing field for all. I quite accept, for the reasons you give, that lenders may not often be prepared to advance additional amounts to cover conveyancing fees. That would substantially reduce the number of occasions on which this suggestion would be given practical effect; and again any opposition to it from lending institutions should be correspondingly low.

Copies of this letter go to the Prime Minister, to members of E(CP), to the Home Secretary, the Secretaries of State for Education and Science, Scotland and Northern Ireland, the Attorney General, the Leaders of both Houses, the Chief Whip, the Director General of Fair Trading and Sir Robin Butler.

Yours ever,

James.

CONFIDENTIAL

Secretary of State
Rt Hon the Lord Mackay of Clashfern
Lord Chancellor
House of Lords
LONDON
SW1A 0PW

Northern Ireland Office
Stormont Castle
Belfast BT4 3ST

12 January 1989

Dear Tom,

GREEN PAPER ON THE LEGAL PROFESSION

I have seen your Private Secretary's letter of 30 December enclosing drafts of the three Green Papers and I have no objection to the manner in which you wish to proceed.

Insofar as Northern Ireland is concerned, almost all of the issues dealt with in the Green papers in relation to England and Wales have parallels in Northern Ireland. Accordingly I propose to institute similar consultations in Northern Ireland. I intend that the three Green Papers will be issued accompanied by "Northern Ireland Supplements" for the assistance of consultees in the Province. I would like to stick as closely as possible to the same timetable as you have in mind; this would enable the results of consultation in both jurisdictions to be considered simultaneously, which would be a benefit.

I am copying this letter to the Prime Minister, members of E(CP), Malcolm Rifkind, Patrick Mayhew and Sir Robin Butler.

Yours

TK

CONFIDENTIAL

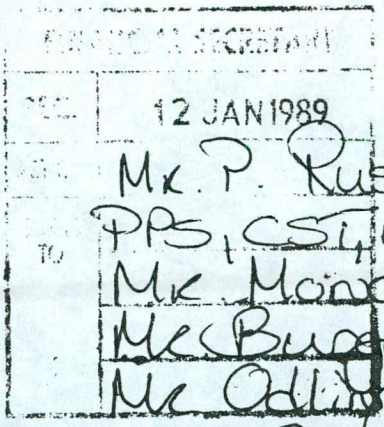
KS 18882

N 8

S/190

12 JAN 1989

HOUSE OF LORDS,
LONDON SW1A 0PW



12 January 1989

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cc Mr. J. Unwin C+E
Sir A. Battishill - IL

.../continued

The Rt Hon Norman Lamont MP
The Financial Secretary to the Treasury
Treasury Chambers
Parliament Street
London SW1P 3AG

(b) Employed Lawyers

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Yours ever,

James.

0477A/2

DEPARTMENT OF HEALTH AND SOCIAL SECURITY
Richmond House, 79 Whitehall, London SW1A 2NS
Telephone 01-210 3000

From the Secretary of State for ~~Social Services~~ Health

The Rt Hon Lord Young of Graffham
Secretary of State for Trade and Industry
Department of Trade and Industry
1-19 Victoria Street
LONDON
SW1H 0ET

12 January 1989

Ch/ Other Ministers comments also behind.

Dear David,

I am responding to your letter of 20 December to Nigel Lawson about restrictive trade practices and the professions. My main concern is, of course, the application of your proposals to the professions concerned with health care.

I fully share your concern that the Lord Chancellor's Green Paper on the legal profession should reflect the government's general stance on restrictive practices, as set out in last year's RTP Green Paper. However, I must register my concern over your proposal that decisions on some of the more detailed aspects of RTP policy as it affects the professions, for instance the precise form of the exemption criterion, should be taken in such haste before they have been properly considered at official or ministerial level. You will recall that Tony Newton wrote to you in July last year to draw your attention to the special position of health professionals, and more recently my officials have been in touch with yours with detailed comments on this issue.

My main concern is over the proposal to base the exemption criterion, against which restrictive practices with an anti-competitive effect would be judged, solely on Article 85(3) of the Treaty of Rome. On this criterion, exemptions would have to demonstrate that they contributed either to "the production on distribution of goods or to promoting technical or economic progress ...". This is not a full or sensible criterion to judge, for instance, all professional practices. The legal and medical profession do have some practices which genuinely do safeguard the client and patient but have the effect of restricting competition. For example, I would oppose any suggestion that medical specialists should advertise directly for patients or offer consultations without referral by a GP. The GP has to decide which specialty is the one most suitable for the patient's condition and to assess the most sensible and cost-effective route to treatment. Unscrupulous specialists taking patients directly could sell unnecessary high cost tests and procedures to patients who themselves were quite unable to make a sensible decision about the need for consultant

E.R.

advice and treatment. I am not arguing that any professional practices should escape scrutiny, merely that they should be judged against a sensible criterion. One possibility might be to widen the criterion to allow practices intended to protect the health and well-being of consumers where it could be demonstrated that the benefits of so doing outweighed the adverse effects of restricting competition.

I am copying this letter to the recipients of yours.

Yours ever,

KENNETH CLARKE

dti

the department for Enterprise

The Rt. Hon. Lord Young of Graffham
Secretary of State for Trade and Industry

The Rt Hon Nigel Lawson MP
Chancellor of the Exchequer
HM Treasury
Parliament Street
LONDON
SW1P 3AG

CH/EXCHEQUER

REC.	12 JAN1989
ACTION	FST
COPIES TO	

12/1

Department of Trade and Industry

1-19 Victoria Street
London SW1H 0ET

Switchboard
01-215 7877

Telex 8811074/5 DTHQ G
Fax 01-222 2629

Direct line 215 5422
Our ref PB3AJD
Your ref
Date 12 January 1989

Ch.

Officials' advice for FSTs reply to Mr Rifkind's letter (behind) is along similar lines to this letter. I have asked FSTs office to ensure that this latest letter is taken on board.

12/1

L. YOUNG → CHEX 12/1

Dear Nigel,

COMPETITION IN THE LEGAL PROFESSION : CONVEYANCING

Malcolm Rifkind sent me a copy of his letter of 20 December to you containing his proposals for a review of conveyancing services in Scotland.

Whilst I agree that there must be a full public debate and that all the options should be exposed, I do feel that the consultation paper should indicate the Government's view just as we agreed for the Green Paper on legal services in England and Wales. James MacKay has recently circulated his proposals which if accepted mean that as well as the system of licenced conveyancers we would have a system of authorised practitioners offering conveyancing in England and Wales.

I trust that Malcolm Rifkind's paper will state our dislike of the restrictive and anti-competitive status quo in Scotland. The argument in its favour is unconvincing. Even if conveyancing on the Sasines Register is too complicated for non solicitors to undertake, and that is not proven, it does not explain why authorised practitioners who employ solicitors would have any difficulty.

I believe we should indicate that we intend to take similar steps in Scotland as in England and Wales. This would suggest favouring option 4 which, as I understand it, would result in

there being conveyancers who would be entitled to practice either on their own account or to be employed by authorised practitioners. This option has the advantage that it both breaks the solicitors' monopoly and allows "corporate" conveyancing through the employment of qualified persons. In so doing it offers the widest possible choice to consumers in a properly regulated environment and outweighs the attractions of option 3 where solicitors, employed or independent, retain a monopoly until others are deemed competent on an as yet unspecified basis.

I appreciate that we are now working to very tight timetables but I do believe it is important that we made our intentions clear and therefore I hope that if necessary we shall be able to discuss these issues at E(CP) on 19 January which is also the deadline for discussion of the Lord Chancellor's papers.

I am sending copies of this letter to colleagues on H and on E(CP) as well as to James MacKay, Kenny Cameron and Sir Robin Butler who all received a copy of Malcolm Rifkind's letter.

Yours,
David

chex.ps/ds/49

CONFIDENTIAL

FROM: D I SPARKES
DATE: 13 January 1989

PS/PAYMASTER GENERAL

cc PS/Chief Secretary
Sir P Middleton
Mr Anson
Dame A Mueller
Mr Monck
Mr Phillips
Mr C D Butler
Mrs Case
Mr C W Kelly
Mr Harris
Mr Gieve
Ms Seammen
Mr Jordan
Mrs Harrop
Mr Flitton
Mr Barker
Mr Spencer - OMCS

ANDREW REPORT: PAY

The Chancellor has seen Mr Barker's minute of 11 January to the Paymaster General concerning publicity arrangements and is content with his proposals.

2. The Chancellor has also seen Mr Kelly's minute of 12 January to the Paymaster General concerning the remaining differences on lawyers' pay. He has comments that the amendments agreed between the Paymaster General and the Attorney General at their meeting this morning, of which you advised me on the telephone, adequately preserve the Treasury's position.

DUNCAN SPARKES

CONFIDENTIAL

PWP ACTION

FROM: C W KELLY
DATE: 13 JANUARY 1989

PS/Chancellor.

cc Dame Anne Mueller
Mrs Case
Miss Seammen
Mr Barker

Mr Saunders (Legal Secretary to Attorney General)

PAYMASTER GENERAL —

Ch/ Draft report to PM OK?
(You approved the two textual changes earlier today.

DIS

OK

✓ Spoke to PS/PMG 16/1 DIS

LAWYERS PAY

There remains one loose end following your meeting with the Attorney this morning, which is that you need to report back to colleagues on the various issues remitted to you for further discussion by the Prime Minister's meeting on 20 December.

2. I attach a draft.

3. I am sending a copy simultaneously to Mr Saunders, who will show it to the Attorney General. He will let your office have direct any comments the Attorney may have on the draft.

CWK

C W KELLY

DRAFT

PRIME MINISTER

ANDREW REPORT: GOVERNMENT LEGAL SERVICES

In your summing up of the meeting on 20 December to discuss Sir Robert Andrew Report you invited the Attorney General and myself to give further consideration to a number of points and to report back to colleagues when we had done so.

2. The most substantial of these points was the Attorney's proposal that three rather than two spine points should be awarded across the board to Grade 5 lawyers in London. I have discussed this further with him and he has now agreed - with some reservations - not to press this proposal in the light of the discussion we have had about the way in which the further selective increases at this level will be operated. We have agreed forms of words about this which are to be incorporated in the message to legal staff from the new Head of the Government Legal Service and in the Guidance to be given to Principal Establishment Officers in Departments.

CH/ You agreed these changes

3. We have also agreed that personal promotion from Grade 7 to Grade 6 should be available for lawyers both in the Crown Prosecution Service and elsewhere on the basis of new criteria recently agreed with Departments.

4. The final point remitted to us concerned the proposed treatment of Grade 2 and 3 lawyers. We have begun consultations about this with the TSRB, and I will report back on the outcome when these are concluded. The draft statement, a copy of which I attach, refers to the need for such consultation and says that we will defer responding to this part of the report until we know the TSRB's views.

5. I am copying this letter to the Lord Chancellor, the Foreign and Commonwealth Secretary, the Chancellor of the Exchequer, the Secretary of State for Northern Ireland, the Attorney General, the Lord Advocate and to Sir Robin Butler.

PAYMASTER GENERAL

To ask the Prime Minister whether Sir Robert Andrew's report of his Review of the Government Legal Services is to be published and if she will make a statement.

DRAFT WRITTEN ANSWER

Last year I asked Sir Robert Andrew to undertake a Review of Government Legal Services and to make recommendations on what legal services the Government needs, how they can be provided most effectively and economically and what changes are needed in the management of legal staff so as to make best use of them. Sir Robert's report is being published today. Copies have been placed in the Library of the House. [I am grateful to Sir Robert Andrew for the work he has put into the report.]

2. Sir Robert Andrew concludes that the Government continues to need a wide range of legal services provided to a high standard and that the need for them is likely to go on increasing. He considers it likely that the bulk of these services will continue to be provided within Government, but departments should decide on cost-effectiveness grounds whether to meet their needs in government or outside. He suggests that some of the bodies providing services of a legal nature direct to the public might become executive agencies and that the relocation of some work out of London should prove cost-effective. The Government accepts these conclusions.

3. The Report proposes some adjustments in organisation to improve the effectiveness of legal services. In the light of

these recommendations, I have decided to make the following changes in England and Wales. Under the ministerial direction of the Attorney General, the Treasury Solicitor will become the Head of the Government Legal Service. As Head of Profession he will advise on the personnel management of lawyers across Departments, and will be supported in this by a new Lawyers' Management Unit. The present Law Officers' Department will be renamed the Legal Secretariat to the Law Officers, and the legal departments for which the Attorney General is the ministerial head (the Treasury Solicitor's Department, the Legal Secretariat to the Law Officers, the Crown Prosecution Service, and the Serious Fraud Office) will be known collectively as the Law Officers' Departments. The Lord Chancellor's Department will take over responsibility for the Statutory Publications Office from the Treasury Solicitor's Department probably in April 1990.

4. The Report makes a number of recommendations aimed at improving the management of lawyers. The Government accepts these recommendations and agrees that greater effort needs to be put into recruitment and that the areas of recruitment should be broadened. It believes that the Government Legal Service as a whole will benefit from more coordinated personnel management and from improved training and career management. The new Lawyers' Management Unit will have a key role in helping the Treasury Solicitor as Head of Profession work with Departments in implementing the report's recommendations.

5. Sir Robert Andrew also makes a number of recommendations to improve the pay of lawyers. The Government welcomes his emphasis

on the need for selectivity in considering special pay treatment for lawyers, which is consistent with the Government's policies on pay. It also recognises the Government's comparatively greater difficulties of recruiting and retaining lawyers in London, which have already led to the establishment of special London pay scales for lawyers at grades 6 and 7 from April 1988.

6. Lawyers at grades 2 and 3 form part of the Senior Open Structure, whose pay is decided by the Government on the recommendation of the Top Salaries Review Body. The Government is consulting the TSRB about the recommendations which affect these grades and will respond to this part of the report when it has received the TSRB's views.

7. Subject to consultations with the unions, the Government proposes to respond to the recommendations on the pay of grades below the Senior Open Structure as follows.

8. Around £2,500 a year will be added to the pay of all lawyers in grades 4 and 5 working in London. For grade 5 this will take the form of two points on the pay scale. Staff at grade 4 will receive a £2,500 allowance.

9. In addition, it is proposed that up to three points on the scale should be made available as personal pay points for certain grade 5 lawyers selected on the basis of their skills, experience, marketability and value to the department. Broadly similar treatment will be applied to Grade 4.

10. The Government regards it as important that all at grade 5 should be eligible for performance pay. For lawyers (including

those in London) without personal pay points, up to four performance points will continue to be available. For those on the highest personal point, it is proposed that two should be available. ~~Broadly similar treatment will be applied to grade 4.~~

11. Lawyers in grades 5 to 7 are covered by the long term pay agreement of July 1988, under which these grades will receive pay increases of 4 per cent from 1 April 1989, and further increases on 1 August 1989 under a settlement informed by a survey of pay levels in the private sector.

12. The Government does not propose to make personal pay points available at grades 6 and 7. But grade 6 lawyers in London will receive an additional scale point, worth around £1,000.

13. It is proposed to make these changes to pay in response to Sir Robert Andrew's recommendations from 1 April 1989.

13 January 1989

Robert 01.12.1.89

CC: PS/CHANCELLOR, 2
PS/CST, PS/EST,
PS/Sir P. MIDDLETON, 67 16/1
Mr MONCK, Mrs CASE,
Mr BURR, Mr P. RUSSELL,
Ms YOUNG, Mr KERLEY,
Mr G. DICKSON,
Mr ODLING-SMEE,
Mr TYRIE, MR CALL -

RESTRICTED

FINANCIAL SECRETARY TO THE TREASURY

Treasury Chambers, Parliament Street, SW1P 3AG

The Rt Hon Malcolm Rifkind QC MP
Secretary of Scotland
Dover House
Whitehall
LONDON SW1

13th January 1989

Dear Malcolm

COMPETITION IN THE LEGAL PROFESSION: CONVEYANCING

You wrote to Nigel Lawson on 20 December about your proposals for a review of conveyancing services in Scotland. I have also seen James Mackay's response of 9 January and David Young's letter of 12 January.

As you are aware, James Mackay proposes to publish his consultation paper on conveyancing by authorised practitioners in England and Wales this month. The paper will give a clear commitment to legislate to permit a system to be implemented for banks, building societies, other institutions and individuals to provided conveyancing services for their clients. Those who comply with the proposed conditions will become authorised practitioners.

I can appreciate your desire to stimulate as wide ranging a public debate as possible. But unlike James Mackay's paper, you are not planning to indicate the Government's preferred approach. A wide range of options is not necessary to meet the public interest: your intermediate options which fall short of both complete deregulation and maintaining the status quo are satisfactory in this respect. Options (iii) and (iv) in your letter would lead to a scheme very similar to that proposed by James Mackay for England and Wales.

As well as setting out clearly the Government's approach, I agree with David that it would be desirable for the main options to be identifiably similar to those proposed for England and Wales. Although the consultation in Scotland may be on a different basis, I believe that, at the end of the day, it makes considerable sense to have Scotland, England and Wales all adopt a broadly similar system. This is the best way to encourage national institutions to operate in all countries, thus increasing the competition for provision of conveyancing services.

If you have any problems with my suggestions, perhaps we can discuss them at E(CP) ON 19 January. I am copying this letter to colleagues on H and on E(CP), and to James Mackay, Kenny Cameron and Sir Robin Butler.

Yours ever

Norman

NORMAN LAMONT

SF/Conf/10

RESTRICTED

Department of Employment
Caxton House, Tothill Street, London SW1H 9NF

Telephone 01-273 . . 5803.
Telex 915564 Fax 01-273 5821

Secretary of State

The Rt Hon Lord Young of Graffham
Secretary of State for Trade and Industry
1-19 Victoria Street
LONDON
SW1H OET

Dear David.

LEGAL PROFESSION GREEN PAPER - APPROACH TO COMPETITION, RESTRICTIVE TRADE PRACTICES AND THE PROFESSIONS

In your letter of 20 December to Nigel Lawson, you proposed that the draft Green Paper on the legal profession should indicate that there would be no exclusion for the professions in the new legislation on restrictive trade practices.

My Department has become increasingly convinced that there is a strong link between competition in the provision of goods and services and flexibility in the labour market, with beneficial employment consequences. I see no reason why this should not also be true of the professions and support your proposal.

I am copying this letter to the recipients of yours.

NORMAN FOWLER

he.dc/russell.p/green

PWP

FROM: P RUSSELL
DATE: 16 JANUARY 1989

1. MRS CASE
2. FINANCIAL SECRETARY

cc: Chancellor ✓
Chief Secretary
Paymaster General
Economic Secretary
Mr Monck
Mr Burgner
Mr Odling-Smee
Mr Mortimer
Mr Culpin
Mr Dickson
Mr Kerley

Mr J B Unwin
Sir A Battishill

RESTRICTIVE PRACTICES IN THE LEGAL PROFESSION: FORTHCOMING GREEN PAPERS

The Lord Chancellor's letter of 12 January is a swift response to your letter of 11 January expressing concern at one or two aspects of the Lord Chancellor's draft Green Papers on the Work and Organisation of the Legal Profession and Conveyancing by Authorised Practitioners. This submission has been prepared in collaboration with FIM Division.

Line to take

2. You are advised to acknowledge the assurances given by the Lord Chancellor in respect of rights of audience and to leave the points on conveyancing to the process of consultation. There would be advantage in placing your understanding of these assurances on the record before the draft papers are discussed by Cabinet on 19 January.

The Work and Organisation of the Legal Profession (Rights of Audience)

3. In your letter of 11 January you expressed concern about the adverse effect that the rights of audience chapter could have on the current practice of Inland Revenue and HM Customs of using their own (non-lawyer) staff to prosecute in the courts. The Lord Chancellor bases his assurance that existing rights of audience held by some Government officials would be retained on paragraph 5.39 of the draft Green Paper. He adds that he envisages asking the expanded Advisory Committee to advise him as an early priority

on the precise arrangements to ensure the continuing grant of advocacy certificates to such staff. There is something of a misunderstanding here - probably the result of hasty drafting - since advocacy certificates are not issued under the present arrangements. But the intention not to interfere with Revenue's and Customs' present practice is clear and could perhaps simply be secured in the future by granting advocacy certificates to people authorised by reference to, say, s.155 of the Customs and Excise Management Act 1979.

4. On the subject of rights of audience for Government Departments' own lawyers, the concerns you expressed on behalf of Inland Revenue and HM Customs were echoed by Lord Young and Mr Moore in respect of their own Departments. The Lord Chancellor is sticking to the Philips principle of separation of the investigative process from the prosecution process, and is not disposed to question that Inland Revenue and HM Customs already satisfy that principle (indeed, if the Attorney General's own Serious Fraud Office can satisfy Philips, it is difficult to see how any other Department could fail to do so - and it is the Attorney General who has been making the running on this point).

Conveyancing by Authorised Practitioners

5. In his letter the Lord Chancellor also refers to two points of disagreement in his conveyancing paper. The first is a suggested condition that the authorised practitioners do not cross-subsidise their conveyancing services. The second is a further suggestion that where a lender offers to roll-up the conveyancing fee into the loan, he does so whether the borrower uses his conveyancing services or those of an independent solicitor. The Lord Chancellor wish to retain both proposals in the paper.

6. The proposal on cross-subsidisation was opposed strongly at official level both by ourselves and by the Office of Fair Trading. A comprehensive case was made for the impracticality of such a condition and the Lord Chancellor is no doubt aware of the arguments. Lord Young's letter to him of 11 January records a number of reasons that would make the condition difficult to implement. Lord Young, nevertheless, appears content to include the suggestion in the paper. The Lord Chancellor replied on 12 January that he would not pursue the proposal if it was shown during the consultation to be unworkable.

7. The Lord Chancellor also wishes to retain the suggestion that lenders offering to roll-up the conveyancing fees do so irrespective of the conveyancer used by the borrower. The Building Societies Commission and the Bank of England advised that this was an unacceptable imposition on the normal rights of a lender. If the condition is included in the consultation paper, the financial institutions will make this quite clear themselves.

8. The Lord Chancellor argues that both proposals should be included to demonstrate to solicitors that they will not be at risk from large institutions and that they will also be necessary to ensure a good reception for the proposals amongst supporters. However, the good reception would be very short-lived, and could be replaced by uncertainty and anxiety amongst solicitors, if the financial institutions made clear, as we would expect, that the proposals were unworkable, or unduly restrictive. The building societies have complained that, some two years after the Building Societies Act 1986 came into effect, Regulations have still not been made under that Act, by the Lord Chancellor, to allow them to offer conveyancing. Any hint of restrictions in the ability of the financial institutions to compete with solicitors will be met with accusations of over-protection of the legal profession.

Recommendation

9. On rights of audience, there would be advantage in making clear to the Lord Chancellor that Departments will expect no reduction in their existing practices in their own specialised areas of the law and that their understanding of the Lord Chancellor's assurances means precisely that. On conveyancing, the important point is that the outcome of the consultation is a system which allows fair competition. The Lord Chancellor appears to be more nervous about the reception of this paper by the legal profession, than the others. I recommend that, having now recorded your view that the suggestions are unworkable and will meet with opposition from the financial community, you write to the Lord Chancellor before the Cabinet discussion giving your consent to the paper as it stands. The Building Societies Commission and the Bank of England are content with this recommendation. A draft letter is attached.

P RUSSELL

fim1.ma/Graeme/152

he.dc.russell.p/green

DRAFT LETTER FOR THE FINANCIAL SECRETARY TO SEND TO THE LORD CHANCELLOR

FORTHCOMING GREEN PAPERS

Thank you for your letter of 12 January.

Lay Advocacy

I am grateful for your assurance that it is intended that all Government officials who currently enjoy limited rights of audience in their specialised fields would be entitled to retain these when new arrangements are introduced. Such staff do not hold anything equivalent to formal advocacy certificates under the present arrangements but I am sure that the Advisory Committee would be able to devise a simple method of identifying and accrediting such staff.

Employed Lawyers

I am also grateful for what you say here. Clearly departments have in the past considered their current practices against the Philips principle and are satisfied that they do not fall short. As you say, there should be no need to debate the question in respect of each individual department in advance of the consultation process.

Conveyancing by Authorised Practitioners

In my earlier letter I welcomed your proposals for conveyancing and I agree that the presentation of this paper, in particular, will be important. Its reception among our supporters in the legal profession must certainly be taken into account. But they will not be very reassured if financial institutions and others immediately argue that the proposals are unworkable or unduly restrictive. It was for that reason I raised the two points in my 11 January letter.

I did not explain my opposition to cross-subsidisation because the arguments had already been rehearsed sufficiently at official level and I trust that you are aware of them. They were also outlined by David Young in his letter to you of 11 January. I fully support your reply to him of 12 January that, if convincing arguments arise during the consultation process, you will accept that it will not be reasonable to pursue this proposal.

I am also grateful for your clarification of the suggested requirement to include a conveyancing fee as part of a loan. The consultation may also show this requirement to be unnecessary because lenders will not wish to offer the service, or impractical because it would be unworkable to enforce such a condition.

If we are in general agreement on these points, I have no further comments on this paper.

I am copying this letter to the recipients of yours.

BF 18/1 (see note attached)

THE BOARD ROOM
INLAND REVENUE
SOMERSET HOUSE

D B Rogers CB
Director General

Telephone: 01-438 6789

Oh. Your note on Mr Russell's note behind. (You wanted to raise Magistrates with Ld. Mackay)

17 January 1989

FINANCIAL SECRETARY

25 17/1

RESTRICTIVE PRACTICES IN THE LEGAL PROFESSION: FORTHCOMING GREEN PAPERS

The Lord Chancellor's reply of 12 January to your letter of the 11th deals only partly with the concerns expressed on our behalf about the possible effects on our employed lawyers and on non-professional staff, such as Collectors of Taxes, who appear in some Courts.

We agree with the line (in Mr Russell's minute to you of 16 January) that your understanding of the Lord Chancellor's assurances should be put on record by way of a letter to him before the draft papers are discussed by Cabinet on 19 January.

---

cc Chancellor
Chief Secretary
Paymaster General
Economic Secretary
Mr Monck
Mr Burgner
Mr Odling-Smee
Mr Mortimer
Mr Culpin
Mr Russell
Mrs Case
Mr Dickson
Mr Kerley

Mr J B Unwin C & E
Mrs V Strachan C & E

Chairman
Mr Rogers
Mr Beighton
Mr Miller
Mr Jones
Mr Cherry
Mr Roberts
PS/IR

But we suggest a small amendment to the paragraph on Lay Advocacy in the draft letter that Mr Russell provided to ensure that the new accrediting arrangements also apply for future postholders and not just those presently in post. This could be achieved by inserting 'categories of' before 'Government officials' in line 2 and adding 'both present and future' at the end of the paragraph after 'such staff'.

D B ROGERS

[illegible]bert 02.16.1.89

cc: PPS, CST, PMG, EST,
Mr MONCK, Mr BURGNER,
Mr ODLING-SMEE,
Mr MORTIMER, Mr CULPIN,
Mr RUSSELL, MRS CASE,
Mr DICKSON,
Mr KERLEY,
Mr J.B. UNWIN - C&E
MRS V STRACHAN - C&E

Treasury Chambers, Parliament Street, SW1P 3AG

The Rt Hon the Lord Mackay of Clashfern
Lord Chancellor
Lord Chancellor's Department
House of Lords
SW1A OPW

17 Jan 89

Dear Lord Chancellor,

FORTHCOMING GREEN PAPERS

Thank you for your letter of 12 January.

Lay Advocacy

I am grateful for your assurance that it is intended that all categories of Government officials who currently enjoy limited rights of audience in their specialised fields would be entitled to retain these when new arrangements are introduced. Such staff do not hold anything equivalent to formal advocacy certificates under the present arrangements but I am sure that the Advisory Committee would be able to devise a simple method of identifying and accrediting such staff, both present and future.

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Conveyancing by Authorised Practitioners

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I did not explain my opposition to cross-subsidisation because the arguments had already been rehearsed sufficiently at official level and I trust that you are aware of them. They were also outlined by David Young in his letter to you of 11 January. I fully support your reply to him of 12 January that, if convincing arguments arise during the consultation process, you will accept that it will not be reasonable to pursue this proposal.

I am also grateful for your clarification of the suggested requirement to include a conveyancing fee as part of a loan. The consultation may also show this requirement to be unnecessary because lenders will not wish to offer the service, or impractical because it would be unworkable to enforce such a condition.

If we are in general agreement on these points, I have no further comments on this paper.

I am copying this letter to the recipients of yours.

Yours sincerely

Robert Lamont

pp NORMAN LAMONT

(Approved by the Chancellor Secretary and signed in his absence)

SECRETARY OF STATE FOR SCOTLAND

SCOTTISH OFFICE
WHITEHALL, LONDON SW1A 2AU

V1711

RESTRICTED

The Rt Hon Lord Young of Graffham
Department of Trade and Industry
1 Victoria Street
LONDON
SW1H 0ET

17 January 1989

Dear David,

LEGAL PROFESSION GREEN PAPER:
APPROACH TO COMPETITION IN THE PROFESSIONS

Thank you for sending me a copy of your letter of 20 December 1988 to Nigel Lawson.

Your proposal that professions should be subject to the same prohibition and exemption test as the rest of the economy has my general support. However I do share Kenneth Clarke's concern that the decisions which we take on the detailed aspects of RTP policy as they affect the professions should not be taken in haste and should allow for full consideration given the implications, for example, for health professionals. I agree in particular with Kenneth that to base the exemption criterion solely on Article 85(3) of the Treaty of Rome is unlikely to bring out the full range of public interest issues which should be taken into consideration. I suggest therefore that we should consider more carefully what the criterion for exemptions in respect of professional practices should be before we reach a final decision on the way forward.

I am copying this letter to the Prime Minister, James Mackay, members of E(CP), Peter Walker, Tom King and Patrick Mayhew and to Sir Robin Butler.

Yours ever,

MALCOLM RIFKIND

EML013N8

17 JAN 1989

SCOTTISH OFFICE
WHITEHALL, LONDON SW1A 2AU

FINANCIAL SECRETARY

REC.	17 JAN1989
ACTION	Mr Kerley
COPIES TO	PPS, CST, PMG, EST, Sir P. Middleton, Mr Anson, Mr Monck, Mr Burgner, Mr Burr

17 January 1989

Mr Scholar, Mr Call.

RESTRICTED

The Rt Hon Lord Young of Graffham
Department of Trade and Industry
1 Victoria Street
LONDON
SW1H 0ET

Dear David,

LEGAL PROFESSION GREEN PAPER:
APPROACH TO COMPETITION IN THE PROFESSIONS

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I am copying this letter to the Prime Minister, James Mackay, members of E(CP), Peter Walker, Tom King and Patrick Mayhew and to Sir Robin Butler.

Yours ever,

MALCOLM RIFKIND

EML013N8

iae../Ke/056

FROM: R D KERLEY
DATE: 17 January 1989

KEELEY → FST 17/1

MR BURR
FINANCIAL SECRETARY

cc Chancellor
Chief Secretary
Paymaster General
Economic Secretary
Sir P Middleton
Mr Monck
Mr Burgner
Mr Molan
Mr A R Williams
Ms Yule — Ms Young

E(CP): 19 JANUARY

You are attending a meeting of E(CP) on 19 January. The Chancellor will be in the chair.

2. I attach briefing as follows:

(i) **Liberalisation of Air Services in Europe**

E(CP)(88)17: Memorandum by the Secretary of State for Transport.

Brief by HE1 at Annex A.

(ii) **Car Price Differentials in the EEC**

E(CP)(89)1: Note by the Secretary of State for Trade and Industry.

Brief by IAE2 at Annex B.

(iii) **Quantitative Restrictions on Imports**

E(CP)(88)18: Memorandum by the Secretary of State for Trade and Industry.

E(CP)(89)3: Memorandum by the Secretary of State for Trade and Industry.

Brief by EC1 at Annex C.

(iv) Action Programme and Future Work of the Sub-Committee

E(CP)(89)2: Memorandum by the Parliamentary Under-Secretary of State for Corporate Affairs, Department of Trade and Industry.

Brief by IAE3 at Annex D.

Ross Kerley

R D KERLEY

he.dc/russell.p/sub1

CONFIDENTIAL

FROM: P RUSSELL
DATE: 18 JANUARY 1989

1. MRS CASE
2. CHANCELLOR

cc: Chief Secretary
Financial Secretary
Paymaster General
Economic Secretary
Sir P Middleton
Mr Monck
Mr Burgner
Mr Odling-Smee
Mr Mortimer
Mr Culpin
Mr Dickson
Mr Kerley
Mr J B Unwin
Sir A Battishill

Ch. Copy of Ld. Ch. ppr. itself behind. Green Pps. (loose) behind.

C(89)1: GREEN PAPERS ON THE LEGAL PROFESSION

The Lord Chancellor's memorandum of 17 January seeks the agreement of Cabinet colleagues to the publication of his three Green Papers covering -

(a) the work and organisation of the legal profession;

(b) conveyancing by authorised practitioners; and

(c) contingency fees.

Line to take

2. You are advised to give a warm and encouraging welcome to the papers which go much further than one would expect from a Lord Chancellor in questioning and seeking to change the long-standing restrictive practices of the legal profession. A short speaking note is attached.

Background

3. Lord Mackay inherited Lord Hailsham's commitment to put a paper to E(CP) on restrictive practices. At an E(CP) discussion in January 1988 he set out a number of restrictive practices on which he then seemed disposed to take a somewhat defensive line. The subsequent report of the Marre Committee - commissioned by the legal profession - was so blinkered that the Lord Chancellor has recognised that the profession has no intention of reforming itself and will therefore have to be forced.

4. The background on conveyancing is somewhat different. The Government broke the solicitors' monopoly on conveyancing some 3 or 4 years ago but the take-up by licensed conveyancers has not been large. The Lord Chancellor's Department had been slow to make regulations under the Building Societies Act 1986 to allow institutions to offer conveyancing services. Unconvincing arguments about conflicts of interest were eventually dropped when the Lord Chancellor offered E(CP) in October 1988 an altogether more liberal approach - and a fundamental change from Lord Hailsham's previous position - favouring self-regulation through a Code of Conduct, allowing conveyancing by a wide variety of institution and its provision for their own borrowers.

5. The drafting of all three Green Papers has been supervised by an inter-departmental working party of senior officials on which not only the Treasury was represented but also the Department of Trade and Industry and the Office of Fair Trading.

Comment

6. The Green Papers represent a very satisfactory outcome of the previous E(CP) discussions. The paper on the work and organisation of the legal profession takes a vigorous line, not least in its general acceptance of Lord Young's proposals for Restrictive Trade Practices legislation which envisages no exclusions for the professions. The tone is critical in its radical and open-minded look at the widespread restrictive practices in the legal profession from the standpoint of the Government's policies on competition and the supply side. The Green Paper largely reflects the current Lord Chancellor's robust view of the profession's need to shed its cloak of restrictive practices.

7. The Green Paper deals with all the restrictive or inefficient practices picked up in the earlier E(CP) papers, including direct access to counsel, attendance on counsel and the archaic organisation of the Bar. Where these practices rest on statute, the Green Paper proposes action for immediate change (eg amending the Solicitors Act 1974 to allow multi-disciplinary practices). Similarly the Green Paper gives a strong steer towards change where rules set by the Bar or Law Society apply (eg to professional conduct and standards).

8. The Green Paper also opens up the whole issue of rights of audience envisaging Crown Prosecution Service (CPS) lawyers being able to present their own cases in the Crown courts as well as the magistrates courts. There is also a surprising readiness to contemplate a greater range of lay advocacy, subject to assurances on standards. The wording of the paper caused some doubts whether the existing practices of some Government departments (notably Inland Revenue and HM Customs) in this respect would continue to be acceptable. An exchange of letters between the Financial Secretary and the Lord Chancellor has produced assurances from the latter both on lay advocacy and the ability to demonstrate that the prosecution and investigation process were sufficiently separated. (Correspondence attached - top copy only).

9. The paper on conveyancing by authorised practitioners has been the subject of considerable negotiation between the Lord Chancellor's Department and the Treasury, the Building Societies Commission and the Bank of England to ensure that competition, by the major institutions most likely to provide it, was not stifled by over-regulation. The result is a two-tier system of authorisation with the banks and building societies automatically meeting the "fit and proper" criteria while other applicants (eg estate agents) would need to submit to the supervision of a competent authority. All would be required to obey a Code of Conduct and accept other provisions to protect consumers.

10. Two late problems involved the Lord Chancellor's suggestion that authorised practitioners should prove they did not cross-subsidise their conveyancing services and that lenders offering to roll-up conveyancing fees do so irrespective of the conveyancer used by the borrower. The Lord Chancellor wishes to retain these two suggestions in his Green Paper to demonstrate a "level playing field". He has been warned by the Financial Secretary that the consultation is likely to produce convincing arguments that the suggestions are impractical or restrictive.

11. The paper on contingency fees is of less direct interest to the Treasury. It commends some liberalisation of the existing prohibition of any form of arrangement whereby a lawyer could pursue a client's case on the basis that he receives no payment if the case is lost but takes an agreed percentage of whatever award is made by the court if the case is won. Movement on this would again conform to the spirit of the Government's policy for more deregulation generally and easier access to justice.

Recommendation

12. You are recommended to give a warm welcome to the Green Papers in the context of the Government's policies on competition and the supply side, and not just from a perception of outdated practices in the legal profession. There will be an important symbolic benefit in reforming a particularly recalcitrant profession but there should also be some marginal (but worthwhile) economic and financial benefits accruing to industry and commerce (including small firms) as well as the individual consumer - allowing the one-stop "property shop" that consumers appear to want. Public expenditure should also gain some benefit through the impact of high legal costs on legal aid and restrictions on rights of audience preventing the Government making the most cost-effective use of its own lawyers. A suggested speaking note is attached.

Russell

P RUSSELL

SUGGESTED SPEAKING NOTE

he.dc/russell.p/18January

SUGGESTED SPEAKING NOTE

Very much welcome radical approach to the future structure and organisation of legal profession in England and Wales shown in the Green Papers. Exactly what E(CP) was looking for. Such a comprehensive survey of the issues should stimulate a wide-ranging public debate; but the papers do not shirk giving clear pointers to the Government's view of the way ahead.

Proposals represent satisfactory outcome of previous E(CP) discussions and Green Papers the fruit of urgent discussions by officials from many Departments, under enlightened chairmanship of Lord Chancellor's own Department.

Emphasis in the Green Papers on opening the legal profession to greater competitive discipline very much in tune with Government's approach to other sectors of the economy. Likely to be some economic and financial benefits to industry and commerce as well as to individual consumer - as already shown by lower prices resulting from opening up conveyancing and breaking ban on solicitors' advertising. Also public expenditure likely to benefit from natural effect of greater competition.

Glad to know that a few doubts whether rights of audience paragraphs might impede present and future practices of prosecuting departments such as Revenue and Customs now resolved in correspondence with Financial Secretary. Note the differences on two aspects of conveyancing. Feasibility of suggestions will no doubt become apparent during consultation process.

Hope it will be possible soon to move to an early extension of the right of audience of these Departments' lawyers to Crown Courts

SCOTTISH OFFICE
WHITEHALL LONDON SW1A 2AU

The Rt Hon Norman Lamont MP
Financial Secretary
HM Treasury
Parliament Street
LONDON
SW1P 3AG

CH/EXCHEQUER	
REC.	18 JAN1989
ACTION	FST
COPIES TO	

18 January 1989

Dear Norman.

CONVEYANCING IN SCOTLAND

Thank you for your letter of 13 January, in which you suggest that we might discuss the presentation of the options on conveyancing in my forthcoming consultation document on the legal profession in Scotland.

I am in discussion with James Mackay about the general presentation of the issues in my paper, and I expect to have a text ready for circulation to colleagues at the end of January. That will allow the conveyancing issue to be seen in context. I am afraid that this timing is unlikely to allow for my paper to be circulated for discussion at E(CP) on 1 February, but I hope that the paper as a whole can be cleared in the early part of next month. While there are presentational advantages in my paper being seen to be quite separate from the Lord Chancellor's, I do not want it to lag too far behind his. James Mackay agrees with me about this and about the fact that we should have the opportunity to concert our papers, while bearing in mind of course the different circumstances north and south of the border.

Copies of this go to other members of E(CP), to the Lord Chancellor, the Lord Advocate and to Sir Robin Butler.

MALCOLM RIFKIND

HMP017M6.016

MONGER → CHEX 18/1

CONFIDENTIAL

Reference No: E 0653

Ch/ As usual, I have split up the briefing so that it is separately in front of each item. Yellow ppr. briefs for you; white ppr. (Tony) briefs for FST behind these. GP 18/1

CHANCELLOR OF THE EXCHEQUER

E(CP)

I attach the briefs for the E(CP) meeting tomorrow.

Pps on this behind

2. In their comments on Mr Rifkind's letter on Scottish conveyancing both Lord Young and the Financial Secretary pressed that his Green Paper should indicate which option he favoured. They also said that the point could be discussed at the 19 January meeting if necessary.

3. As you know, we have reserved a time for a meeting to discuss Scottish legal reforms on 1 February, although it may not in the event be needed. This is partly to give Mr Rifkind more time to react to the suggestion on conveyancing (he may be willing to move in the direction the other Ministers want) and partly because he says he cannot circulate his draft Green Paper until after tomorrow's meeting. Mr Rifkind, who is not a full member of E(CP), will not therefore be present.

4. If the point is raised, you might therefore say simply that you hope that points on the Scottish legal Green Paper can be cleared in correspondence but if they cannot time is available for discussion on 1 February.

G W MONGER

Cabinet Office
18 January 1989

CONFIDENTIAL

MANAGEMENT IN CONFIDENCE

Board Room
H M Customs and Excise
New King's Beam House
22 Upper Ground
London SE1 9PJ
Telephone: 01-620 1313

Ch/ The speaking note does in fact refer to future practices. But I have added a few words to meet this point. Thanks -
JF
18/1

FROM : THE CHAIRMAN
DATE : 18 January 1989

CHANCELLOR OF THE EXCHEQUER

LORD CHANCELLOR'S GREEN PAPER: CABINET ON 19 JANUARY: RIGHTS OF AUDIENCE FOR CUSTOMS LAWYERS

May I bother you briefly on this subject again. I do so since I understand the Green Paper is to be considered at Cabinet tomorrow.

2. The Financial Secretary - for which we are very grateful - has been battling with the Lord Chancellor on a range of issues affecting both the Treasury and the two Revenue Departments. In the course of this he has sought assurances that our present rights of audience in the courts will not be prejudiced by the new proposals (?restrictive practices) that the Green Paper seem to be advocating.

3. The Lord Chancellor has made reassuring noises. But I remain very worried. As you know, our aim is to extend our rights of audience to the Crown Courts so as to save money and improve morale and recruitment. But the game we seem to have been manoeuvred into is that of defending the rights we already possess.

---

cc Financial Secretary
Economic Secretary
Mrs Case
Mrs Strachan
Solicitor
Mr Butt
Mr Howard

4. We may well be able to preserve the status quo. But that is not good enough. We must move to an early extension of the right of audience of our lawyers (most of whom are in fact barristers) in the Crown Courts. This is also what Andrew recently recommended.

5. This is no doubt a relative detail in the wider Green Paper context and it may not be appropriate in Cabinet to get into this sort of thing. But if any opportunity arises, it would be very helpful if you could again register and endorse our cause. There are still entrenched forces trying to prevent any advance in this highly protected field.

J B UNWIN

chex.rm/jmt/42 **MANAGEMENT IN CONFIDENCE**

FROM: J M G TAYLOR
DATE: 19 January 1989

MR UNWIN - CUSTOMS AND EXCISE

cc Financial Secretary
Economic Secretary
Mrs Case

Mrs Strachan - C&E

LORD CHANCELLOR'S GREEN PAPER: CABINET ON 19 JANUARY: RIGHTS OF AUDIENCE FOR CUSTOMS LAWYERS

The Chancellor has seen and noted your minute of 18 January.

J M G TYALOR

chex.rm/jmt/42 **MANAGEMENT IN CONFIDENCE**

FROM: J M G TAYLOR
DATE: 19 January 1989

MR UNWIN - CUSTOMS AND EXCISE

cc Financial Secretary
Economic Secretary
Mrs Case

Mrs Strachan - C&E

LORD CHANCELLOR'S GREEN PAPER: CABINET ON 19 JANUARY: RIGHTS OF AUDIENCE FOR CUSTOMS LAWYERS

The Chancellor has seen and noted your minute of 18 January.

2. He spoke to the Lord Chancellor in the margins of Cabinet. Lord Mackay indicated that he had had great difficulties with this. He thought, however, that a satisfactory position had been reached. The Phillips principle did not mean that Customs' lawyers who had general oversight of a particular investigation would not be allowed to prosecute. Its effect was confined to those lawyers who had actually carried out the investigation (in terms of interviewing witnesses, etc). The intention was to avoid, eg, suspicions of "coaching".

3. The Chancellor thinks this is reasonable. But he is sure that, if you continue to have difficulties, Lord Mackay would be happy to speak to you direct.

J M G TAYLOR

chex.md/jmt/39 **CONFIDENTIAL**

FROM: J M G TAYLOR
DATE: 19 January 1989

MR P RUSSELL (HE)

cc Mrs Case
Mr Kerley

C(89)1: GREEN PAPERS ON THE LEGAL PROFESSION

The Chancellor was grateful for the briefing you provided for today's Cabinet discussion.

J M G TAYLOR

SECRETARY OF STATE FOR SCOTLAND

SCOTTISH OFFICE
WHITEHALL, LONDON SW1A 2AU

CONFIDENTIAL

The Rt Hon Lord Young of Graffham
Department of Trade and Industry
1 Victoria Street
LONDON
SW1H 0ET

23 January 1989

Dear David,

not received by us at FST Mike.

LEGAL PROFESSION GREEN PAPER:
APPROACH TO COMPETITION IN THE PROFESSIONS

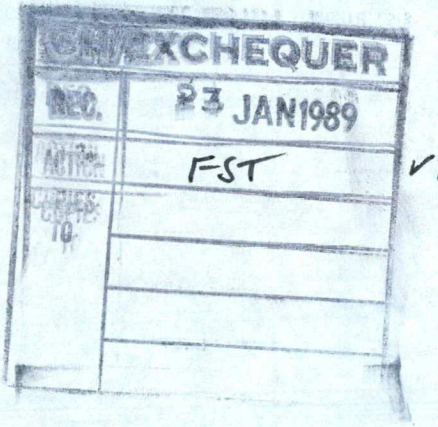
Thank you for your reply, on 18 January, to my letter of 17 January.

The suggestions you make for amending paragraph 1.8 in the full version of the Green Paper and for official discussions on the position of the medical profession so that we have further advice available before the White Paper on Restrictive Trade Practices is finalised meet my concerns. I am therefore content that we proceed as you suggest.

I am copying this letter to the Prime Minister, James Mackay, members of E(CP), Peter Walker, Tom King and Patrick Mayhew and to Sir Robin Butler.

Yours ever,

MALCOLM RIFKIND



V 23/1

HMP018M8.016

SECRETARY OF STATE FOR SCOTLAND

SCOTTISH OFFICE
WHITEHALL, LONDON SW1A 2AU

15 FEB 1989

* with Attachments

The Right Hon Nigel Lawson MP
Chancellor of the Exchequer
HM Treasury
Parliament Street
LONDON
SW1P 3AG

FINANCIAL SECRETARY	
REC.	15FEB1989
ACTION	Mr. G.F. Dickson *
COPIES TO	PPS, CST, EST
	Sir P. Middleton
	Mr. Monck
	Mrs. Case
	Mr. Burr
	Mr. P. Russell *
	Mr. Odling-Smee

15 February 1989

2

Dear Nigel,

THE LEGAL PROFESSION IN SCOTLAND

As agreed at the meeting of E(CP) on 5 October 1988 (E(CP)(88) 4th meeting), I have now prepared a consultation paper on the legal profession in Scotland, of which I attach a copy.

The paper builds on my earlier discussion paper "The Practice of the Solicitor Profession in Scotland" issued in November 1987 (which dealt, inter alia, with multi-disciplinary practices) and indicates that decisions on the issues raised there will be taken at the same time as those arising from the present consultation exercise. The 2 papers together cover essentially the same ground as James Mackay has in his 3 Green Papers.

The section in the paper dealing with conveyancing expands the outline given in my letter to you of 20 December but, as colleagues have suggested, it does not offer as options the proposals previously described as options 1 and 2. It includes a draft code of conduct similar to that set out by James Mackay in his Green Paper on Conveyancing with necessary, fairly minor, adjustments to reflect differences in Scottish conveyancing law and practice.

I hope to publish the paper around the end of this month in order that the consultation period may be concluded in May shortly after the end of the consultations on James's Green Papers.

I am sending copies of this letter and its enclosure to the Prime Minister, colleagues on E(CP) and H, to Peter Fraser, and Sir Robin Butler.

Yours ever,

MALCOLM RIFKIND

cc: Ms. Young
Mr. N. Fray *
Mr. Tyrie
Mr. Call

E...044L4

FROM THE RIGHT HONOURABLE THE LORD MACKAY OF CLASHFERN

HOUSE OF LORDS,
LONDON SW1A 0PW

22 FEB 1989

FINANCIAL SECRETARY

REC.	22 FEB 1989
ACTION	Mr. Mortimer
COPIES TO	PPS, CST, JEST
	Sir P. Middleton
	Mr. Monck, Mrs. Case
	Mr. Burr, Mr. P. Russell

CONFIDENTIAL

22 February 1989

Dear Nigel,

THE LEGAL PROFESSION IN SCOTLAND

I have studied the above consultation Paper which was distributed to colleagues on 15 February.

My officials and I have commented on two previous versions of this Paper which Malcolm Rifkind was kind enough to let me see. I am grateful that some of my points have been taken on board, but I am still concerned that the general thrust of the Paper remains one of equivocation. Although it is important that the Scottish Paper should be different from the Green Paper relating to the legal profession in England and Wales, it is also important that it should be equally emphatic on general principles.

I share the Prime Minister's view, expressed in Paul Gray's letter of 19 February to David Crawley, that the Scottish Paper should be given a clearer sense of direction and emphasise the interests of the consumer. I wonder if this could be achieved by splitting the Paper into two sections. The first section could deal with areas where the Government could now express its provisional views, perhaps multi-disciplinary partnerships, confirmation of executors and, possibly, conveyancing. The second section could perhaps deal with those areas, such as the right to plead in court and advocates' professional practice, where it may perhaps be more difficult for us to express our provisional views at this stage. This section of the Paper should, however, be prefaced by a full discussion of the structure

cc:- Mr. Odling-Smee
Ms. Young
Mr. N. Fray
Mr. Tyrie
Mr. Call

The Right Hon Nigel Lawson MP
Chancellor of the Exchequer
HM Treasury
Parliament Street
London SW1P 3AG

of the Scottish courts system which emphasises the fact that solicitors in Scotland and the procurators fiscal already have wide rights of audience in jury trials. It could then go on to ackowledge that, unlike in England and Wales, there has been no recent discussion of these general areas. This helps to provide a cogent reason for reaching no provisional views on some issues.

I am sending copies of this letter to the Prime Minister, colleagues on E(CP) and H, to Peter Fraser, and Sir Robin Butler.

Yours ever,

James.

dti

the department for Enterprise

The Hon. Francis Maude MP
Parliamentary Under Secretary of State for
Corporate Affairs

The Rt Hon Malcolm Rifkind QC MP
Secretary of State for Scotland
Scottish Office
Dover House
Whitehall
LONDON SW1A 2AU

Department of Trade and Industry

1-19 Victoria Street
London SW1H 0ET

Switchboard
01-215 7877

Telex 8811074/5 DTHQ G
Fax 01-222 2629

CH/EXCHEQUER
REC. 27 FEB 1989
ACTION FST
COPIES TO

Direct line 215 4417
Our ref
Your ref
Date 24 February 1989

Dear Malcolm,

Thank you for copying to me and to David Young, who is abroad at present, your letter of 15 February to Nigel Lawson, and the enclosed copy of your proposed consultation paper on the legal profession in Scotland.

I fully recognise the differences in the Scottish and English legal systems and the need for your consultative paper to reflect these. E(CP) did however agree last October that reforms in Scotland should adopt the same general approach as in England. Your paper seems to differ in two major respects from James Mackay's:

a) E(CP) agreed the papers should, as far as possible, indicate the Government's view of each of the issues it considered. Your approach is much more open ended and rarely comes down on one side. I would like to see each chapter, while inviting comments, giving a clear indication of the Government's thinking on the way forward and the reasons for it;

b) partly because of the more open ended approach of the paper, it seems much less robust in tone than those for England and Wales. Although paragraph 1.7 deals with the question of competition and the maintenance of restrictions only where justified, the paper generally seems much less concerned with finding the right balance between competition and regulation than James Mackay's.

JCJANY

the enterprise initiative

The problem with these differences is not just the effect they may have on the Scottish consultative process but that in England and Wales too. A paper on the Scottish system which seems less certain in its approach must surely suggest that our resolve is weakening in England and Wales even before the end of the consultative period. This cannot be the message that we want to give at this stage. As we expected, the debate is already attracting attention and that is likely to increase over the consultative period. The arguments against the reforms have been predictable, and should be resisted but this task will be made considerably more difficult if we appear to be treating the two systems differently in ways which go beyond their inherent differences.

Apart from these general points about the paper, I also have some more detailed concerns. I have asked my officials to prepare a comprehensive note of these but I also suggest relevant officials should meet urgently, as they did for the English papers, to discuss specific concerns. However, there are some examples which I think are worth mentioning at this stage. I think it should be made clear that the objectives for the provision of legal services in Scotland are the same as for those in England and Wales and that the Government is concerned to ensure that those providing legal services are exposed to the discipline of competition. The proposals concerning the professions and the new restrictive trade practices legislation, which we have agreed, will affect Scottish solicitors and advocates as much as any others. There are a number of points in the paper where this needs to be made clear - notably paragraphs 1.7 and 5.7 to 5.10 (instructing an advocate) - to reflect the way we would expect any restrictions to be judged. Paragraph 2.10 seems to suggest that some rules might be given statutory back up. A specific example quoted is restricted access to advocates. I recognise that the paper is drafted in a consultative fashion but the approach adopted here differs radically from James Mackay's paper which favours individual advocates taking their own decisions on access.

The paragraphs on partnerships of advocates also seem to me to need expanding to cover the competition argument for the removal of restrictions on the organisation of business. There is, of course, a possibility that the Faculty might divide into a small number of partnerships which could reduce choice (5.14). The other side of the coin, however, is that if such a tendency were apparent, there would be considerable opportunities for independent advocates. It must be the case that advocates would respond, as others do, to the demands of the market, and would join others or remain independent according to which form of practice offers the greater chance of business success and this point needs to be explored in the

paper as well. Paragraph 5.16 should, I believe, reflect the principles contained in paragraphs 11.13 to 11.16 of James Mackay's paper unless it can be demonstrated that the Scottish system demands a different response.

I am concerned that the section on conveyancing ought to be more positive, and I would prefer the discussion of option 3 to indicate that the Government does not favour it. The comment about conflict of interest in paragraph 6.9 could reflect more closely the view expressed as regards conflict of interest in England and Wales in James Mackay's paper on conveyancing (para 3.2).

My comments are necessarily based on a first reading of your proposals but, as I said earlier, I think it would make sense for officials to meet urgently to try to resolve them.

I am copying this letter to the Prime Minister, colleagues on E(CP) and H, to Peter Fraser and Sir Robin Butler.

FRANCIS MAUDE

iae.ph/IAE3/Fray/289

RESTRICTED URGENT

FROM: N G FRAY
DATE: 27 February 1989

1. MR BURR T.J.B. 28/2
2. FINANCIAL SECRETARY

cc Chancellor
Chief Secretary
Sir P Middleton
Mr Hardcastle
Mr Monck
Mr Phillips
Mr Scholar
Mr Burgner
Mr Odling-Smee
Mr Peretz
Miss O'Mara
Mr Ilett
Mrs Ryding
Mr Sharples
Mr Stevens
Ms Young
Mrs Chaplin
Mr Tyrie

FST

Are you content with the proposed letter to Lord Young?

Susan 28/2

RESTRICTIVE TRADE PRACTICES POLICY

Lord Young wrote to the Chancellor on 17 February seeking E(CP) colleagues' agreement to the broad shape of the proposed restrictive trade practices (RTP) legislation to be included in a White Paper. The policy outlined below follows very closely the proposals set out in last year's Green Paper. Lord Young hopes that his proposals can be agreed by colleagues without the need for an E(CP) meeting, so that the White Paper can be published in April.

Main Proposals

2. As foreshadowed in the Green Paper, the main proposal is to prohibit business agreements whose **effect**, rather than whose legal form, prevents, restricts or distorts competition. Fines (of up to 10 per cent of UK turnover, or £250,000, whichever is the higher) would be imposed in appropriate cases of breach of the prohibition to ensure that the legislation would be direct, tough and effective. But an exemption system administered along lines similar to that of the European Commission under Article 85 of the EEC Treaty will be set in place to exempt agreements whose other economic benefits outweigh their anti-competitive effects.

FRAY TO FST 27/2

3. It is envisaged that as many as possible of the exemptions under the existing RTP Act, including those in the professions, will be ended. Individual and block exemptions which are granted will be

of limited duration (normally 5, 10 or 15 years) to ensure periodic review. Agreements required by statute or approved by Ministers will be excluded from the scope of the legislation, but they will be subject to review by the new Competition Authority who can then report to the appropriate Ministers. FIM and MG have been considering the implications of the proposed legislation for Treasury responsibilities for the financial system, and particularly for the Bank of England. Discussions with the Bank and DTI are continuing. FIM will be minuting you separately on these issues in due course. The DTI is also holding discussions with other interested Departments. The DTI hope to reflect the outcome of these discussions in the White Paper. Agreements relating to terms and conditions of employment are being dealt with in separate Ministerial correspondence (see Lord Young's letter to Mr Fowler of 15 February, on which we will be submitting advice once we have seen Mr Fowler's reply).

4. It is intended that the main decision - making body will no longer be the RTP Court. Instead, the Office of Fair Trading will be the authority empowered to take the initial decisions on prohibition and exemption. Under these new arrangements, the Director General of Fair Trading (DGFT) will have the power to enter premises, if necessary by force, and to inspect and take copies of documents.

5. Lord Young is also considering appointing a small number of part time lay members to work alongside the DGFT in a collegiate body, whose members will form 3-man adjudication panels, to consider individual appeals against exemptions and impose fines where necessary. The RTP Court will be retained to hear final appeals. The DGFT will be responsible for the management of the authority and for making administrative decisions. He would also work with the lay members on guidance notes on the interpretation of the prohibition and on exemptions policy, and on recommendations to the Secretary of State on block exemptions. We understand that the DGFT is keen to sit on the panels hearing appeals on individual exemptions. The DTI paper is therefore deliberately vague on this point, but we understand that Lord Young's view is that Sir Gordon Borrie should not be a member of these panels.

Comment

6. We understand that another meeting of QL has been arranged for ~~Tuesday~~ Thursday ~~28 February~~ 2nd March to prepare its final submission to Cabinet, and it is still not clear whether an RTP Bill will be included in the proposed legislative programme for the next Session of Parliament. If the Bill fails to find a place, the timetable for publication of the White Paper is likely to be slowed down. However, we strongly support the general thrust of Lord Young's proposals for the White Paper. The White Paper will not give detailed explanations of how in future many of the present individual exemptions will be treated. It is envisaged that individual interests will be informed separately when the White Paper is published and there will be full consultation before the legislation is introduced.

7. As regards the DGFT's role, we support Lord Young's view that he should not be a member of the panels hearing appeals on individual exemptions. It would offend against the principles of natural justice for the person taking the original decision to be involved in hearing the appeal, and it could undermine public confidence in the procedures. This would be particularly likely if the other two members did not agree, since this would give the Director General the casting vote.

8. Lord Young proposes that the collegiate body might be part-time members of the Monopolies and Mergers Commission (MMC). The membership of the MMC would then be expanded to cope with its dual responsibilities. It is clearly right, for the reasons given in paragraph 6 above, and the fact that the Office of Fair Trading will be the competition authority, for the collegiate body to be located away from the DGFT. But it is also not entirely clear that we need a 'collegiate body' as a distinct entity from the MMC.

9. We **recommend** that you write to Lord Young endorsing his proposals on RTP generally; supporting his view that Sir Gordon Borrie should <u>not</u> sit on the adjudication panels, suggesting that it might be better not to have the collegiate body as a separate 'quango'; and noting continuing official discussions. A draft letter is attached.

Nigel Fray

NIGEL FRAY

DRAFT LETTER FROM THE FINANCIAL SECRETARY TO:

Rt Hon Lord Young of Graffham
Secretary of State for Trade and Industry
Department of Trade and Industry
1-19 Victoria Street
LONDON SW1

RESTRICTIVE TRADE PRACTICES POLICY

Thank you for copying to me your letter to Nigel Lawson of 17 February.

I warmly support your proposals for the forthcoming restrictive trade practices White Paper. Like you, I hope that as many as possible of the current exemptions under the RTP Act are not carried across to the new legislation. I am sure that colleagues will be robust in determining which agreements in the sectors for which they have responsibility should no longer be retained.

I have two comments about the proposed institutional arrangements. It is important that the relationship between the Director General of Fair Trading and the new panels which will consider individual appeals and sanctions should be seen to be fair. It would therefore not be right for the Director General to sit on these panels. Otherwise the procedures may be perceived as being biased against an appellant, and confidence in them could be undermined. I therefore welcome your proposal that the Director General should not be a member of the panels.

More generally, it seems to me that there may still be scope for clarifying the relationship between the panels, the collegiate body, and the Monopolies and Mergers Commission (to which as I understand

it the members of the collegiate body would belong). If the collegiate body were to acquire a life of its own, we would not only have an additional quango, but there could be some risk of inconsistency between its approach to restrictive practices and that of the MMC to monopolies questions. Might it not be better to dispense with the concept of the collegiate body, and simply have panels of the MMC? The panels could then be convened as necessary not only to consider appeals and sanctions, when the Director General would not participate, but also to consider the sort of issues which you see as falling to the collegiate body, when he would participate. This may be partly a matter of presentation, but we need to be sure that the arrangements for administering the new regime are seen to be reasonably straightforward.

I understand that discussions are continuing at official level on the implications of the proposed legislation for Treasury responsibilities in the financial system and that the White Paper will reflect the outcome of these discussions.

I am copying this letter to the Prime Minister, members of E(CP), Geoffrey Howe, James Mackay, Douglas Hurd, Peter Walker, Tom King, Kenneth Baker, Malcolm Rifkind, John Wakeham and Sir Robin Butler.

[N L]

Susan 1.01.03.89

RESTRICTED

CC: PPS, CST, Sir P. Middleton, Mr Hardcastle, Mr Monck, Mr Phillips, Mr Scholen, Mr Burgner, Mr Odling-Smee, Mr Peretz, Miss O'Mara, Mr Ilett, Mrs Rydling, Mr Sharples, Mr Stevens, Mr Fray, Mr Burr, Ms Young, Mrs Chaplin, Mr Tyrrell.

FINANCIAL SECRETARY TO THE TREASURY

Treasury Chambers, Parliament Street, SW1P 3AG

Rt Hon Lord Young of Graffham
Secretary of State for Trade and Industry
Department of Trade and Industry
1-19 Victoria Street
London SW1

1st March 1989

P/IND/2

Dear David

RESTRICTIVE TRADE PRACTICES POLICY

Thank you for copying to me your letter to Nigel Lawson of 17 February.

I warmly support your proposals for the forthcoming restrictive trade practices White Paper. Like you, I hope that as many as possible of the current exemptions under the RTP Act are not carried across to the new legislation. I am sure that colleagues will be robust in determining which agreements in the sectors for which they have responsibility should no longer be retained.

I have two comments about the proposed institutional arrangements. It is important that the relationship between the Director General of Fair Trading and the new panels which will consider individual appeals and sanctions should be seen to be fair. It would therefore not be right for the Director General to sit on these panels. Otherwise the procedures may be perceived as being biased against an appellant, and confidence in them could be undermined. I therefore welcome your proposal that the Director General should not be a member of the panels.

More generally, it seems to me that there may still be scope for clarifying the relationship between the panels, the collegiate body, and the Monopolies and Mergers Commission (to which as I understand it the members of the collegiate body would belong). If the collegiate body were to acquire a life of its own, we would not only have an additional quango, but there could be some risk of inconsistency between its approach to restrictive practices and that of the MMC to monopolies questions. Might it not be better to dispense with the concept of the collegiate body, and simply

FST TO C. Young 1/3

have panels of the MMC? The panels could then be convened as necessary not only to consider appeals and sanctions, when the Director General would not participate, but also to consider the sort of issues which you see as falling to the collegiate body, when he would participate. The may be partly a matter of presentation, but we need to be sure that the arrangements for administering the new regime are seen to be reasonably straightforward.

I understand that discussions are continuing at official level on the implications of the proposed legislation for Treasury responsibilities in the financial system and that the White Paper will reflect the outcome of these discussions.

I am copying this letter to the Prime Minister, members of E(CP, Geoffrey Howe, James Mackay, Douglas Hurd, Peter Walker, Tom King, Kenneth Baker, Malcolm Rifkind, John Wakeham and Sir Robin Butler.

Yours

NORMAN LAMONT

CHANCELLOR OF THE EXCHEQUER

PMP

Ch.

Your note behind.

2. Lord M. will not, I am afraid, appear on any programme (pre-recorded or not) that is broadcast on a Sunday. (Nor will he give interviews to Sunday pps.). Such are the rules of the wee free! !

3. The upshot is that Ian Gow (not John Redwood) is putting the pro-competitive case. Pretty bad, but they've done the recording already, I think. Ok

4. On a happier note, the PM is going to take a robust line with the Bar's pleas for a further extension. Good

5. Miss Sinclair tells me that Sir G Howe has shown distressing signs of wobbliness

/over

towards Ld. M's proposals. When you next see him you could perhaps take the opportunity to bring him / keep him properly onside.

MM

[redacted]

6/3

he.dc/russell.p/sub4

FROM: P RUSSELL
DATE: 2 MARCH 1989

1. MRS CASE
2. MR J M G TAYLOR

cc: Financial Secretary
Mr Monck
Mr Mortimer
Ms Young

REVIEW OF THE LEGAL PROFESSION: LORD CHANCELLOR'S GREEN PAPERS

The Bar have protested to the Lord Chancellor that the 3 months consultation period is not long enough and that they will need at least another 3 months in order to carry out some research. We understand the Bar is tacitly if not overtly being supported by the Law Officers in this ploy to secure further delay.

The Lord Chancellor is not disposed to give way and is particularly anxious not to lose the place he has gained in the 1989-90 legislative programme for his Bill to curb the restrictive practices of, and introduce greater competition in, the legal profession. I understand that the Prime Minister is being advised to resist any extension beyond a possible 2 weeks such as was conceded for the Green Paper on broadcasting.

Both the Chancellor and the Financial Secretary may wish to be aware of this in case the issue should be raised in the margins of a Committee meeting, more particularly in the context of the retention of the Lord Chancellor's Bill in the 1989-90 legislative programme.

P RUSSELL

cst.rj/docs/14.3.2

PERSONAL AND CONFIDENTIAL

FROM: A G TYRIE
DATE: 14 March 1989

CHANCELLOR

REFORM OF THE LEGAL PROFESSION

It would be a great shame if we ended up backing down on this. Unlike some of our other reforms I think we will only get one chance and this is it.

2. Why don't we get the leading lawyers in the Government to lend Lord Mackay some practical support? Speeches from Michael Howard, Kenneth Clarke and Geoffrey Howe would be very useful. I gather on the grapevine that Sir Geoffrey is shuffling from Hush Puppie to Hush Puppie on this. It would be a great boon if he could be persuaded to lend his support.

3. I was particularly perturbed because my spies tell me that the Prime Minister has been murmuring that we have taken on too much in this Parliament and that something might have to give. It would be tragic if the reform of the legal system, which is probably easiest to remove from the programme, were to be a casualty.

A G TYRIE

Secretary of State

Northern Ireland Office
Stormont Castle
Belfast BT4 3ST

The Rt Hon the Lord MacKay of Clashfern
Lord Chancellor
Lord Chancellor's Department
House of Lords
LONDON
SW1A OPW

4 April 1989

Dear James,

As you know, I propose to issue a Northern Ireland Supplement to the three Green Papers which you presented to Parliament on 25 January 1989. The Green Papers and the Supplement will then form the basis in Northern Ireland for consultation on the future of the legal profession.

The publication of the Supplement has been delayed to enable full account to be taken of the differences in law, practice and procedure between Northern Ireland and England and Wales.

Officials in the Department of Finance and Personnel here have consulted closely with those in the Northern Ireland Court Service on the content of the Supplement, a copy of which I now enclose.

I should be grateful for confirmation that you are content that the Supplement should be published as soon as possible.

I am copying this letter to the Prime Minister, members of E(CP) and Sir Robin Butler.

Yours ever,
Ian

TK

Enc

PM/21366

DRAFT

A NORTHERN IRELAND SUPPLEMENT

on

THE WORK AND ORGANISATION OF THE LEGAL PROFESSION

CONTINGENCY FEES

CONVEYANCING BY AUTHORISED PRACTITIONERS

ISSUED BY

THE DEPARTMENT OF FINANCE AND PERSONNEL

INTRODUCTION

THE GREEN PAPERS ON THE FUTURE OF THE LEGAL PROFESSION: THE NORTHERN IRELAND CONTEXT

1. On 25 January 1989 the Lord Chancellor presented to Parliament 3 Green Papers namely, "The Work and Organisation of the Legal Profession", "Contingency Fees" and "Conveyancing by Authorised Practitioners". The Government has decided to issue these Green Papers in Northern Ireland as the basis for consultation together with this Northern Ireland Supplement. The Supplement is comprised of 3 parts (A, B and C) respectively corresponding to the Green Papers.

2. The underlying principle which lies behind the proposals contained in the Green Papers is the promotion of the Government's competition policy. The Government believes that the legal profession and clients' access to legal services should be subject to fair competition and wider consumer choice. This should be no less the case in Northern Ireland as is proposed for England and Wales. The Government believes that the public in Northern Ireland should have access to the widest possible choice of cost-effective legal services provided that the interests of justice are safeguarded.

3. The Government takes the view that while the major proposals contained in the Green Papers are suitable for implementation in principle in Northern Ireland, they would have to be tailored in detail to fit the situation here. The Supplement draws attention to instances where this would be necessary, indicates any differences between the 2 jurisdications which are relevant to the discussion and to the proposals and invites comments from a Northern Ireland perspective.

4. The Government notes that whilst the 2 branches of the profession in Northern Ireland operate on a broadly similar basis to their counterparts in England and Wales (with the major difference that barristers in Northern Ireland practise from the Bar Library rather than chambers: see Chapter 11 of this Part of the Supplement), the profession in Northern Ireland is closely knit and much smaller than in England and Wales; approximately 1,200 solicitors and 300 barristers as against 50,000 and 6,000 respectively in England and Wales; the number of practices with 5 or more partners in the Province barely reaches double figures. Further differences relating to the professional training of lawyers in Northern Ireland and to the preponderance of unregistered conveyancing in urban areas may also need to be taken into consideration.

5. The Government hopes that the issue of the 3 Green Papers with this Supplement will stimulate much thought and comment on the issues raised from a Northern Ireland perspective not just from lawyers but also from other professions and the general public.

Comments should be addressed to

The Secretary
Department of Finance and Personnel
Room 208
Parliament Buildings
Stormont
BELFAST
BT4 3SW

so as to arrive not later than 30 June 1989.

Further copies of the Northern Ireland Supplement are available from:

Mrs T Price
Room ID
Permanent House
21-23 Arthur Street
BELFAST
BT1 4JL Telephone 327661 x 45

PART A: THE WORK AND ORGANISATION OF THE LEGAL PROFESSION

CHAPTER 1 THE PURPOSE OF THE GREEN PAPER

1. In Chapter 1 of the Green Paper the Government

   (a) sets out as its objectives in publishing the Green Paper that the public should have the best possible access to legal services and those services should be of the right quality for the particular needs of the client, (paragraphs 1.1 to 1.4);

   (b) sets out its general competition policy (paragraphs 1.5 to 1.8); and

   (c) states that the legal profession should not be excluded from the discipline of competition (provided that the interests of justice and the needs of those who use or are affected by the law are safeguarded) (paragraphs 1.9 to 1.10).

2. The Government considers that the general policy of increased competition in the legal profession, subject to appropriate safeguards, should apply equally in Northern Ireland but wishes to consider carefully all comments received from lawyers and others particularly on aspects where there are relevant differences between Northern Ireland and England and Wales.

CHAPTER 2 THE PURPOSE OF THE GREEN PAPER

1. **Chapter 2** of the Green Paper sets out the main areas of legal services, their users, providers and funders in England and Wales. The position in Northern Ireland is similar, subject to the points noted in the following paragraphs.

2. In **paragraph 2.2** reference is made to the new profession of licensed conveyancers in England and Wales which operates under the Administration of Justice Act 1985. There is no provision at present for licensed conveyancers in Northern Ireland and there are no immediate plans to provide for such a profession.

3. In **paragraph 2.7** reference is made to the Legal Aid Act 1988 and to the Legal Aid Board. These do not extend to Northern Ireland. The Lord Chancellor is, however, considering the implications of the Legal Aid Act 1988 for the administration of legal aid in Northern Ireland.

CHAPTER 3 LEGAL EDUCATION AND THE GROWTH OF SPECIALISATION

INTRODUCTION

1. Chapter 3 of the Green Paper deals with the system of legal education in England and Wales and the growing need to provide for specialist training in areas of the law.

The Objective of Legal Education

2. Paragraph 3.1 In Northern Ireland the Armitage Report (1973) (Cmd 579) and the Bromley Report (1985) HMSO (Belfast) on Professional Legal Education both expressed agreement with the definition of the general objective of legal education as contained in the Report of the Ormrod Committee on Legal Education, (March 1971), (Cmd 4595) (England and Wales) that is, that legal education –

"should concentrate on providing [the lawyer] with the best possible general introduction so as to enable him, with the help of experience and continuing education after qualification, to become a fully equipped member of the profession".

Current Position

3. Paragraphs 3.3 and 3.4 The legal education system as it operates today in Northern Ireland is based upon the recommendations contained in the Armitage and Bromley Reports and differs in a number of important respects from that in England and Wales. Unlike in the latter jurisdiction, where barristers and solicitors have separate vocational training, the Institute of Professional Legal Studies at the Queen's University of Belfast, offers a postgraduate course of vocational training for both student barristers and student solicitors. Anyone who intends to enter either branch of the legal profession in Northern Ireland must, after successfully completing the academic stage (usually by obtaining a law degree), attend the Institute and successfully complete the course which leads to the award of a Certificate in Professional Legal Studies. The course for solicitors is an integrated 2 year apprenticeship, beginning with a 4 month period of in-office training, then one year at the Institute followed by a further 8 months period of in-office training, before qualification. The Law Society have also made compulsory for newly qualified solicitors the post qualification seminars provided by the Servicing the Legal System (SLS) programme of the Queen's University, Belfast.

For Bar students in-practice training consists of a 12 month pupillage, starting after they have sucessfully completed one year at the Institute. A successful pilot scheme has begun at the Institute which provides Bar students with court experience; each Bar student is assigned to a junior barrister (of about 3-5 years standing) for a week in court.

Increasing the supply of specialists

4. Paragraph 3.8 This paragraph proposes that legal education should include specialist training within certain areas of the law. The Government believes that the growth of specialisation in the legal field is to be encouraged since it offers advantages to the client/consumer in that it gives him an easier and wider choice of practitioner who he can be assured is skilled in a particular area of law. In Northern Ireland the Government accepts that the potential for specialisation, given the preponderence of small, general practices is much more limited than in England and Wales. Nevertheless, it considers that the advantages to the public of the specialist practice or the specialist panel of practitioners are such that a structure should be created for Northern Ireland similar to that proposed for England and Wales which would provide the standards of education, training, qualification and conduct necessary for the development of specialist expertise. Providers of specialist services need not be exclusively lawyers but may be members of other professions who have acquired the appropriate training and experience in the relevant area of the law. The questions posed in this paragraph are relevant in this context for Northern Ireland commentators:

(a) Which areas of work require specialist expertise?

(b) What is the appropriate level of education, qualification and training required to be a specialist in any given area?

(c) Who is to provide the necessary education, qualification and training?

(d) How are appropriate standards of conduct to be set for practitioners and who is to monitor these standards?

Advertising of specialisms

5. Paragraph 3.9 The current position in Northern Ireland in respect of advertising of legal services is discussed further in this Supplement at Chapter 13. Briefly, Regulation 4(1) of the Solicitors Practice Regulations contains a general prohibition on advertising by solicitors. The Bar in Northern Ireland operates an absolute prohibition on advertising. The Government considers that an important purpose of specialisms is to provide the public with a better choice of practitioner appropriate for their needs. It is therefore in favour of allowing accredited specialists to advertise themselves as such to the general public.

Recognition of specialisms

6. Paragraph 3.11 It is proposed that the Secretary of State for Northern Ireland, in consultation with the Lord Chancellor, will be responsible for approving requirements for the education, training and qualification of lawyers and of recognised providers of specialist legal services.

The Advisory Committee on Legal Education and Conduct

7. **Paragraph 3.12** In Northern Ireland the Council of Legal Education was set up in 1977 as a result of recommendations in the Report of the Armitage Committee on Legal Education in Northern Ireland (Cmd 597). Its membership and functions were revised as a result of the Bromley Report on Professional Legal Education in Northern Ireland (HMSO Belfast) (1985). The membership of the Council comprises

(a) the Lord Chief Justice of Northern Ireland, or his nominee being a person holding high judicial office, who shall be Chairman;

(b) three members of The Inn of Court of Northern Ireland, nominated by the Executive Council thereof;

(c) three members of the Law Society of Northern Ireland, nominated by the Council thereof;

(d) the Dean of the Faculty of Law of Queen's University;

(e) four members of the University nominated by the Senate, not being members of staff of the Institute of Professional Legal Studies, of whom at least one shall be a member of the Senate;

(f) the Director of the Institute;

(g) such other persons, not exceeding 2 in number, as the Council may co-opt.

The role of the Council is to act as the governing body for the Institute of Professional Legal Studies.

8. The Council is therefore similar in constitution and scope to the Lord Chancellor's Advisory Committee in England and Wales, and as such could be reconstituted to form a standing committee with a remit similar to that of the proposed Lord Chancellor's Advisory Committee on Legal Education and Conduct. The new Northern Ireland Committee, to be entitled the Northern Ireland Advisory Committee on Legal Education and Conduct, would advise the Secretary of State for Northern Ireland on education, training and conduct within the legal profession and on specialisation by both lawyers and other professionals in the designated specialist legal areas. An Annual Report by the new Committee would be submitted to the Secretary of State and published.

9. **Paragraph 3.13** Final decisions on whether a particular specialist area of expertise should be recognised as such, and on what standards of education and training are appropriate in each case should rest with the Secretary of State, following advice from the new Committee. The Secretary of State would consult the Lord Chancellor on these matters, particularly in those areas pertaining to advocacy.

10. **Paragraph 3.14** The composition of the new Northern Ireland Committee would be similar to that proposed for the Lord Chancellor's Advisory Committee. The Northern Ireland Committee would be appointed by the Secretary of State, acting with the concurrence of the Lord Chancellor.

11. **Paragraph 3.15** It is proposed that the Secretariat of the new Committee would be provided by the Department of Finance and Personnel.

Comments sought

12. The Government would welcome views on this chapter, in particular on;

(a) the question of specialisation within Northern Ireland;

(b) the proposed terms of reference of a newly constituted Northern Ireland Advisory Committee on Legal Education and Conduct, and

(c) the proposed membership of the Committee.

CHAPTER 4 MAINTENANCE OF PROFESSIONAL STANDARDS

1. **Chapter 4** of the Green Paper deals with the maintenance of professional standards of competence and conduct within the legal profession in England and Wales.

2. **Paragraphs 4.1 to 4.3** of the Green Paper set out general statements of principle in relation to the need to maintain standards of competence and conduct in the provision of legal services to the public and stresses the role of the legal professional bodies in maintaining such standards.

THE STANDARDS OF CONDUCT

Present arrangements

3. **Paragraphs 4.5, 4.6 and 4.7** set out the provision made by the Bar and the Law Society in England and Wales for standards of conduct. The Bar in Northern Ireland has a similar code of conduct to that mentioned in **paragraph 4.5**. The Law Society of Northern Ireland makes Practice Regulations similar to the Practice Rules mentioned in **paragraph 4.6**. The current regulations are the Solicitors' Practice Regulations 1987. In addition to these, the Law Society of Northern Ireland publishes written standards of practice; in 1988 it published standards on litigation and conveyancing.

Codes of Professional Conduct and Standards

4. **Paragraphs 4.8 to 4.15** set out the Government's proposals for written codes of conduct which would set out clear and accessible standards of practice. The Government believes similar codes of conduct should be drawn up with respect to Northern Ireland.

5. **Paragraph 4.11** envisages 2 codes, one dealing with the provision of legal advice generally, the other with advocacy and pre-trial preparation. The broad subject-matter is set out in **paragraphs 4.14 and 4.15** (in 4.15 (a)(i) "conferences" are generally referred to as "consultations" (with counsel) in Northern Ireland).

6. In England and Wales the Lord Chancellor would look for advice on the content of the codes of conduct from his proposed new Advisory Committee on Education and Conduct (see **paragraphs 3.12 and 3.13** of the Green Paper). In Northern Ireland, it is envisaged that the Northern Ireland Advisory Committee on Legal Education and Conduct (see Chapter 3 to this Supplement, paragraphs 7 to 11) would report on such matters to the Secretary of State who would act in consultation with the Lord Chancellor.

7. **Paragraph 4.12** envisages that the principles to be embodied in such codes would be prescribed in England and Wales by the Lord Chancellor by statutory instrument. In Northern Ireland they would be prescribed by the Secretary of State after consultation with the Lord Chancellor. **Paragraph 4.13** touches on the relationship of the codes to the relevant professions: the codes would lay down minimum professional standards (**paragraph 4.12**); implicit in this (and in **paragraph 4.13**) is that professional bodies would be free to lay down additional standards of practice to the extent that they were not incompatible with (or "repugnant to") the codes.

COMPLAINTS AND DISCIPLINE

Present arrangements

8. The present arrangements outlined in **paragraphs 4.16 to 4.17** and **4.18 to 4.19** also apply to Northern Ireland, except that there are differences of detail from that set out in **Annex D**. Annex D to this Supplement refers to the corresponding arrangements in Northern Ireland.

Criticism of existing procedures: the Law Society

9. **Paragraphs 4.20 and 4.21** refer to the criticism of the Law Society's complaints procedures in England and Wales. The Law Society of Northern Ireland has striven to streamline its procedures for handling complaints without setting up a Solicitors' Complaints Bureau or its equivalent. It has split its Practice Committee so that one arm of the Committee (the Practice Committee (Complaints)) deals specifically with complaints while the other arm (the Practice Committee (Professional)) oversees professional conduct generally. Lay participation in complaints procedures will be introducted with the coming into operation of the Solicitors (Amendment) (Northern Ireland) Order later this year. Lay participation will go some way to increasing the public's perception of impartiality in the handling of complaints against solicitors. The Government, however, will watch with interest the operation of the new arrangements to ascertain whether any future improvements in the complaints procedure might be necessary.

10. **Paragraphs 4.24 to 4.29** address the difficult question of the English Law Society's powers in cases involving negligence, with particular reference to the Society's powers to impose sanctions on solicitors for inadequate professional services. It remains to be seen how the Law Society of Northern Ireland will operate its similar powers under the Solicitors (Amendment) Order when that is enacted and in operation.

11. **Paragraphs 4.28 and 4.29** refer to delays in handling complaints involving solicitors. In its latest Annual Report the Law Society of Northern Ireland indicates that it is currently reviewing its procedures; the Society is specifically addressing the problem of solicitors who fail to deal with the Society's enquiries expeditiously (a matter adverted to in **paragraph 4.28**). The Lay Observer for Northern Ireland has commented favourably on the Society's procedures.

12. **Paragraph 4.30** of the Green Paper refers to the powers of the English Lay Observer (as set out in **Annex D** to the Green Paper) and suggests that his powers are inadequate. In Northern Ireland the position is somewhat similar. The Lay Observer here has no power to re-examine complaints as such but only the way in which they were handled; he has no power to award compensation; and he will only have a limited power to refer complaints under the Solicitors (Amendment) Order to the Solicitors Disciplinary Tribunal.

13. **Paragraph 4.30** also suggests that it is anomalous that there is no equivalent office holder to review the complaints procedures of the Bar.

14. Accordingly, **paragraph 4.31** puts forward the proposal for the replacement of the Lay Observer with a Legal Services Ombudsman in England and Wales. The appointment would be made by the Lord Chancellor. The Government believes that a similar office should be established for Northern Ireland; the appointment of a Legal Services Ombudsman in Northern Ireland would be made by the Secretary of State after consultation with the Lord Chancellor and the Lord Chief Justice.

15. The Legal Services Ombudsman would have statutory powers to

(a) examine allegations about the way in which complaints about barristers, solicitors (and any other categories of future legal professionals which may be established) have been handled by the relevant professional body;

(b) refer complaints back to the investigating body for further consideration or refer them forward to the relevant disciplinary tribunal;

(c) re-investigate complaints;

(d) require the payment of compensation by the professional body concerned;

(e) recommend changes or improvements in the complaints procedures of the relevant professional bodies;

(f) publicise his decisions.

Summary of consultation

16. Comments from a Northern Ireland perspective are sought on the following matters –

(a) the Government's proposal to prescribe in subordinate legislation clear principles and standards of conduct (breach of which would found disciplinary proceedings) covering

(i) provision of legal advice and assistance;

(ii) the preparation of cases and their conduct in court;

(see paragraphs 4.11, 4.14 and 4.15)

(b) the Government's view that each professional body should demonstrate that it has a supervisory body for the investigation of complaints which is impartial and independent of the profession's representational body;

(see paragraph 4.21)

(c) The Government's proposal to replace the Lay Observer with a Legal Services Ombudsman with greater powers to examine the handling of complaints made to the Bar, the Law Society and any other future legal professional bodies.

(see paragraphs 4.30 and 4.31)

CHAPTER 5 ADVOCACY

1. **Chapter 5** of the Green Paper examines whether the current restrictions on rights of audience before the courts in England and Wales are compatible with the principles outlined in **Chapter 1** particularly in the light of the matters discussed in **Chapter 3** (Legal Education and the Growth of Specialisation).

2. In **paragraph 5.2** reference is made to **Annex E**; rights of audience in courts in England and Wales. For the Northern Ireland equivalent, see Annex E to this Supplement; the rights of audience are generally similar, save that in Northern Ireland both solicitors and professional officers (who are barristers) in the Department of Public Prosecutions have an unrestricted right of audience in the Crown Court.

3. **Paragraphs 5.3 to 5.6** deal with the case for restricting rights of audience in England and Wales to those who will not only give the right quality of service to the parties involved in a case, but who will also enable the quality of justice and the standards of advocacy to be maintained in Northern Ireland as in England and Wales.

OBTAINING RIGHTS OF AUDIENCE

4. **Paragraph 5.8** sets out the principle which, in the Government's views, should underlie a right of audience before a court in England and Wales; that the advocate can demonstrate he has the appropriate education, training and qualifications and is bound by an appropriate code of conduct. The Government accepts that this should be the principle which should also apply in future for determining rights of audience before the courts in Northern Ireland. It is proposed that in Northern Ireland advocates' professional bodies should have to satisfy the Secretary of State that their members are fit and proper persons to appear as advocates before the court or courts in question in order to obtain rights of audience before them. Before being so satisfied, the Secretary of State will consult with the Lord Chancellor and the Lord Chief Justice.

LAY ADVOCACY

5. **Paragraph 5.9** deals with the matter of lay advocacy in England and Wales. The Government believes that it may now be right for lay representatives to be granted rights of audience in the courts on behalf of others in some instances. It considers that the whole area of lay representation should be considered by the Lord Chancellor's Advisory Committee in England and Wales. In Northern Ireland the Government intends to invite the proposed Northern Ireland Advisory Committee on Legal Education and Conduct to consider the matter of lay representation in the courts here.

EMPLOYED LAWYERS

6. **Paragraphs 5.10 to 5.12** deal with employed lawyers in England and Wales. The Government envisages that the proposed Northern Ireland Advisory Committee on Legal Education and Conduct will be invited to consider the matter of rights of audience for employed lawyers in Northern Ireland.

ROLE OF THE ADVISORY COMMITTEE

7. **Paragraph 5.13** deals with the role of the Lord Chancellor's Advisory Committee on Legal Education and Conduct in England and Wales in the area of advocacy. In Northern Ireland it is envisaged that the proposed Northern Ireland Advisory Committee on Legal Education and Conduct would be responsible for advising the Secretary of State on the education, qualifications and training of advocates appropriate for each of the courts. The Secretary of State would be required to consult the Lord Chief Justice before reaching decisions and his final decision would be subject to the concurrence of the Lord Chancellor. Decisions by the Secretary of State on rights of audience would be put into effect by means of subordinate legislation thus being subject to Parliamentary control.

ADVOCACY CERTIFICATES

8. **Paragraphs 5.4 to 5.16** deal with proposals for advocacy certificates in England and Wales. The Government proposes to adopt a similar approach in Northern Ireland; rights of audience for all advocates should depend on a certificate of competence. These advocacy certificates would be issued, and, where appropriate, varied, suspended or revoked by the relevant professional bodies. The Secretary of State would decide, on advice from the Advisory Committee, after consulting with the Lord Chief Justice and with the concurrence of the Lord Chancellor, which professional bodies should be authorised to grant advocacy certificates.

Requirements for obtaining an Advocacy Certificate

9. **In paragraph 5.15** the Government suggests that, in order to obtain a full advocate's certificate in England and Wales, those who wish to practise in all the courts should need to:

(a) undertake an *appropriate academic course* in law;

(b) undertake a *vocational course* which includes advocacy training;

(c) undertake *practical training* in advocacy;

(d) *obtain a limited certificate*; and then

(e) *practise with a limited certificate for a certain period.*

The above 5 steps should, in the government's opinion, also be the requirements for obtaining a full advocate's certificate in Northern Ireland. **Paragraphs 5.17 to 5.39** go on to describe in detail, in relation to England and Wales, the manner of obtaining an advocate's certificate, the effect of holding such a certificate and the proposed transitional arrangements. The Government believes that these proposals should apply mutatis mutandis in Northern Ireland as in England and Wales and would welcome views on this proposed approach to advocacy rights.

CHAPTER 6 IMMUNITY FROM ACTIONS IN NEGLIGENCE IN ADVOCACY WORK

1. **Chapter 6** of the Green Paper refers to immunity from action for negligence in advocacy in England and Wales whereby an advocate is immune from an action for negligence at the suit of his or her client in respect of his or her conduct and management of a case in court. No change in this position is recommended for England and Wales.

2. The Northern Ireland position in this area corresponds to that of England and Wales and should, in Government's opinion, remain so and therefore no change is suggested.

CHAPTER 7 ATTENDANCE ON COUNSEL

1. Chapter 7 of the Green Paper deals with attendance on counsel in court in England and Wales. The same general rules relating to attendance on counsel apply in Northern Ireland.

2. The Government believes that the suggestion in **paragraph 7.4** (that those who are paying for in-court work should be allowed to decide whether assistance in court is required) should apply equally in Northern Ireland.

CHAPTER 8 DIRECT ACCESS TO COUNSEL

1. In **Chapter 8** of the Green Paper the Government proposes there should be legislation to permit barristers in England and Wales who wish to do so to enter into contractual relations with those who instruct them. The Government believes that similar action should be taken in respect of barristers in Northern Ireland and invites comments on this approach.

2. In **paragraph 8.6** the Government indicates its belief that in future advocates should themselves have a discretion to decide whether they wish to take instructions directly from lay clients or to restrict themselves, as at present, to taking instructions only from other professionals. Comments are sought as to whether such a change would be appropriate in Northern Ireland.

CHAPTER 9 QUEEN'S COUNSEL

1. **Chapter 9** of the Green Paper deals with the appointment of Queen's Counsel in England and Wales.

2. **Paragraph 9.2** describes how, in England and Wales, Queen's Counsel are appointed. In Northern Ireland the Lord Chief Justice advises the Queen on such appointments.

3. The Government believes that the proposals for England and Wales regarding those treated as eligible for Silk (**paragraph 9.8**) should be adopted in Northern Ireland and would welcome views on this approach.

CHAPTER 10 THE JUDICIARY

1. **Chapter 10** of the Green Paper sets out in general terms the Government's proposals in respect of the criteria for judicial appointments in England and Wales. The Government proposes that in England and Wales all advocates who have held the relevant advocacy certificate for the appropriate length of time should in future be eligible for judicial appointment and in addition that judges in a lower court should be eligible for promotion to a higher one on the basis of their judicial experience in the lower court. The Government believes these criteria should also apply in Northern Ireland.

CURRENT DIFFERENCES IN JUDICIAL APPOINTMENTS

2. **Paragraph 10.4** In Northern Ireland solicitors are not eligible for appointment as Lords Justices of Appeal or High Court Judges. Although a solicitor can be appointed a County Court Judge, he must first have been a deputy County Court Judge for not less than 3 years; this requirement does not apply to barristers.

3. The Lord Chancellor may request a County Court Judge to sit and act as a judge of the High Court. The office of Deputy High Court Judge does not exist in Northern Ireland. However, under section 7(3) of the Judicature (Northern Ireland) Act 1978 the Lord Chancellor may appoint a person qualified for appointment as a High Court Judge to sit and act as a judge of the High Court where he considers this expedient as a temporary measure.

4. **Paragraph 10.5** The equivalent of a Circuit Judge in Northern Ireland is a County Court Judge.

5. **Paragraph 10.9** In Northern Ireland only solicitors may be appointed to the following statutory officer posts: Master (Chancery), Master (Bankruptcy), Master (Taxing Office) and Circuit Registrar.

6. **Paragraph 10.13** sets out the detail of the Government's proposed arrangements for judicial appointments in England and Wales. The Government believes that these proposals should also be applied in Northern Ireland subject to the differences referred to above. Views are sought on this approach.

CHAPTER 11 BARRISTERS' PRACTICES

1. **Chapter 11** of the Green Paper deals with barristers' practices in England and Wales. Much of the detail is not relevant to Northern Ireland, where barristers do not practise out of chambers. In Northern Ireland, barristers practise from the Bar Library situated within the Royal Courts of Justice: barristers practise from there together, but as individuals, in an atmosphere of friendship and comradeship which helps to transcend religious and political differences. The Government believes that this assists in the administration of justice in a society where religious and political barriers exist. There is no grouping of barristers, either formal or informal.

2. Since barristers in Northern Ireland do not practise from chambers, there are no barristers' clerks: barristers receive instructions in the Bar Library from solicitors direct and not through any intermediary.

3. **Paragraphs 11.13 to 11.17** deal with partnerships between barristers. In Northern Ireland there is a similar prohibition on barristers forming partnerships. The Government acknowledges that the absence of a chambers' system in Northern Ireland militates against the formation of partnerships. In addition it sees merit in the retention of the Bar Library System because of the atmosphere it fosters amongst barristers.

4. The Government therefore invites comments on the general question of barristers in Northern Ireland forming partnerships and in particular on the effect such a proposal would have on the Bar Library System.

CHAPTER 12 MULTI-DISCIPLINARY AND MULTI-NATIONAL PRACTICES

1. Chapter 12 of the Green Paper deals with the formation of multi-disciplinary and multi-national practices in England and Wales.

A. MULTI-DISCIPLINARY PRACTICES

2. Paragraphs 12.1 and 12.2 set out the statutory background in England and Wales to the situation whereby solicitors and barristers are prevented from practising in conjunction with any other professionals. Similar restrictions apply to the 2 branches of the legal profession in Northern Ireland. In relation to solicitors, by virtue of section 5 of the Partnership Act 1890 and Articles 23 and 28 of the Solicitors (Northern Ireland) Order 1976, and in relation to barristers, by virtue of the Bar's Code of Conduct.

3. Paragraph 12.8 states the Government's view in relation to solicitors in England and Wales; that it proposes to legislate to amend the statutory restrictions on multi-disciplinary (and multi-national) practices. The Government takes a similar view in relation to solicitors in Northern Ireland. The Government is particularly concerned that the current high professional standards that govern solicitors' practices in Northern Ireland should be maintained in a practice containing non-solicitors.

4. Paragraphs 12.9 to 12.11 deal with safeguards in England and Wales; these would be equally necessary in Northern Ireland and, accordingly, comments are invited as to what form the safeguards should take.

5. Paragraph 12.14 states the Government's view that barristers in England and Wales should be permitted to enter into multi-disciplinary practices. In Chapter 11 of this Supplement the Government recognised the particular merits of the Bar Library System for Northern Ireland in the context of barristers forming partnerships with other barristers. The Government would similarly welcome views generally as to whether barristers in Northern Ireland should be permitted to enter into multi-disciplinary practices with particular reference to the effect this might have on the Bar Library System.

B MULTI-NATIONAL PRACTICES

6. **Paragraph 12.15** sets out the present position in England and Wales. Similar restrictions apply in Northern Ireland; solicitors may not practice in conjunction with lawyers from another jurisdiction.

7. **Paragraph 12.22** sets out the Government's view that multi-national solicitors' practices should be permitted in England and Wales. The Government takes a similar view in relation to Northern Ireland and invites comments.

CHAPTER 13 ADVERTISING AND INFORMATION

THE GOVERNMENT'S APPROACH

1. **Chapter 13** of the Green Paper deals with advertising and information about the legal professions and legal services in England and Wales.

2. **Paragraph 13.3** sets out the Government's approach in England and Wales, expressly linked to the encouragement of greater competition and consumer choice namely, that the only restraints on advertising should be those set out in the British Code of Advertising Practice of the Advertising Standards Authority, that advertising should be legal, decent, honest and truthful.

PRESENT POSITION

3. **Paragraph 13.5** sets out the present position in respect of advertising by solicitors in England and Wales. There, solicitors may advertise their services though any medium and specify their fees for particular services or the fact that they are prepared to give a quotation.

4. The current position in Northern Ireland is very different. Regulation 4(1) of the Solicitors Practice Regulations 1987 contains a general prohibition on advertising by solicitors. That is subject to the terms of a General Waiver by the Council of the Law Society, which sets out detailed requirements for press announcements and entries in directories.

5. Collective announcements setting out the services offered by firms and solicitors in their local area may be published under the aegis of local solicitors' associations. Announcements by individual firms of solicitors must be confined to matters such as the opening of a new office, the amalgamation or dissolution of firms, changes of partners and of firms' names and their addresses, office hours, telephone numbers and telex details. Firms offering legal aid services may have their names entered in the "Legal Aid Solicitors List" (published annually by the Law Society of Northern Ireland) opposite the legal aid services which they undertake. There is no provision which permits firms of solicitors to publish information in relation to their fees.

6. It is understood that the Council of the Law Society of Northern Ireland is currently revising the Regulations on advertising.

7. **Paragraphs 13.6 and 13.7** set out the present position of the Bar in England and Wales in relation to advertising. The position in Northern Ireland is similar to that outlined in **paragraph 13.6**: there is an absolute prohibition on advertising.

THE GOVERNMENT'S VIEW

8. The Government's views on advertising in the Legal Profession in England and Wales are set out in **paragraph 13.3** (referred to in paragraph 2, above) and **paragraphs 13.8 to 13.10**: the Government favours a general relaxation of the restraints on advertising in the legal profession to enable the provision of legal services to be brought to the attention of the public.

9. The Government believes that there should be a similar relaxation in Northern Ireland, where the restraints on advertising are even more severe than in England and Wales.

CHAPTER 14 PROBATE

1. **Chapter 14** of the Green Paper deals with the current restrictions on the preparation of papers in connection with probate in England and Wales.

2. **Paragraph 14.1** indicates that the Government proposes to amend section 23 of the Solicitors Act 1974 which imposes restrictions in England and Wales on those who may draw or prepare for reward certain papers in connection with non-contentious applications for probate and letters of administration. In Northern Ireland similar restrictions are imposed by Article 24 of the Solicitors (Northern Ireland) Order 1976. It is the Government's view that Article 24 should be amended for the same reasons that are put forward in respect of the amendment of Section 23.

3. **Paragraph 14.5** refers to a "trust corporation" in England and Wales as defined by Section 128 of the Supreme Court Act 1981 and the Law of Property (Amendment) Act 1926. In Northern Ireland "trust corporation" is defined by Article 9 of the Administration of Estates (Northern Ireland) Order 1979. The provisions are, however, similar and in Northern Ireland, as in England and Wales, it is the banks which are the most likely companies to be involved in the administration of clients' estates.

4. The Government would welcome views on Option A (**paragraphs 14.12 to 14.15**) and Option B (**paragraph 14.18**) and the requirement of the oath (**paragraph 14.18**) in a Northern Ireland context.

ANNEX A COMPETITION IN THE EC

1. Annex A to the Green Paper deals with the possibility of an increase in competition for the provision of legal services from European lawyers which may result from the changes to be brought about in 1992 by virtue of the Single European Act.

2. As part of the UK Northern Ireland is bound in the same manner as England and Wales by the requirements of the EC treaty and the Council Directive on a general system for recognition of higher education diplomas adopted by the Council of Ministers on 21 December 1988.

3. Northern Ireland will also be affected by the likely increased body of law implementing EC directives and an increased body of EC law coming as a result of the 1992 single internal market.

ANNEX B THE PROVIDERS OF LEGAL SERVICES

1. **Annex B** to the Green Paper lists the providers of legal services in England and Wales.

2. **Paragraphs 1 and 2** The qualification requirements for a barrister practising in Northern Ireland are dealt with in Chapter 3 to this Part of the Supplement.

3. **Paragraph 3** At present, as in England and Wales, there is no compulsory continuing education in Northern Ireland for barristers after pupillage.

PRACTICE AT THE BAR

4. **Paragraph 4** Practice at the Bar in Northern Ireland is dealt with in Chapter 3 to this Part of the Supplement.

THE EMPLOYED BAR

5. **Paragraph 5** The exact number of barristers employed by government departments', commerce and industry in Northern Ireland is not known.

SOLICITORS

6. **Paragraphs 6, 7 and 8** The qualification requirements for a solicitor practising in Northern Ireland are dealt with in Chapter 3 to this Part of the Supplement.

PRACTICE AS A SOLICITOR

7. **Paragraph 9** The latest figure for the number of solicitors holding practising certificates in Northern Ireland is approximately 1200. Section 9 of the Administration of Justice Act 1985 does not extend to Northern Ireland but similar provision is included in the draft Solicitors (Amendment) Order. In Northern Ireland the great majority of law firms have under 5 principals and there is a high percentage of one principal firms. The largest solicitors firm in Northern Ireland has 12 partners and no more than 10 firms here have between 6 and 10 partners.

EMPLOYED SOLICITORS

8. **Paragraph 10** The exact number of solicitors employed in Government departments, commerce and other employments is not known.

NOTARIES

9. **Paragraph 11** In Northern Ireland notaries have similar functions to those in England and Wales.

LEGAL EXECUTIVE

10. **Paragraph 12** There is no equivalent in Northern Ireland to the legal executive.

LICENSED CONVEYANCERS

11. **Paragraphs 13 and 14** There is at present no provision for licensed conveyancers in Northern Ireland.

PATENT AGENTS

12. **Paragraph 15** There are currently no patent agents practising in Northern Ireland.

INSOLVENCY PRACTITIONERS

13. **Paragraph 16** Under the recently published Proposal for a draft Insolvency (Northern Ireland) Order 1989 insolvency practitioners in Northern Ireland have the same functions as their counterparts in England and Wales.

BANKS, BUILDINGS SOCIETIES, ACCOUNTANTS AND CHARTERED SECRETARIES

14. **Paragraph 17** In Northern Ireland banks, building societies, accountants and chartered secretaries give legal advice to their clients on such matters as taxation, wills, insolvency and company law.

LAW CENTRES

15. **Paragraph 18** There is one law centre in Northern Ireland situated in Belfast. It specialises in giving advice on debt, welfare, social security and housing law.

CITIZENS ADVICE BUREAUX

16. **Paragraph 19** There are currently 30 Citizens Advice Bureaux in Northern Ireland. They give advice on the same matters as their counterparts in England and Wales.

TRADE UNIONS

17. **Paragraph 20** Trade unions provide advice and assistance to their members on the same basis as their counterparts in England and Wales.

THE ROYAL BRITISH LEGION

18. **Paragraph 21** The Royal British Legion operates in Northern Ireland in the same manner as it does in England and Wales.

ANNEX C ACADEMIC AND VOCATIONAL TRAINING

1. **Annex C** to the Green Paper describes the vocational and academic training for lawyers in England and Wales.

ACADEMIC STAGE

2. **Paragraph 2** The current core subjects for the LLB course at Queen's University of Belfast are as follows:

Company Law

Constitutional Law

Contract

Evidence

Tort

Land Law

Equity

Criminal Law

3. **Paragraph 3** Consideration could be given at the academic stage to reflecting the increasing importance of financial regulation and the EC.

VOCATIONAL STAGE

5. **Paragraph 4** In Northern Ireland the vocational stage of legal training in the Institute of Professional Legal Studies provides a common system of vocational training which emphasises practical skills for both branches of the legal profession. The minimum requirements for vocational training set out at **paragraph 4** to Annex C are covered by the courses provided at the Institute. In particular the 2 newer types of courses, (i) management of legal practice including computerisation and (j) negotiation and communication skills in both non-contentious and contentious matters, are being successfully developed at the Institute.

ANNEX D

PRESENT ARRANGEMENTS OF THE BAR AND THE LAW SOCIETY FOR HANDLING COMPLAINTS

1. Annex D to the Green Paper describes the present arrangements of the Bar and the Law Society in England and Wales for handling complaints.

2. *PART 1: THE BAR*

Paragraphs 1 to 3 of the Green Paper set out the disciplinary procedures of the Bar in England and Wales. The Bar of Northern Ireland has similar procedures.

3. *PART 2: SOLICITORS*

Paragraphs 2 to 7 of the Green Paper set out the arrangements for complaints and discipline in relation to solicitors in England and Wales.

4. Paragraph 4 refers to the Solicitors Complaints Bureau. In Northern Ireland complaints to the Law Society about the conduct of solicitors are referred by the Society's Secretariat to the Practice Committee (Complaints) for investigation. In doing so the Committee may direct a solicitor to attend before it (and failure to attend may attract further disciplinary action as a breach of the Practice Regulations). The Committee may deal with (less serious) cases informally; it may recommend to the Council of the Law Society that the Society's powers of intervention in a solicitor's practice be exercised; and it may recommend that proceedings be brought against the solicitor before the Disciplinary Committee (which will be reconstituted as the Solicitors Disciplinary Tribunal with the enactment of the Solicitors (Amendment) Order). The Practice Committee (Complaints) will have further powers (on the assumption that the Society's powers will be delegated to the Committee) when the Solicitors (Amendment) Order comes into operation. These will include specific powers to direct the production of documents and powers to impose sanctions for inadequate professional services. There will also be powers to impose conditions on practising certificates, and, in extreme cases, a power to suspend a practising certificate. The Committee will have some lay members for the first time when the Solicitors (Amendment) Order comes into operation.

5. Paragraph 5 refers to the Solicitors Disciplinary Tribunal. The position in Northern Ireland is similar and lay membership will be introduced with the coming into operation of the Solicitors (Amendment) Order, as will the power of the Lay Observer to refer certain cases (although the latter provision may ultimately be superseded if it is decided to establish a Legal Services Ombudsman with greater powers). The members of the present Disciplinary Committee are (and those of the newly constituted Tribunal will be) appointed by the Lord Chief Justice of Northern Ireland. The Committee has power to strike off the roll, suspend from

practice, restrict practice (so prohibiting a solicitor from practising as a principal on his own account), order the payment of compensation or the making of restriction, fine or order the payment of costs.

6. **Paragraph 6** refers to the inherent supervisory jurisdiction of the High Court over solicitors, who are officers of the Court. In England and Wales, most applications of complaints are made to the Solicitors Disciplinary Tribunal; in Northern Ireland all applications are made to the Disciplinary Committee, although the High Court's inherent jurisdiction remains. There is also a power for a judge or a resident magistrate to report prima facie professional misconduct to the Law Society with a view to proceedings before the Disciplinary Committee. Appeals from the Disciplinary Committee lie to the High Court. The Lord Chief Justice has a statutory disciplinary jurisdiction in certain particular cases and certain appeals will lie to the Lord Chief Justice when the Solicitors (Amendment) Order comes into operation.

7. **Paragraph 7** refers to the office of the Lay Observer. There is a similar office holder in Northern Ireland, appointed under Article 42 of the Solicitors (Northern Ireland) Order 1976. His function is to report on the nature of complaints made to the Law Society of Northern Ireland and the manner in which those complaints are dealt with. The Solicitors (Amendment) Order will give the Lay Observer power to examine written allegations relating to the Law Society's treatment of complaints and the power to refer certain cases to the Tribunal in respect of the quality of professional services but his will be ultimately superseded if it is decided to have a Legal Services Ombudsman.

ANNEX E RIGHTS OF AUDIENCE

1. **Annex E** to the Green Paper describes the rights of audience of lawyers before courts in England and Wales.

2. The following paragraphs identify the differences between Northern Ireland and England and Wales which are relevant to rights of audience.

3. **Paragraph 2** In Northern Ireland lay magistrates have a very limited jurisdiction in Magistrates' Courts sitting out of petty sessions. The vast majority of cases are dealt with in courts of summary jurisdiction presided over by legally qualified resident magistrates. Juvenile cases are heard by a Bench comprising a resident magistrate and 2 members (one male, one female) drawn from a panel of lay people appointed by the Lord Chancellor.

4. **Paragraph 3** Article 164(1) of the Magistrates' Courts (Northern Ireland) Order 1981 provides that a party to proceedings before a Magistrates' Court in Northern Ireland may be represented by a barrister or solicitor. Where a Magistrates' Court is satisfied that a party to proceedings is unable to appear due to illness or "other reasonable cause", it may allow that person's spouse, child, parent or sibling to be heard [Article 164(2)].

5. **Paragraph 4** The Crown Court in Northern Ireland is presided over by a High Court Judge or by a County Court Judge. Ordinarily, trials are heard by a judge sitting with a jury. However, certain offences are tried by a judge sitting alone (this is sometimes referred to as a "Diplock Court"). In Northern Ireland, appeals from Magistrates' Courts are heard in the County Courts.

6. **Paragraph 5** Barristers have a right of audience in all cases in the Crown Court in Northern Ireland. A solicitor's right of audience in the Crown Court is regulated by section 50 of the Judicature (Northern Ireland) Act 1978, which provides as follows:–

"(1) A solicitor of the Supreme Court may appear in, conduct, defend and address the court in any proceedings in the Crown Court, other than proceedings of such description (if any) as may from time to time be specified in directions given by the Lord Chief Justice under this section.

(2) In considering whether to exercise his powers under this section the Lord Chief Justice shall have regard to any rights of audience heretofore exercised by solicitors at any trials on indictment and to any other circumstances affecting the public interest.

(3) Any directions given under this section may be subject to such conditions and restrictions as appear to the Lord Chief Justice to be necessary or expedient.

(4) Nothing in this section shall take away or affect the inherent powers of any court or judge to confer a right of audience."

To date, no directions have been given by the Lord Chief Justice under section 50(1) but the right of audience afforded solicitors in the Crown Court is seldom exercised.

7. **Paragraph 6** Article 4(10) of the Prosecution of Offences (Northern Ireland) Order 1972 provides that a professional officer of the department of the Director of Public Prosecutiions who has been admitted to practise at the Bar of Northern Ireland may prosecute criminal proceedings in the Crown Court, the County Courts and the Magistrates' Courts and may exercise a right of audience in those proceedings notwithstanding he has not been instructed by a solicitor.

8. **Paragraph 7** The County Courts in Northern Ireland also hear appeals from Magistrates' Courts in both criminal and civil cases. In an appeal from the juvenile court, the judge sits with two assessors drawn from a juvenile court lay panel.

County Court trials are heard by County Court Judges. Certain cases where the amount in issue does not exceed £1,000 are heard by Circuit Registrars. Circuit Registrars also hear consumer cases where the amount in issue does not exceed £500 using a small claims arbitration procedure.

9. **Paragraph 8** Rights of audience are regulated by Article 50 of the County Courts (Northern Ireland) Order 1980, which (so far as is material) provides as follows:–

"(1) In any proceedings in a county court the right of audience shall extend only to

(a) any party to the proceedings;

(b) a barrister-at-law retained by or on behalf of any party;

(c) a solicitor acting generally in the proceedings for a party thereto, or a solicitor employed by one so acting, but not a solicitor retained as an advocate by a solicitor so acting;

(d) any other person (including another solicitor) allowed by leave of the court in special circumstances to appear instead or on behalf of any party."

10. **Paragraph 9** The reference in the text to the Divisional Court of the Chancery Division and to the Divisional Court of the Family Division are not applicable to Northern Ireland. While the Queen's Bench Division of the High Court exercises a supervisory jurisdiction over inferior courts and tribunals, it is only referred to as a Divisional Court when dealing with a criminal cause or matter. In addition to its own unlimited general jurisdiction, the High Court hears appeals in civil cases from the County Courts.

11. **Paragraph 10** The High Court in Northern Ireland consists of the Lord Chief Justice (who is the President of the court) and normally not more than 6 High Court Judges.

12. **Paragraph 11** Barristers have a general right of audience in the High Court in Northern Ireland. A solicitor's right of audience is regulated by section 106 of the Judicature (Northern Ireland) Act 1978, which provides as follows:-

"(1) A solicitor of the Supreme Court shall have a right of audience in any proceedings in the High Court or the Court of Appeal respecting -

(a) any bankruptcy matter;

(b) any matter relating to the winding-up of a company;

(c) any matter to be heard in chambers or which is adjourned from chambers into court; or

(d) any matter in which counsel already instructed is for any reason unable to appear,

without being required to instruct counsel, or other counsel as the case may be, and may act and plead therein as counsel might have acted or pleaded.

(2) Where in any proceedings in the High Court or the Court of Appeal (other than proceedings to which subsection (1) relates) a solicitor has had no reasonable opportunity, having regard to all the circumstances, of adequately instructing counsel, the court, if of opinion that it is desirable in the interests of justice to do so, may grant the solicitor a right of audience as ample as that which counsel would have enjoyed.

(3) A solicitor of the Supreme Courrt shall have a right of audience in any enquiries or proceedings before a statutory officer sitting in the exercise of his jurisdiction whether original or delegated; and any such officer may in his discretion permit such right of audience to be enjoyed by an experienced solicitor's clerk acting on behalf of his principal.

(4) Nothing in this section shall take away or affect the inherent powers of any court of judge to confer a right of audience."

13. **Paragraph 12** The Court of Appeal in Northern Ireland is not divided into criminal and civil divisions. The court consists of the Lord Chief Justice (who is the President of the court) and 3 other Lords Justices of Appeal. Any High Court Judge is entitled to sit in the Court of Appeal for the purposes of the court's criminal jurisdiction.

14. **Paragraph 15** Rights of audience in the Court of Appeal in Northern Ireland are as stated above at paragraph 12 in relation to the High Court.

PART B CONTINGENCY FEES

CHAPTER 1 INTRODUCTION

1. Chapter 1 of this Green Paper provides a general description of the contingency fee arrangement in legal proceedings and the arguments for and against the use of such arrangements are briefly described. The Government concludes that in line with its general policies of deregulation and greater consumer choice, it is time to consider some relaxation of existing restrictions on contingency fee agreements in England and Wales. The Government believes that a similar relaxation should be considered for Northern Ireland.

CHAPTER 2 BACKGROUND

1. **Chapter 2** This chapter sets out the current position in England and Wales, Scotland and the United States of America with respect to contingency fee arrangements. In England and Wales contingency fee agreements are prohibited. This is also the position in Northern Ireland where Section 11 of the Attorneys' and Solicitors' Act 1870 (c.28) restricts such agreements and Regulation 17 of the Solicitors' Practice Regulations 1987 provides that:-

> "a solicitor shall not accept instructions in respect of any claim or in relation to any matter in circumstances or under any arrangement whereby he will receive in respect of such claim or matter of a contingency fee; and a solicitor shall not make any agreement with his client for payment of his fees in respect of contentious business done or to be done by way of a gross sum, commission or percentage otherwise than in accordance with the Attorneys' and Solicitors' Act 1870 or any statutory modification or re-enactment thereof".

2. In Scotland lawyers may act on a speculative basis. A solicitor and advocate can undertake to act for the pursuer on the basis that they will not be remunerated except in the event of success and that any costs such as court fees will be defrayed by the solicitor. In the event of the case being successful the solicitor and advocate are paid their normal fee. If the case is lost they are paid nothing.

3. In the USA there is a very extensive contingency fee system. The problems associated with such a wide, unregulated system are dealt with in further detail in **Chapter 3** of the Green Paper on Contingency Fees.

CHAPTER 3 ARGUMENTS FOR AND AGAINST THE INTRODUCTION OF CONTINGENCY FEES

1. Chapter 3 This chapter sets out in detail the arguments for and against the introduction of contingency fee agreements. Critics of the American system argue that the contingency fee agreements encourage juries to award excessively high damages to successful plaintiffs; that contingency fees lead to excessive litigation, and that they encourage the distasteful practice of 'bounty-hunting' lawyers chasing those affected by accidents, disasters etc. In the Green Paper a number of significant differences between the American legal systems and that of England and Wales are pointed out. The Northern Ireland position corresponds to that of England and Wales.

2. (i) damages in England and Wales (and in Northern Ireland) are almost always awarded by a judge and an approach similar to that taken on payment into court could be adopted so that the existence of a contingency fee arrangement would not be revealed to the judge until the case has concluded;

(ii) in England and Wales (and in Northern Ireland) the rule that costs follow the event would continue to act as a real deterrent on nuisance litigation;

(iii) United States society is litigious on a scale not known in England and Wales (or Northern Ireland);

(iv) huge sums in damages and punitive damages are common in the United States;

(v) class actions which are permittable in the United States but not in England and Wales, (or Northern Ireland) encourage the 'bounty-hunting' by US lawyers.

3. The chapter concludes that a wholly unregulated contingency fee system similar to that operating in the USA would be undesirable. However the government believes that there is no objective evidence which supports the view that the introduction of a restricted type of contingency fee system in England and Wales would lead to the kind of problems and excesses experienced in the USA. The arguments put forward for and against are equally relevant to Northern Ireland and comments are invited from the Northern Ireland view point.

CHAPTER 4 HOW A SYSTEM OF CONTINGENCY FEES MIGHT OPERATE

1. **Chapter 4** describes how a system of contingency fees might operate in England and Wales. The Government considers that there is no substantial argument against the introduction of speculative actions (akin to the Scottish system) in England and Wales. The Government suggests the speculative system could be further relaxed by extending it to include the ability to agree an uplift in costs, payable to the lawyers in the event of success. Restrictions on the amounts recoverable and on the stage at which they could be recovered could be contained in primary or secondary legislation. The Government considers that a similar regime should exist for Northern Ireland. Comments are invited on how such a system might operate within Northern Ireland.

CHAPTER 5 CONCLUSION

1. Chapter 5 sets out the Government's provisional recommendation for England and Wales, that is, to permit speculative actions on the Scottish model coupled with the ability to agree an uplift in costs (paragraph 5.3). The Government in Northern Ireland agrees with this approach but would welcome views as to whether a restricted form of contingency fee going beyond that suggested in paragraph 5.3 might be introduced in Northern Ireland.

Comments should be sent to

The Secretary
Department of Finance and Personnel
Room 208
Parliament Buildings
Stormont
BELFAST
BT4 3SW

so as to arrive not later than 30 June 1989.

PART C CONVEYANCING BY AUTHORISED PRACTITIONERS

CHAPTER 1 INTRODUCTION

1. Chapter 1 of this Green Paper introduces the Government's proposals for legislation in England and Wales permitting the provisions of conveyancing services by banks, building societies, other institutions and individuals, subject to certain safeguards. The Government in Northern Ireland believes that a similar system for the provision of conveyancing services should apply in Northern Ireland.

2. Paragraph 1.2 sets out the essence of the Government's proposals for England and Wales: authorised practitioners (that is, financial institutions, such as banks and building societies, and others who are not solicitors) should be permitted to provide conveyancing services to the public, providing that they satisfy strict conditions including compliance with a code of conduct and the employment of solicitors or licensed conveyancers to carry out the conveyancing. In Northern Ireland there would be a similar scheme, except that there are currently no plans for licensed conveyancers here (see Chapter 2 of this Part of the Supplement, paragraphs 2 and 4).

3. Paragraph 1.3 indicates that there would be no prohibition against lending institutions providing conveyancing services for their borrowers, but emphasises the Government's concern to ensure that independent solicitors and licensed conveyancers in England and Wales would be able to complete with such institutions on a fair basis.

4. The Government in Northern Ireland shares this concern. Views are therefore invited generally on whether authorised practitioners might be required not to cross-subsidise conveyancing services from their other activities; and on whether a similar restriction should be placed on independent solicitors, so creating a level playing field. Views are also sought as to whether authorised practitioners should be expressly required to offer conveyancing services at not less than their true costs (and to satisfy their auditors as to this). There might also be a requirement that a lending institution which has offered to add the conveyancing costs to the loan should be required to do this whether the borrower chose that institution or an independent solicitor to do his conveyancing.

CHAPTER 2 BACKGROUND

1. **Chapter 2** of this Green Paper sets out the background in England and Wales. The starting point is the statutory provision restricting conveyancing for reward, contained in section 22 of the Solicitors Act 1974 (**paragraph 2.1** of the Green Paper): similiar provision is contained in Article 23 of the Solicitors (Northern Ireland) Order 1976. The practical effect of these provisions has been to restrict the provision of conveyancing services to solicitors. These provisions would, without more, provide a bar to the provision of conveyancing by financial institutions and others who are not solicitors, even where the conveyancing was carried out by employed solicitors.

2. This position was modified in England and Wales with the establishment under the Administrtion of Justice Act 1985 of the new profession of licensed conveyancers; the 1985 Act set out an elaborate legislative framework to provide for the education, training and regulation of licensed conveyancers; that legislation is clearly modelled on the legislation regulating the solicitors' profession. Licensed conveyancers in England and Wales (of which there are now about 500 as compared with 50,000 solicitors) are allowed to offer conveyancing services for reward.

3. A second development in England and Wales was the announcement by the Solicitor-General in December 1985 that the Government intended to introduce legislation to allow banks and building societies to offer conveyancing to the public (**paragraph 2.3** of the Green Paper). The framework for this is set out in section 124 of the Schedule 21 to the Building Societies Act 1986. These provisions empower the Lord Chancellor to recognise institutions and individual practitioners (other than solicitors or licensed conveyancers) as suitable to provide conveyancing services, and give the Lord Chancellor extensive rule-making powers to control the provision of such services. Broadly, the Government's policy in 1985 (embodied in the 1986 Act) was to allow lending institutions to provide conveyancing, but to prohibit them from providing conveyancing for their own borrowers; this restriction resulted from concern over the potential for conflicts of interest where a solicitor (or licensed conveyancer) employed by the lender acted throughout for both the lender and the borrower.

4. As far as Northern Ireland is concerned, there are currently no plans to provide for licensed conveyancers, and there is no legislation similar to Schedule 21 to the Building Societies Act 1986.

CHAPTER 3 THE NEW APPROACH

1. **Chapter 3** of this Green Paper outlines the new approach to the provision of conveyancing services by lending institutions and others in England and Wales. The Government in Northern Ireland believes that there should be a similar approach here.

2. **Paragraphs 3.1 to 3.3** deal with the question of conflicts of interest where solicitors and licensed conveyancers employed by lending institutions in England and Wales act throughout for both the lender/their employer and the borrower. The Government proposes to allow solicitors and licensed conveyancers employed by lending institutions and other authorised practitioners (see paragraph 3 below) in England and Wales to undertake conveyancing on behalf of their employers' clients on the basis of safeguards set out in a code of conduct (**paragraph 3.9**). The Government in Northern Ireland believes that solicitors employed by lending institutions here should be allowed to undertake conveyancing on a similar basis.

3. **Paragraph 3.4** contains the proposal that, apart from solicitors and licensed conveyancers, any person (whether an individual, a partnership or a body corporate) in England and Wales must meet certain requirements laid down by the Lord Chancellor before being permitted to provide conveyancing services to the public. Such persons would be as authorised practitioners. The Government in Northern Ireland considers that a similar regime for conveyancing by authorised practitioners should apply here: the Secretary of State would lay down the requirements for authorisation.

4. **Paragraphs 3.5 to 3.14** outline the proposed requirements for authorisation which would have to be satisfied by authorised practitioners in England and Wales. Similar requirements would need to be satisifed by authorised practitioners in Northern Ireland. These would be –

   (i) authorised practitioners must be suitable persons to provide conveyancing services (that is, authorised under a statutory provision or by a recognised authority as a fit and proper person competent to provide conveyancing services);

   (ii) conveyancing must be carried out by, or under the supervision of, solicitors employed by authorised persons;

   (iii) clients' money must be kept in separate clients' accounts;

   (iv) authorised practitioners must comply with the code of conduct to be laid down by the Secretary of State by statutory rule (see the **Annex** to the Green Paper, which sets out the main principles of the proposed Code for England and Wales under the headings "Proper supervision of conveyancing services", "Conflicts of interest", "Contractual obligations" and "Conduct of business");

(v) authorised practitioners must have adequate indemnity cover to meet claims for professional negligence arising from the provision of conveyancing services;

(vi) authorised practitioners must be able to demonstrate that they have suitable mechanisms to deal with complaints and disciplinary matters;

(vii) authorised practitioners must have suitable compensation schemes to cover losses through dishonesty;

(viii) authorised practitioners must belong to a suitable ombudsman scheme (which provides for the investigation of complaints, the production of documents, the payment of compensation by the authorised practitioner, the taking of corrective action by the authorised practitioner, a requirement that the authorised practitioner is to bide by the ombudsman's rulings, and the reporting of the authorised practitioner to the relevant supervisory authority); and

(ix) adequate protection for clients where an authorised practitioner ceases to provide conveyancing services (for example, through bankruptcy or winding up, death, illness, or disciplinary action).

5. Paragraphs 3.15 to 3.18 deal with the proposed methods of obtaining the status of authorised practitioners in England and Wales. Banks and building societies are already subject to statutory regulation. The Government believes that they should be allowed to operate as authorised practitioners by certifying to their regulatory authorities that they can comply with the requirements set out above. Others wishing to become authorised practitioners would be required to submit themselves to an authroity recognised by the Lord Chancellor as being able to impose and enforce the requirements set out above. The proposed arrangements for obtaining authorisation in Northern Ireland would be similar, except that the Secretary of State would recognise the relevant supervisory authorities.

CHAPTER 4 SUMMARY

1. Chapter 4 of this Green Paper summarises the Government's proposals to introduce legislation for England and Wales which would provide for the authorisation of practitioners for the provision of conveyancing services, and invites comments.

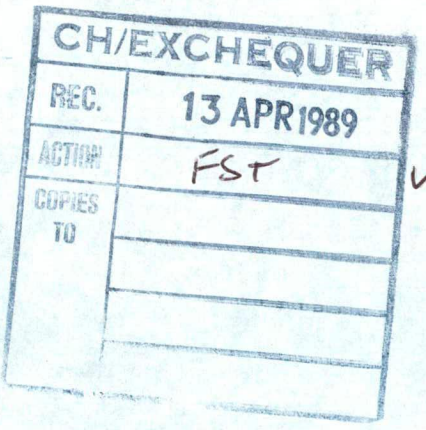
2. The Government in Northern Ireland would welcome comments on the proposals from a Northern Ireland perspective.

Comments should be sent to

The Secretary
Department of Finance & Personnel
Room 208
Parliament Buildings
Stormont
BELFAST
BT4 3SW

so as to arrive not later than 30 June 1989.

LORD CHANCELLOR



13/4

HOUSE OF LORDS,
LONDON SW1A 0PW

13 April 1989

Dear Tom,

Thank you for your letter of 4th April, enclosing the Northern Ireland Supplement to the three Green Papers.

I can confirm that I am content that the Northern Ireland Supplement should be published as soon as possible.

I am copying this letter to the Prime Minister, members of E(CP) and Sir Robin Butler.

Yours ever,

James.

The Rt. Hon. Tom King
Secretary of State for Northern Ireland
Northern Ireland Office
Stormont Castle
Belfast BT4 3ST

dti

the department for Enterprise

The Hon. Francis Maude MP
Parliamentary Under Secretary of State for
Corporate Affairs

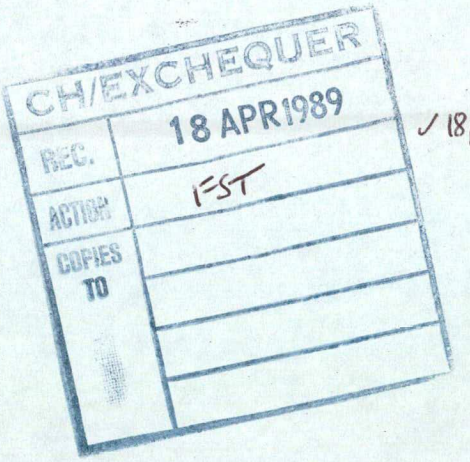
Department of Trade and Industry

1-19 Victoria Street
London SW1H 0ET

Switchboard
01-215 7877

Telex 8811074/5 DTHQ G
Fax 01-222 2629

The Rt Hon Tom King MP
Secretary of State for
Northern Ireland
Northern Ireland Office
Stormont Castle
BELFAST
BT4 3ST



18/4

Direct line 215 4417
Our ref
Your ref
Date 17 April 1989

Dear Tom,

NORTHERN IRELAND SUPPLEMENT TO THE LORD CHANCELLOR'S GREEN PAPERS

Thank you for sending me a copy of the Northern Ireland Supplement to James Mackay's Green Papers on the work and organisation of the legal profession, contingency fees and conveyancing by authorised practitioners. I have seen a copy of James' reply of 13 April.

I very much welcome the line your paper takes: it complements admirably the papers already published for England and Wales. There are, however, two points I would wish to make.

While I support the pro-competition stance that you have taken throughout the paper, I think that the reference in the introduction to the promotion of the Government's competition policy as the underlying principle behind James Mackay's papers could be misleading. James' papers have been careful to stress that what is at issue is the opening up of the legal profession to competition provided that the interests of justice and the needs of those who use or are affected by the law are safeguarded. The point is in your chapter 1 but it would be worth including it in paragraph 2 of the introduction as well.

I also note that your consultation period ends on 30 June. E(CP) will be discussing the English and Welsh Green Papers, so James Mackay can make a statement before the summer recess. It would obviously make sense to discuss the results of the Scots and Irish consultative process at the same time. I hope this will be possible.

LM5ACD

the enterprise initiative

dti
the department for Enterprise

I am copying this letter to the Prime Minister, James Mackay, members of E(CP) and Sir Robin Butler.

FRANCIS MAUDE

888-273

LM5ACD

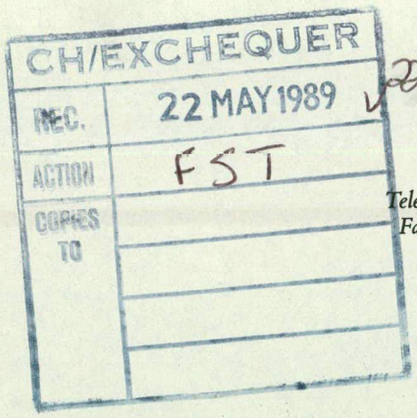
dti

the department for Enterprise

The Hon. Francis Maude MP
Parliamentary Under Secretary of State for
Corporate Affairs

CONFIDENTIAL

The Rt Hon Nigel Lawson MP
Chancellor of the Exchequer
HM Treasury
Treasury Chambers
Parliament Street LONDON



Department of Trade and Industry

1-19 Victoria Street
London SW1H 0ET

Enquiries
01-215 5000

Telex 8811074/5 DTHQ G
Fax 01-222 2629

Direct line 215 4417
Our ref
Your ref
Date 19 May 1989

Dear Chancellor,

RESTRICTIVE TRADE PRACTICES LEGISLATION AND THE PROFESSIONS

E(CP) on 8 May invited me to clarify the precise wording of the exemption test in the proposed RTP legislation; to consult the Law Officers on its likely interpretation; and to examine the option of including in the proposed test a reference to the maintenance of ethical standards.

Drafting legislation is, of course, the prerogative of Parliamentary Counsel but, when preparing drafting instructions, we anticipate that we should be asking Counsel for clauses providing a prohibition and exemption test as summarised in Annex A to this letter. You will see from para exemption test as summarised in Annex A to this letter. You will see from Para 2 of Annex A that any exemption assessment would require the agreement or practice in question to pass a cumulative four-part test. We see no prospect at all of making changes in the last three parts of the test. These reflect fundamental competition principles and provide essential consistency with Community competition law. The first leg of the exemption test (containing three alternatives) has been adapted, (as compared with the wording of Article 85(3)) so as to allow for services (including the professions). The issue, therefore, is whether it would require further adaptation for the test to take proper consideration of ethical factors. You asked us at E(CP) to seek advice from the Law Officers. On reflection, I wonder whether it would be practicable to consult the Law Officers until Parliamentary Counsel has produced a draft. However, this is likely to be some way off, and I am therefore sending the Law Officers a copy of this letter.

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In seeking to finalise the policy in this area, I think that we are all agreed on the following:

(a) ethical rules which do not affect competition in the profession concerned should not be caught by the prohibition on anti-competitive agreements;

(b) ethical rules which do affect competition but operate for the benefit of the "consumers" of the professional services in question, as clients or patients, should be entitled to exemption from the prohibition after examination by the Office of Fair Trading.

This leaves the difficult question of ethical rules which affect competition, do not necessarily benefit clients or patients individually, but are desirable for some other reason and ought therefore not to be prohibited. I am not convinced that any of the professions' rules fall into this category.

However, there may be other arrangements which do and Kenneth Clarke gave possible examples at E(CP). I am attaching as Annex B a note on these, prepared by my officials. This illustrates our belief that such arrangements are also unlikely to create difficulties under the new legislation.

We have examined further the suggested option of including in the exemption test a reference to the maintenance of ethical standards. This raises the question of what precisely is meant by "ethical".

It would not be satisfactory to leave it to the profession alone to decide what is ethical. Creating a need for the competition authority to do this with any frequency would risk diverting it from its primary task of pursuing covert cartels. There would also be a serious danger that a special reference to particular considerations will weaken the general test and invite the professions to justify almost any restriction in terms of ethics. To the extent that such a provision was superfluous, its inclusion would in itself be damaging for the legislation. We therefore regard this option as most undesirable.

We would hope that colleagues will now feel able to stand by the decision taken in principle following David's letter of 20 December 1988, that the professions should be subject to the

proposed legislation in the same way as other sectors of the economy and that there should be no elucidation of the prohibition or the exemption test in the legislation which might have the appearance of special treatment.

Nonetheless, we recognise that it may not be possible for this view to be demonstrated conclusively until Counsel have undertaken some drafting. I therefore suggest the following approach. In the forthcoming White Paper, points (a) and (b) above should be expressly set out (not necessarily in those words), but nothing should be said about ethical rules or practices desirable for reasons other than client/patient benefit. I am sure that we can rely on the professional bodies to tell us if they think that something is missing. We can then analyse their representations to see whether there really are such rules. When Parliamentary Counsel is instructed, the question will be fully explained to him, complete with examples of what are said to be ethical rules and arrangements of this type; my officials will agree with interested colleagues' officials, particularly Kenneth Clarke's, how exactly this should be set out in the instructions to Parliamentary Counsel. The Law Officers will then be able to express their view on the resultant draft.

Kenneth Clarke is meanwhile considering whether it would be practical to meet his concern about practices which are not the subject of professional rules by including specific provisions in forthcoming health legislation and so take them outside the proposed new RTP prohibition.

I hope that this method of proceeding will provide an acceptable route to the solution of this knotty problem. I should be grateful for replies before the Whitsun recess, so that we can keep to the planned White Paper timetable.

I am sending copies of this letter to the Prime Minister, members of E(CP), Geoffrey Howe, James Mackay, Douglas Hurd, Peter Walker, Tom King, Kenneth Baker, Malcolm Rifkind, John Wakeham, Patrick Mayhew, Nicholas Lyell, Sir Robin Butler and First Parliamentary Counsel.

Yours sincerely

Chris Nash

pp **FRANCIS MAUDE**

(Approved by the Minister and signed in his absence)

ANNEX A

OUTLINE DRAFT PROHIBITION AND EXEMPTION TEST

Prohibition

1. The following shall be prohibited: all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object, effect or likely effect the prevention, restriction or distortion of competition within the United Kingdom. Without prejudice to the generality of this prohibition, it will apply in particular to:

(i) those fixing prices and charges including any terms or conditions (eg resale prices, discounts, credit terms) which determine effective net prices;

(ii) those which may be expected to lead to the fixing of prices, such as price information exchange agreements and recommendations on fees;

(iii) collusive tendering;

(iv) those sharing or allocating markets, customers, raw materials or other inputs, production or capacity;

(v) collective refusals to supply or to deal with suppliers, collective discrimination in the terms on which different customers or classes of customer are supplied, and collective anti-competitive conditions of supply such as tie-ins, aggregated or loyalty rebates and "no competition" clauses.

Exemption

2. An agreement may be exempted from the prohibition provided that

(i) it contributes to the improvement of the production or distribution of goods; or

the improvement of the provision of services; or

the promotion of economic or technical progress;

and

(ii) allows consumers and users a fair share of the resulting benefits; and

(iii) does not entail restrictions which go beyond what is indispensable to attain these objectives; and

(iv) does not allow competition to be eliminated.

ANNEX B

POSSIBLE TREATMENT UNDER NEW RTP LAW OF MEDICAL PRACTICES RAISED BY THE SECRETARY OF STATE FOR HEALTH

1. Consultants' referral system and related advertising restrictions.

These arrangements were considered by the recent Monopolies and Mergers Commission inquiry. The Commission endorsed the referral system and accepted that restrictions on consultants advertising direct to patients were not against the public interest. The Office of Fair Trading has advised that it sees little likelihood that these arrangements would be assessed differently under the proposed RTP legislation, in view of the benefits they produce for patients.

The referral system is justified in part by ethical considerations (no treatment without access to full relevant medical history) and in part economic (efficient use of scarce resource). Both objectives could be achieved through means other than a recommendation by the professional body, at least so far as NHS consultants are concerned.

This is not seen as a problem area.

2. Voluntary Blood Donations

By tradition, the National Blood Transfusion Service (NBTS) relies entirely on voluntary donations. It is the exclusive supplier of blood to the NHS and private hospitals and of plasma for processing by the Blood Products Laboratory (BPL). The activities of the NBTS and BPL within the NHS are co-ordinated by a National Director. The private sector have no formal agreement for blood supplies but in practice accept the NBTS as the exclusive supplier. If commercial concerns sought to change the donor market by offering payments to donors, the Department of Health would not be able to prevent this under current legislation. Nor is it clear that the NHS could resist it indefinitely.

This may be a problem under RTP legislation but perhaps mainly in relation to private sector medicine. It would be open to the Government to legislate for health policy reasons if there were any threat to the voluntary system.

3. Control over private abortion clinics

The Secretary of State has powers under the Abortion Act 1967 to approve private sector abortion facilities. The Department of Health has suggested that the administrative controls which are promulgated go beyond those strictly required by the Act. To the extent that controls in this category are necessary for the protection of the patient(s), they would raise no problem under RTP legislation. Nor would the legislation call into any doubt the restriction in the Act against unregistered abortionists.

4. Sale of human organs for transplant

Legislation has recently been introduced to ban the sale of human organs for transplantation. The definition of organ for the purposes of the Bill would cover organs such as heart, liver, kidneys and corneas. The legislation will not cover other human material but this does not imply that the sale of such other human material would be acceptable.

This area would appear to be more a question of ethical standards rather than one of competition. Difficulties in enforcing a ban on other human material in the future could also be dealt with, if necessary, by legislation.

CONFIDENTIAL

SOLICITOR GENERAL

01-936 6269

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

26 May 1989

The Hon Francis Maude MP
Parliamentary Under Secretary of State
for Corporate Affairs
Department of Trade and Industry
1 Victoria Street
LONDON S W 1

Dear Francis,

RESTRICTIVE TRADE PRACTICES LEGISLATION AND THE PROFESSIONS

E(CP) on 8 May invited you to consult the Law Officers on the likely interpretation of an exemption test in the proposed RTP legislation to exempt restrictive practices required to maintain ethical standards of the professions.

I agree entirely with the view expressed in your letter of 19 May, that it would be preferable for the Law Officers to consider the exemption when Parliamentary Counsel have produced a draft. It would not be possible to comment with any precision on a proposal before the terms have been formulated.

I am sending copies of this letter to the Prime Minister, members of E(CP), Geoffrey Howe, James Mackay, Douglas Hurd, Peter Walker, Tom King, Kenneth Baker, Malcolm Rifkind, John Wakeham, Peter Fraser, Sir Robin Butler and First Parliamentary Counsel.

Yours ever

Nick.

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SE OF LORDS.
ONDON SW1A 0PW
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CONFIDENTIAL

31 May 1989

Dear David,

RESTRICTIVE TRADE PRACTICES LEGISLATION AND THE LEGAL PROFESSION

When we met on 4 May, I was grateful for the opportunity to talk over the difficult relationship between securing the principal objectives of the Green Papers on the reform of the legal profession, and re-assuring the professions and our supporters in Parliament that we are not seeking radically to disturb the existing important safeguards of the independence of the profession, and particularly of the Bar. As you know, particular concern has been expressed about the allegedly undesirable effects of multi-disciplinary partnerships. I would be grateful for your assistance in exploring what we might do to allay these concerns.

In that context, it is clearly of the greatest importance to be able to demonstrate that we wish to allow both sides of the legal profession as much freedom to regulate their own affairs as we can. In fact, the question of partnerships does not seem to me to have much real bearing on the issue of competition. Provided that we ensure that entry into each branch of the profession is not artificially restricted, and that operators in the market are not able to exercise undue control, I think we will have achieved our aims. I am, therefore, writing to ask for your views on what options exist for allowing the Bar Council and the Law Society to enforce their own rules on the question of partnerships among their members. Perhaps our officials might explore the possibilities together in the first instance.

Continued/..

The Right Honourable
The Lord Young of Graffham
Secretary of State for Trade & Industry
The Department of Trade & Industry
1-19 Victoria Street
London SW1

Anxiety has been expressed in this area about the likely reaction of a future Competition Authority. We ought, therefore, to consider whether in the legislation which establishes it, or perhaps in the Courts and Legal Services Bill, specific provision might be needed to remove the uncertainty which threatens to damage confidence in the institutional independence of that branch of the profession. I would wish, however, that that should be done in a way which did not leave the profession's arrangements unavoidably fixed, but would leave them open to change by the profession as the profession's activities needed to respond to the market. My aim would be for us arrive at a formula in time for me to announce it in July.

One possibility would be the use of some kind of general test relating to the maintenance of ethical standards, which was obviously sufficiently wide to encompass rules about partnerships. I have now seen Francis Maude's letter of 19 May and am content with the way he suggests we should in general attempt to clarify this difficult area. This will, however, obviously have to be considered alongside my own particular concerns, to some extent at least.

The next possibility seems to be a specific exemption for lawyers, and in particular the Bar, as respects rules relating to partnership, from the remit of the Competition Authority. This could be done by making a specific exemption of this kind in the legislation which establishes the Competition Authority. A third possibility, which might achieve the same end, might be to give the profession power in the Courts and Legal Services Billto make rules to prohibit partnerships. If the profession were exercising a clear and specific statutory power granted to them under this Bill, that might be sufficient to exclude such rules from the general remit of the Competition Authority, when it is established under your legislation. The advantage of this course is that it would enable the professional bodies to make rules to prohibit partnerships only for so long as they themselves thought this was necessary. I would be grateful to know whether you think this would be possible.

The last possibility would be for partnerships to be explicitly banned on the face of the statute. This, however, would involve direct Government interference in, and regulation of, the internal working of the profession; and, in this respect, it would fossilize the market in legal services indefinitely, since amending legislation would be needed, if, in a few years, possibly after 1992, the profession itself decided that the ban on partnerships was unhelpful to its competitive position.

As I say, my objective is to secure certainty for the profession on the position they want to take in respect of partnerships without preventing the possibility of change at some point in the future. Perhaps our officials might discuss this.

Yours ever,

James.