PART 3 (On attached sheet: Bar work and organisation of the legal profession; Conveyancing by Barristers and Contingency fees).

MF

CONFIDENTIAL FILING

Legal Powers Challenges against DHSS and other Departments

Judicial Review

(Contained in folder: 'Work and organisation of the Legal Profession' A.N.E. Supplement (Draft) Law Under Review)

LEGAL PROCEDURE

Part 1 Dec 1985

Part 3: April 1989

Referred to	Date	Referred to	Date	Referred to	Date	Referred to	Date
~~4-4-89~~							
~~13-4-89~~							
~~7-4-89~~							
~~18-5-89~~							
~~6-6-89~~							
~~21-6-89~~							
~~31-6-89~~							
~~19-7-89~~							
~~28-9-89~~							
~~12-10-89~~							
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~~24-8-89~~							
~~3-11-89~~							
~~10-11-89~~							
~~16-11-89~~							
28.11.89							
PT3 CMS							

PRM 19/2758

PART 3 ends:-

Scot. Off to Poo 28.11.89

PART 4 begins:-

C Sinclair to AT. 19.1.90

SCOTTISH OFFICE
WHITEHALL, LONDON SW1A 2AU

Stephen Catling
Private Secretary to the
Lord President of the Council
Privy Council Office
Whitehall
LONDON

28 November 1989

Dear Stephen

LEGISLATIVE PROGRAMME 1989/90
LAW REFORM (MISCELLANEOUS PROVISIONS) (SCOTLAND) BILL

My Secretary of State and the Lord Chancellor discussed the Lord Chancellor's letter of 24 November about the divorce provisions in this Bill by telephone on 28 November.

The Lord Chancellor indicated that more interest had been taken in the announcement of the Scottish provisions in the Law Reform Bill in the press than he had expected, and it was being taken by the press as an indication of the Government's general position on divorce. It had certainly been more widely commented upon that he had anticipated in earlier discussions with the Secretary of State. He noted that the Lord President's agreement to the provisions of the Law Reform Bill had been predicated on the assumption that they would be largely uncontroversial. From a business management point of view, it was important to note the Debate might be more prolonged than he had then thought.

The Secretary of State said that these were provisions which now had policy clearance, and, after his discussion with the Lord President, he had agreement to include them in the Bill. The Government's proposals had been publicly announced after the Queen's Speech. In earlier discussions, he had agreed that he should not seek to highlight these provisions, and certainly he had made no reference to the Scottish Law Commission's proposals for changing the law in relation to fault in divorce. He saw very great difficulties in any suggestion that legislation following a Scottish Law Commission recommendation, which had been generally welcomed in Scotland, should be delayed because of the possibility of some future legislation following an English Law Commission recommendation.

The Lord Chancellor agreed that he was not proposing that the Government should resile on its announcement. Naturally, he accepted the need for Scottish law to go its own way, as appropriate, on matters such as this. He was, however, concerned to point out that the controversy might be greater than might have been expected for a purely

technical change to the Divorce Law. For his part, the Secretary of State agreed that he would continue to give these provisions a low profile, and point out that they represented only a minor change, as recommended by the SLC, rather than a major statement of policy on divorce generally.

I am sending copies of this letter to John Tanner, the Private Secretaries to members of L Committee and to Sir Robin Butler.

Yours

Jim

J D GALLAGHER
Private Secretary

EJD332M3

COUNSELS OF DESPAIR

Marcel Berlins investigates the standard of advocacy among English barristers

'HE wasn't much good, the one I had at my trial. The jury found me guilty,' said the friendly black youth who escorted me from the tube station to the courthouse. 'I hope he does better today.' Defendants who have been convicted do not, on the whole, praise their barristers, and I did not take his criticisms too seriously. An hour later I saw him sitting, subdued, in the dock as his counsel put forward his plea in mitigation. Only it wasn't the barrister who had appeared for him at the trial, and this substitute, it became clear, knew little about the case (an assault) or about his client. The judge, fortunately, knew a lot more. He had been the judge at the original trial, and when he came to pass sentence, he listed a number of factors in the defendant's favour which the barrister had failed to mention. The penalty was 80 hours' community service. I have no doubt that had the young man been forced to rely on his barrister's performance alone, he would have gone to prison. It was not an impressive start to my private inquiry into standards of advocacy at the bar.

This was not the first time I had set myself up as a judge of barristers' competence. Ten years ago, just as Lord Benson's Royal Commission on Legal Services was preparing to deliver its complacent whitewash of virtually every aspect of the legal profession's structure and working practices, I went around the courts of London to assess the quality of advocacy being dished out by young barristers.

This is what I wrote in *The Spectator* of 28 July 1979: 'A barrister is expected to do two things: first, to understand and master all the relevant facts and legal issues in the case; and secondly, to present them in court in a lucid and persuasive manner. I was, on a number of occasions, appalled by the inability of counsel to fulfil either task.' In criminal trials, I had come across examples of counsel getting wrong the names, ages, occupations and personal circumstances of the people they were defending; misunderstanding the evidence and even forgetting what crime their clients had been charged with. I had seen much 'inadequacy, incompetence and possible injustice,' I concluded.

I admitted then that my choice of courts had been random and haphazard; the same has been true of my court visits over the last couple of months. I was looking neither for good nor bad advocacy; I merely wandered around, taking in what was on offer. My only criterion was that the cases I attended should not be 'newsworthy', either because of the fame of anyone involved or the circumstances of the case itself.

I limited myself to the Crown Courts, because they are at the centre of the great legal debate of the moment. The Lord Chancellor, Lord Mackay, will in the next few weeks publish the Courts and Legal Services Bill — referred to in the Queen's speech — which will, when enacted, give to some solicitors for the first time the right to argue cases in the higher courts — the Crown Courts for criminal trials, the High Court for civil. Quite how many solicitors will be entitled to perform in those courts depends on the exact criteria and procedures laid down, and those are still under fierce debate, with the bar, openly supported by much of the higher judiciary, determinedly nobbling the Lord Chancellor to try to ensure a restrictive approach to enlarging rights of audience.

Central to the bar's argument is that the public interest demands specialist advocacy in the important courts — 'the presentation of cases in the higher courts is a skilled art', they say — and that barristers alone are the specialists capable of such artistic skill.

Not that they have had any special training in advocacy. Unlike, say, in the medical profession, where to become a specialist requires several years' additional study after qualifying as a doctor, barristers are labelled specialist advocates, immediately entitled to appear in every court in the land, from the moment they are called to the bar. Their near-monopoly of rights of audience in the higher courts is based, not on their proven competence but on their choice of one branch of the legal profession rather than another. But do they in fact provide a good service to the customer, one that justifies the bar's passionate defence of their present privileges?

That is what I have been trying to assess, not at the glamour end of Crown Court advocacy, the Old Bailey, but at places like Snaresbrook, Acton, Kingston and Wood Green, where the true face of English criminal advocacy is to be seen. This time around, I did not see quite as many examples of bad advocacy as ten years ago; and I was often positively impressed. The general level has, I believe, improved a little over the last decade — a judgment shared by judges I have spoken to. Most of the barristers I saw were competently mediocre, and in a few years some of them might graduate to becoming competent.

Most depressing and disturbing was the generally off-hand and too often slapdash approach of counsel presenting pleas in mitigation. The difference between a good plea and a bad one can be the difference between prison and freedom. But I was struck by how often defendants about to be sentenced were represented by barristers who were not at the trial. Many of them, clearly, had received their briefs at the last minute, because the first-choice barrister had been offered something better to do. The lucky defendants had substitutes who had managed to glance at the papers the night before; the less fortunate had to be represented by counsel who had opened their brief for the first time on the tube going to court. It showed. What made it worse was that the solicitor's representative sitting in the row behind was often equally unfamiliar with the case. Several times, in all the courts I went to, the judge had to extricate the barrister from his ignorance ('I think you'll find that the cut was to his left cheek' — to a barrister frantically trying to discover in his papers the wound his client had caused).

Even lower down in barristers' estimation than a plea in mitigation is an application to fix a date for trial. In principle, all it requires is for counsel on both sides, and the court, to agree on an acceptable date, but I saw a defence barrister make a mess even of that, which nearly cost her client two months in custody. 'There is a difficulty about getting all the witnesses together before January,' prosecuting counsel said. A police officer went into the witness box muttering about policemen on leave and witnesses not available. Counsel for the accused — who had been in custody since June — stood up for a split second to agree to a January date. Once again it was left to the judge to do the barrister's job. Exactly what witnesses would not be available if, say, the trial were to be in early November, he asked. It turned out that all the important witnesses were perfectly well able to come. Only a minor one would be away. The judge fixed a date in November. Defence counsel looked not a bit abashed.

Advocates in jury trials seemed rather better prepared, with a few dreadful exceptions, than those engaged purely in mitigation. I saw more apparent competence than incompetence, though if I were running the new, more intensive, enhanced

advocacy training course being introduced this year for budding barristers I would concentrate on the rudiments of cross-examination, not many of which seemed to be known to many of the barristers I saw in action. A startled 'What? Are you sure?' is hardly the sophisticated response to the unexpected answer.

Many, too, seemed ill at ease in addressing a jury, trying vainly to find a happy level between legal-speak and over-familiarity. Most embarrassing were the attempts to speak to the jury in what the barristers must have thought to be the ordinary language of the people. Such false attempts at ingratiation ('We all fancy a cuppa from time to time, don't we?') sounded merely patronising. One case neatly symbolised the whole issue over rights of audience. It was not typical, but it made its point. A young barrister, in his twenties, was cross-examining a prosecution witness, the victim of an alleged vicious assault. Clearly out of his depth and probably the recipient of a last-minute brief, he spent much of his time hunched over, listening to the increasingly desperate solicitor sitting behind him. 'Ask him what he was doing there in the first place,' he whispered. The barrister stood upright and posed the question firmly. The answer given, he resumed his crouch to be told what to ask next. This went on for four or five questions. The young man in a wig is the one they call a specialist advocate.

DAVID BLUNDY

Charles Glass remembers the journalist who died last week

JOURNALISTS have nothing much to give one another, save the few words we write for one of our number who precedes us into oblivion. Each profession has ways of honouring its own: soldiers erect monuments to fallen comrades, and actors gather to recite passages from a lamented thespian's great roles. The journalist's memorials perish, like our life's work, on paper that a few hours after publication wraps fish and chips, lines dustbins or kindles coal fires.

Over the years, you have probably read and forgotten elegies by their friends to Nick Tomalin, David Holden, Peter Niesewand and a score of others. I remember a piece Martin Woollacott wrote in the *Guardian* when James Cameron died. It told a little bit about Cameron and a great deal about Woollacott's friendship and admiration for the older man. This past week, Ian Jack, Harry Evans, Cal McCrystal, Andrew Stephen, Jon Connell and others have written about their friend, David Blundy, the journalist who was killed in El Salvador last Friday, 17 November. Now, it is my turn.

It is not that I have anything new or better to say, just that I want to add my rose to the wreath of his friends' mourning. David deserves more, and he would hate the compliments we have heaped on his memory. Well, too bad, David, but we don't know what else to do, and you were

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

01-936 6269

16 November 1989

The Rt Hon The Lord Mackay of Clashfern
Lord Chancellor
House of Lords
LONDON S W 1

MBM
RCG
22/11

Dear James,

COURTS AND LEGAL SERVICES BILL
CONVEYANCING BY AUTHORISED PRACTITIONERS

In your letter dated 20 October you identified three options for ensuring a proper regulatory system for banks and building societies undertaking conveyancing.

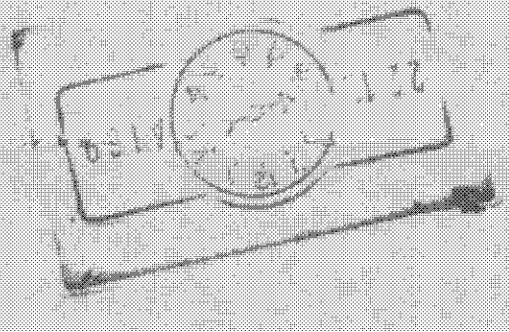
Having weighed the three options you identify I agree with you that the second option, whereby the banks and building societies would themselves be required to set up their own self-regulatory body to monitor the requirements of the new Act and regulations is much to be preferred. I also support your view that this regulatory body should be answerable direct to the Lord Chancellor without the need for any costly over-arching structure between it and you. Even if the setting up of such a regulatory system results in a small delay to the entry into the conveyancing market of these bodies this should not in my view outweigh its advantages.

I am copying this letter to the Prime Minister, the Lord President of the Council, the Chancellor of the Exchequer, the Secretary of State for Trade and Industry, the Secretary of State for Scotland, the Secretary of State for Northern Ireland, the Lord Advocate and to Sir Robin Butler.

Yours ever

Nick.

LEA Assoc. Legal Papers
23



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NBPM
Rec 6 n/11

Treasury Chambers, Parliament Street, SW1P 3AG

The Rt Hon the Lord Mackay of Clashfern
Lord Chancellor
House of Lords
London SW1A OPW

6 November 1989

Dear James,

COURTS AND LEGAL SERVICES BILL: CONVEYANCING AND OTHER MATTERS

Thank you for sending me a copy of your letter to John Major of 10 November. I have also seen Malcolm Rifkind's letter to you of 8 November.

As I said in my letter of 4 November, I believe that the scheme outlined in the White Paper would have been sufficient to provide an adequate standard of consumer protection. However, I accepted the need for a single supervisory body which would be readily identified by the consumer as being responsible for supervising conveyancing by the new entrants to this market. It is a pity that going down this route will require a separate Board for Scotland and that new entrants to the market may be subject to double supervision and regulatory charges.

However, I am glad that you intend that the new Board should regulate in a flexible and light manner. I am also reassured by your willingness to include scrutiny by the Director General of Fair Trading and a statutory requirement that the rules should not be more regulatory than is necessary for consumer protection. On the basis of these and your other measures to prevent over-regulation, I would be content with the revised regulatory framework outlined in your letter.

My only concern is that you pressed strongly for the Government to provide the initial funding for the new Board, which you put at £100,000 or so. I can accept this, provided initial funding is kept to a minimum and the cost is found from within your recently agreed PES provision. I must urge too that the Board be made self-financing as quickly as possible, given the not very encouraging experience of the Council for Licensed Conveyancers, and that as much as possible of the initial funding should be recouped from subsequent charges. I note that Malcolm Rifkind agreed the Scottish Board should be self-financing once fully up and running.

37/2 fst.jf.1.16.11.89

I have no comments on the other items you would like to add to the Bill and which are detailed in the Annex to your letter, provided they involve no potential commitments for public expenditure.

I am sending a copy of this letter to the Prime Minister, to the members of E(CP), to Geoffrey Howe and the other members of H Committee, to Patrick Mayhew, Richard Luce and Peter Fraser and to Sir Robin Butler.

Yours ever

Peter

PETER LILLEY

CC 8

CABINET OFFICE
OFFICE of the MINISTER
for the CIVIL SERVICE

The Minister of State
Privy Council Office
The Rt. Hon. Richard Luce MP

Horse Guards Road
London SW1P 3AL
Telephone: 01 -270 5929

C89/5027

The Rt Hon The Lord Mackay of Clashfern
The Lord Chancellor
House of Lords
LONDON SW1A OPW

16 November 1989

Dear James.

COURTS AND LEGAL SERVICES BILL: CONVEYING AND OTHER MATTERS

Thank you for sending me a copy of your letter of 10 November to the Chancellor. I have also seen Nicholas Ridley's letter to you of 3 November and the other correspondence generated by your letter of 20 October.

My interest is primarily in your proposal to establish a new NDPB, the Authorised Conveyancing Practitioners Board. As you know, our policy is that proposals to create new NDPBs will be resisted unless it can be demonstrated that they are the most appropriate and cost effective way of undertaking the task. I am satisfied that the proposed tasks are essential, that they need to be carried out in the public sector and that direct Ministerial responsibility will be inappropriate. I note, too, that you intend that over the time the body will become self-financing. My officials are in touch with yours about the legislative details, and will continue to offer advice and assistance on establishing the new body. Accordingly, I am content for you to proceed with this proposal.

I understand that you are also proposing to establish a second NDPB to hear appeals from authorised practitioners aggrieved by a decision of the board. I gather your officials are satisfied that the criteria for establishing a new tribunal have been met. I have no objections to this proposal.

My other interest in your proposals is your intention to set up a conveyancing ombudsman scheme to investigate complaints about authorised conveyancers. My officials are in touch with yours about some points of detail on this proposal, but I have no objection to it in principle.

I am copying this letter to the Prime Minister, members of E(CP), to Geoffrey Howe and the other members of H Committee, Patrick Mayhew and Peter Fraser, and to Sir Robin Butler.

RICHARD LUCE

HOUSE OF LORDS.
LONDON SW1A 0PW

10 November 1989

Dear John,

COURTS AND LEGAL SERVICES BILL: CONVEYANCING AND OTHER MATTERS

Nicholas Ridley and Peter Lilley have now replied to my letter of 20 October about the regulation of conveyancing. I have attempted to draw their views together to provide a replacement regulatory framework which still meets the objectives of the White Paper. This letter asks for the agreement of E(CP) colleagues to its inclusion in the Bill. There are several more minor issues in relation to the reform of the legal profession and of civil procedure, for which also I now seek agreement: these are set out in the Annex.

It has become clear that neither the Bank of England nor the Building Societies Commission are prepared to undertake the residual regulatory functions which are necessary if an adequate standard of consumer protection is to be guaranteed. I have therefore come to share the view that a single regulatory body for conveyancing is likely to be both the simplest and most effective way to proceed.

What I envisage is a comparatively small body, consisting perhaps of a Chairman and some eight members to be appointed by the Lord Chancellor, which might be known as the Authorised Conveyancing Practitioners Board. The Board's main functions would be:

i) to grant or refuse applications from those who wish to become authorised practitioners;

ii) to regulate the conduct of authorised practitioners by exercising disciplinary powers which would include the imposing of conditions, and suspending or striking off unsatisfactory practtioners; and

iii) establishing and overseeing a single conveyancing ombudsman scheme.

The Right Honourable
John Major MP
Chancellor of the Exchequer
Treasury Chambers
Parliament Street
London SW1

It would be necessary to establish a new tribunal to deal with refusals of authorisation, and appeals from (ii).

I very much share Nicholas Ridley's concern that the new body should regulate effectively, but in a flexible and light manner. For this reason I doubt we would wish to see a self-regulating organisation along SIB lines; and we must be able simply to stop excessive or unnecessary regulation. Some colleagues have suggested that I should make all the rules. This would take us back towards, involving the Lord Chancellor directly in the detail of policing conveyancing regulation. The disadvantages in that were our main reasons for abandoning the scheme in the Building Societies Act 1986. I also doubt that we could secure the right appointees or the right perceived status for a body which was obviously no more than an executive police-force.

Whilst our officials are still discussing the detail of how to achieve our aims, I would accordingly now propose that the regulatory regime for authorised practitioners should be as follows. Regulations which directly prescribe how authorised practitioners are to operate, and which would be based on the minimum requirements needed to safeguard the interests of the public, should be made by the Lord Chancellor, after consultation with the Board. These regulations would no doubt largely embody the draft code of practice set out in the Green and White Papers. The Board's own rules would govern its relationship with authorised practitioners including the setting of fee levels, the exercise of its disciplinary powers (covering, for example, how applications for authorisation should be handled) and the establishment of an ombudsman scheme. These rules should be made by the Board, but have no force unless the Lord Chancellor approves them.

As Nicholas Ridley says, both the regulations and the Board's rules should be scrutinised to see whether they are more restrictive than is necessary, and whether they contain anti-competitive elements. As I said earlier, I propose therefore that before making the regulations embodying the code of conduct or approving the Board's own rules, the Lord Chancellor should be obliged to seek advice from the Director General of Fair Trading. There should also be a power for the Lord Chancellor to refer particular topics to the Board and require a report from it, and a duty for the Board itself to advise the Lord Chancellor on any changes which it thinks are needed in the regulations. These measures should together ensure that the regulations and the Board's own rules contain all that we require, but go no further. I would have no objection to the legislation specifically requiring, as Nicholas Ridley suggests, that neither the regulations nor the Board's own rules should be more regulatory than is necessary for the purposes of consumer protection.

The legislation will have to provide separately for the Board to oversee the overall suitability of authorised practitioners to continue in business, and for the handling of individual complaints which do not raise such fundamental questions. I think this is best achieved by requiring the Board to set up a scheme for a single conveyancing ombudsman, who would be

appointed by the Board subject to my approval. All authorised practitioners would be required to join that scheme; and he would then deal with all individual complaints. He would have powers on the lines already set out in the White Paper.

As for funding, I entirely agree that the Board should aim to cover its costs as quickly as possible. Quite apart, however, from the complexity of the arrangements that will be required if the Board is to be set up properly before the first applications are received, I see very considerable advantages in the Government providing the small amount of pump-priming that would be required. Likely applicants for authorisation as conveyancing practitioners are in fact pretty diverse, and they have no co-ordinating mechanism. Getting all potential applicants to work together might therefore cause problems. Moreover, we should avoid appearing in our initial arrangements to favour the big and relatively well co-ordinated institutions, such as banks and building societies, at the expense of smaller practitioners, such as surveyors and estate agents, who may also want to enter this market. Drafting the necessary rules for an ombudsman scheme will also be quite complicated; and much of this work will probably have to fall on my Department anyway. I think it will therefore undoubtedly speed matters up and open the market to competition more quickly, if we are able to supply the Board with some money and people at the outset. Providing an initial secretariat also increases the chances of getting the right, light regulatory framework. I would emphasise, of course, that the sums involved are very small. I would myself doubt that we would need more than half a dozen staff, for a year or two at most. We would of course aim to recoup as much of the initial cost as possible by way of application fees. Although provision has not yet been made for this expenditure, it would surely be imprudent to delay increased competition or to expose the Government to criticism on these grounds for the sake of £100,000 or so.

I do not agree, however, with Nicholas Ridley's suggestion that the legislation should compel the Law Society to satisfy me that their own professional discipline requirements fall exactly into line with the code of conduct (now the regulations) required for authorised practitioners. At present, such differences as there are from solicitors' own strict rules are of little importance. This would be even more the case, if, as Nicholas Ridley and you suggest, we drop the true costs requirement. In the circumstances, I am content to accept that this requirement should be dropped for the moment, although I also agree with your suggestion that the new regulatory body should be asked to advise me further on this matter in due course. It would not in any event appear in the Bill, since it is a matter for the regulations, so that it could be imposed later in the event of it being subsequently found necessary. Many of the other requirements set out in the code are irrelevant to independent solicitors, because they are designed to provide extra safeguards to clients of authorised practitioners, since authorised practitioners will not be giving independent professional advice in the same way as a solicitor or licensed conveyancer exists to do. I am also reluctant for us to be seen to interfere with the

Law Society's own internal professional self-discipline, when there do not seem to be any good reasons for doing so.

I fear that officials in the relevant departments have already had as much chance to consider these proposals as time will allow. I hope therefore that colleagues can now agree that provisions incorporating them should be included in the Courts and Legal Services Bill, when it is introduced, which is now to be early next month. If I am to meet that timetable, I must ask for clearance by noon on Friday, 17 November.

There are some further, more minor matters which I would also like to include in the Bill, if colleagues agree. They include: some changes in my proposals for the improvement of civil procedure and the role of the judiciary; the protection of magistrates from actions for damages for their activities as magistrates; and amendments to the Solicitors Act. The proposals are described in some detail in the attached Annex to make their implications clear, but the amount of drafting involved for Counsel is small. Where appropriate, they have all already been discussed and agreed with officials in relevant departments; and nearly all of them have already been canvassed with Parliamentary Counsel. I am of course well aware of the pressure there is on our legislative programme for the next Session. The changes I propose would not, however, add significantly to the length of the Bill. The most important of them are already of lively concern to others, who would quite certainly raise them as amendments, thereby lengthening consideration of the Bill in Parliament. I would be bound then to introduce my own amendments to accept them, if I do not include them in the Bill for Introduction. To do so will therefore save a considerable amount of time.

Colleagues are also already aware that I shall need to use this Bill to amend the Children Bill, primarily to deal with matters which are outside the scope of that Bill, but where action is needed. Since the Children Bill has only just passed the extent of these matters is, however, unlikely to be settled in time for inclusion in the Courts and Legal Services Bill before introduction.

I am sending a copy of this letter to the Prime Minister, to the members of E(CP), to Geoffrey Howe and the other members of H Committee, to Patrick Mayhew, Richard Luce and Peter Fraser, and to Sir Robin Butler.

Yours ever,

James.

ANNEX

FURTHER MATTERS PROPOSED FOR THE COURTS AND LEGAL SERVICES BILL

ADMINISTRATION ORDERS

1. The administration order procedure allows debtors with multiple debts to make regular payments into court which are distributed to creditors pro rata. The Civil Justice Review (CJR) found this useful in rehabilitating debtors comparatively quickly, and recommended a number of improvements designed to improve the recovery rate for creditors and give greater protection for debtors. These improvements include changes to the arrangements for composition orders and preferential debts.

Composition orders

2. Registrars can now order payment in full or as is practicable in the circumstances, and subject to any conditions as to future earnings or income. Orders for partial payment (composition orders) are rarely made. Some Registrars prefer either to make orders run in effect indefinitely or to make no administration order at all, mistakenly thinking that they are doing creditors a favour. The CJR recommended that such orders should be in a form that recognised the realities of the debtor's position.

3. It is therefore proposed to limit the duration of an administration order to a maximum of three years, and make unambiguous provision for a composition order to be made in cases where the debtor is, or is likely to be, unable to pay the full amount within that time. This will not only protect debtors against unrealistic repayment terms, but also ensure a fair distribution to all creditors of the available money.

Preferential debts

4. Creditors who provide essential services sometimes use the threat of withdrawing the service in order to obtain payment in priority over other creditors. The CJR was concerned that the threat was being used by creditors to avoid being scheduled to an administration order, or to induce debtors to remove the creditor from an order once made.

5. It is not clear whether creditors can be prevented from doing this it is therefore proposed to introduce a specific requirement that a scheduled creditor providing a continuing service in the nature of an essential utility should not be allowed to withdraw that service without leave of the court. It will remain open to creditors to make representations at the time the administration order is made, and to return to the court if there are new factors to be taken into account.

CROWN PROCEEDINGS

6. Under existing legislation the Crown is exempt from the normal provisions for transfer down from the High Court to a county court, and from the sanction in costs which the High Court may impose when an action commenced in the High Court

could have been commenced in a county court (ss 19(4) and 40(5) County Courts Act 1984). The Bill already gives power to introduce a new system for the allocation of civil business between the High Court and the county courts. These powers will be used first to abolish the upper financial limit of the county courts' jurisdiction and to introduce a new limit below which all personal injury cases must start in a county court. Similar arrangements are planned for other classes of cases, including debt, in due course.

7. The credibility of the new system will be undermined if the Government opts out of the scheme it is proposing for other litigants by insisting on its right to a particular forum, irrespective of the nature or substance of the proceedings at issue. Other Departments including those with a major debt collecting function (DHSS, Inland Revenue and Customs and Excise) have been consulted. Some are concerned that the service offered by the county courts may not be adequate to meet their needs, although they are content to dispense with Crown privilege in this Bill so long as there is no restriction on the commencement of debt cases in the High Court. The programme for implementation of the Civil Justice Review includes procedural reforms and other measures designed to bring the service offered by the county courts into line with that of the High Court. By the time the new system for the management of debt cases is ready, these new arrangements in the county courts should be working smoothly enough to remove any residual doubts. The powers I am taking under the Bill will, however permit special provisions relating to the Crown in subordinate legislation, including transitional arrangements if necessary. There will be full consultation before the details of the new system are settled.

8. Section 20(1) of the Crown Proceedings Act 1947, which provides that a case brought <u>against</u> the Crown in a county court must be transferred up if the Attorney General certifies that the High Court is the appropriate forum, will remain unchanged.

LEAVE TO APPEAL AND POWERS AND ROLE OF THE JUDICIARY

9. There are three remaining matters connected with the implementation of the Civil Justice Review and the civil courts.

Registrars' powers

10. Changes to the status and powers of Registrars are proposed, to bring them more into line with those of Circuit Judges:

(a) to permit them to take the judicial oath;

(b) to give them power to impose penalties by way of fines or imprisonment in cases of contempt of court and assaults on officers of the court; and

(c) to give them powers to impose similar penalties on defendants and witnesses who fail to attend a hearing, or who refuse to be sworn or to give evidence.

Leave to appeal

11. Powers are needed for rules of court to prescribe cases which may not be taken on appeal to the Court of Appeal without leave of that court or of the court of first instance.

Presiding judges

12. Following discussions with the senior judiciary, the role of presiding judges, who supervise the judicial business of each circuit, should be in placed on a statutory basis.

PROTECTION OF LAY MAGISTRATES

13. The position of magistrates who may, under the Justices of the Peace Act 1979 be sued for costs and damages in connection with their judical activities has been re-examined. The present statutory provisions setting out when such actions may be brought, and indemnity arrangements to cover such awards are now rather obscure and outdated, and should be replaced with new provisions placing justices in effect on a comparable footing with judges in other courts who are, by common law, immune from such actions. The Magistrates' Association have for some time been seeking such a change in the law. The position is similar in Northern Ireland, where appeals against decisions of the justices are heard by county court judges.

14. Provisions are therefore required to confer immunity from claims for costs or damages in respect of all acts done in their judicial capacity on all magistrates, stipendiary magistrates and justices' clerks (when exercising the powers of a single justice) in England and Wales. In Northern Ireland, immunity would be conferred on magistrates (including resident magistrates, justices of the peace, and members of the juvenile court lay panels), on county court judges hearing appeals from magistrates and on clerks of petty sessions when exercising judicial functions.
There would be no additional costs and some savings to the public purse as a result of this change.

ENFORCEMENT OF S.22 OF THE SOLICITORS ACT 1974

15. Section 22(4) of the Solicitors Act 1974 provides that a local weights and measures authority may institute proceedings in respect of the preparation for reward by an unqualified person of, inter alia, a conveyance or a contract for the sale of land. When the legislation was drafted it was considered unnecessary for officers of the authorities (TSOs) to have power of entry, search and inspection. Since then representations have been made by the Council for Licensed conveyancers, who are anxious to maintain the integrity of their new profession, the Law Society and the organisation representing TSOs (LACOTS) that without such powers TSOs cannot properly investigate and prosecute offences under S.22

16. It is therefore proposed that TSOs, where they have reasonable cause to suspect that an offence may have been committed, should have powers of entry, search and investigation. Where entry is refused or certain other requirements are not compiled with, justices of the peace should have powers to issue a warrant enabling TSOs to enter premises using force if necessary. It would be an offence intentionally to obstruct, or fail to comply with a proper requirement of an authorised officer. The proposal conforms with the guidance on powers of entry issued by the Home Secretary.

AMENDMENTS TO THE SOLICITORS' ACT 1974

17. The Law Society has been proposing a package of amendments to the Solicitors' Act 1974 for some time. A limited list of changes has been discussed with the Law Society and approved in substance by the Master of the Rolls. If these changes are not formally adopted now by the Government, I would expect both them and others to be put down as amendments by the Law Society.

18. The most significant of these amendments relate to the system of solicitors' practising certificates. Their main purpose is to prevent a recurrence of the circumstances in the Peasegood case (which revealed that payments were being made from the legal aid fund to uncertificated solicitors). The arrangements for practising certificates are to be amended in three areas:

(a) the requirement to hold a practising certificate is to be extended to all solicitors on the Roll who are employed either by solicitors in private practice or by an incorporated practice;

(b) the Solicitors' Investment Business Rules 1988 are to be used as a model for practising certificates to run until they are withdrawn, and be renewable each year;

(c) a new provision will enable the Law Society to introduce a rolling renewal programme so that practising certificates may

be processed by the Society throughout the year rather than all at once. Coupled with this, the Master of the Rolls is to be empowered to specify reduced fees for applications which are received in good time, and to specify reduced practising certificate fees in respect of solicitors with low fee incomes.

19. The other more minor and technical amendments proposed are:

(a) the Law Society is to be empowered to require a compensation fund "special levy" from an incorporated practice at any time and not just when recognition is applied for;

(b) the circumstances in which the Society may intervene in a solicitor's practice are to be extended;

(c) the Solicitors' Disciplinary Tribunal is to be empowered to suspend a solicitor from practice prior to disciplinary proceedings, and to make orders in respect of former solicitors;

(d) the Disciplinary Tribunal is to be empowered to terminate the suspension of a solicitor who has been suspended from practice for an unspecified period and it is to be made clear that the Tribunal may impose a penalty in respect of each and every allegation which is proved against a solicitor;

(e) where the Law Society rejects an application for restoration of his name to the Roll by a solicitor whose name has been removed from the Roll, the former solicitor is to be able to appeal to the Master of the Rolls;

(f) the Master of the Rolls is to be able to appoint a deputy to exercise his functions under the Solicitors' Act in the event of his absence or incapacity;

(g) the Law Society is to be given greater powers of delegation to sub-committees and to staff;

(h) the Law Society is to be empowered to charge a fee to cover the additional expenses incurred by the Society in respect of practising certificate applications by solicitors who deliver their accountants' reports late.

(i) the rules under which lawyers from certain Commonwealth jurisdictions are able to gain admission as English Solicitors are to be made as regulations by the Law Society (and not, as now, by Order in Council) and the requirement for reciprocity is to be removed.

(j) it is to be made clear that a solicitors' incorporated practice does not commit a criminal offence by using the designation "solicitors" in its formal title.

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SCOTTISH OFFICE
WHITEHALL, LONDON SW1A 2AU

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

8 November 1989

Dear Jam,

COURTS AND LEGAL SERVICES BILL
CONVEYANCING BY AUTHORISED PRACTITIONERS

I have seen your letter of 20 October and Nicholas Ridley's of 3 November. I am content with Nicholas's suggestion for a supervisory board, but on the basis that a separate board will be required for Scotland, standing the differences in conveyancing law and practice. I would propose that the Scottish Board should also be responsible for authorising non-solicitors to practise in the area of confirmation of executors (probate), albeit without the full trappings of a statutory code and some of the other regulatory requirements necessary for conveyancing. This will make for economy of administration and consistency of practice. I agree that, once fully up and running, the Board should be self-financing.

I agree that the Law Society of Scotland should continue to exercise its present supervisory role. Its practice rules will be subject to review by the competition authority, which is I think preferable to requiring the Law Society to satisfy me as to rules on conveyancing. I have deliberately sought as few new powers for my own office as are necessary.

I think that the Scottish Legal Services Ombudsman can properly have a role in respect of authorised practitioners in both conveyancing and confirmation work.

As to certifying true cost I would be prepared to agree with Nicholas if we can secure a robust form of words which guarantees speedy and effective intervention under the competition legislation. Perhaps DTI officials could explain to ours more specifically what would happen, and how long it would take?

I am sending copies of this letter to the Prime Minister, the Lord President of the Council, the Chancellor of the Exchequer, the Secretaries of State for Trade and Industry and for Northern Ireland, the Attorney General, the Lord Advocate, the Minister of State at the Privy Council Office and to Sir Robin Butler.

MALCOLM RIFKIND

37/2 fst.jf.03.3.11.89 CONFIDENTIAL

Treasury Chambers, Parliament Street, SW1P 3AG

The Rt Hon Lord Mackay of Clashfern
The Lord Chancellor
House of Lords
London SW1A 0PW

6 November 1989

Dear Lord Mackay

COURTS AND LEGAL SERVICES BILL: CONVEYANCING BY AUTHORISED PRACTITIONERS

I have been asked to reply to your letter of 20 October to the Chancellor about the regulation of conveyancing in the Courts and Legal Services Bill. I have also seen Nicholas Ridley's letter of 3 November.

I think it is unfortunate that you have concluded that a "self-certification" procedure is not after all going to prove satisfactory for banks and building societies. I believe that in practice the scheme outlined in the White Paper would have had quite enough checks in it to provide adequate safeguards. But I accept that, in the circumstances, any procedure must not only be safe, from the point of view of the consumer, but must also be seen to be safe. I therefore agree, albeit reluctantly, with Nicholas Ridley's conclusion that it would be more straightforward to have a single supervisory body for all authorised practitioners.

A supervisory body would have the advantage of reducing the draconian powers proposed for the Ombudsman in the White Paper. It would also give further reassurance to the consumer bodies that the system was being properly regulated. However, it has the disadvantage that it will be seen by the banks and building societies as a further layer of regulatory bureaucracy. I believe that it will be essential to ensure that any prudential regulation which duplicates that already in place is kept to a minimum. To avoid duplication and keep the authorisation work of the body to a minimum, it should be obliged by statute to take full regard of existing regulatory tests (which duplicate those you propose) under the Banking Act, the Building Societies Act and the Insurance Companies Act.

It will obviously be essential for the regulator to police the Code to the extent that it is necessary. I hope however that such regulation will be light-handed. Your outline Code of Conduct appears to be adequate and I do not believe that it should be necessary for the regulatory body to create a further set of detailed rules in addition to the Code.

Even if a light form of regulation can be achieve, I am sure that the banks and, particularly, the building societies will have reservations about being subject to an additional form of regulation. The building societies are already unhappy about some of the restrictions proposed for the Code which are necessary to avoid a conflict of interest. We should be careful that they are not further dissuaded by the prospect of additional regulation. It could stifle the prospect of competition in the conveyancing market.

I can appreciate that you will wish to retain control of the Code of Conduct and to make it initially quite demanding. But I believe it would help both in the presentation of the new regulatory body and in increasing competition if it was made clear that those constraints could be relaxed in the light of experience. This could be achieve by giving the regulatory body a duty to advise you on any changes to the Code. I also agree with Nicholas Ridley that the Director General of Fair Trading should also be required to advise you on any aspects of the Code which are more anti-competitive than they need to be for the purpose of consumer protection.

I note what Nicholas Ridley says about "pump priming" being desirable to set up the regulatory body. I would be very reluctant to agree that the regulatory body should be funded at all by the Government. Given that only light handed regulation envisaged, the start-up costs of the body should be fairly small, and the banks and building societies which participate should be well able to afford their share.

I wholeheartedly support Nicholas Ridley's view that solicitors and licensed conveyancers should be subject to the same restrictions and standards as the authorised practitioners. I agree that solicitors should be required to abide by the principles of the Code of Conduct. This could be achieve either by an amendment to the Law Society's rules on conveyancing or the adoption of a similar Code of Conduct by solicitors.

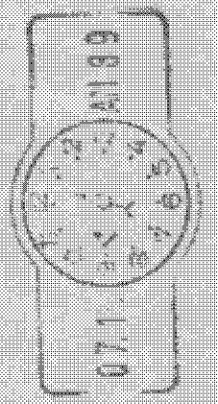
I also find Nicholas Ridley's arguments about true costs and predatory pricing to be persuasive. Although we have given a clear commitment in the White Paper to introduce such a condition, it does appear to present some severe practical difficulties. One possible way forward would be to drop the requirement from the initial Code of Conduct. This could be explained in terms of the detailed practical problems of implementing such a condition and the rather different regulatory structure now proposed. The new regulatory body could be asked to advise you whether the requirement is necessary or workable. This would give an opportunity to examine whether the other safeguards on cross-subsidisation, which are set out in Nicholas Ridley's letter, prove to be sufficient in practice.

37/2 fst.03.3.11.89 **CONFIDENTIAL**

I am copying this letter to the Prime Minister, the Lord President of the Council, the Secretary of State for Trade and Industry, the Secretary of State for Scotland, the Secretary of State for Northern Ireland, the Attorney General, the Lord Advocate, the Minister of State at the Privy Council Office, and to Sir Robin Butler.

agreed by the Financial Secretary and signed in his absence.

PETER LILLEY



Legal Procedure Pt 1

Legal Power

dti

the department for Enterprise

CONFIDENTIAL

The Rt. Hon. Nicholas Ridley MP
Secretary of State for Trade and Industry

Rt Hon The Lord Mackay of Clashfern
The Lord Chancellor
House of Lords
LONDON
SW1A OPW

Department of
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Enquiries
01-215 5000

Telex 8811074/5 DTHQ G
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Direct line 215 5422
Our ref PE4AEV
Your ref
Date 3 November 1989

Dear James

COURTS AND LEGAL SERVICES BILL: CONVEYANCING BY AUTHORISED PRACTITIONERS

Thank you for sending me a copy of your letter of 20 October to the Chancellor about the regulation of conveyancing in the Courts and Legal Services Bill.

Although I have not been involved in earlier discussions about this legislation, I am strongly in support of your objective of opening up the conveyancing market to new entrants. I also agree with you that the potential for abuse in terms of "tying in" by the big financial institutions is sufficient to warrant some degree of consumer protection and that therefore whatever regulation is agreed must be properly enforced, although we will need to ensure the legislation strikes the right balance between regulation and opening up the market. I share your concern that the regulation the Bank of England and the Building Societies Commission seem prepared to undertake could leave some aspects of the regulation unenforced. I also agree with you that the Office of Fair Trading would not be an appropriate body to carry out the regulation. This regulation will require a continuous monitoring role; the OFT's job is not to regulate any single sector of the economy but to enforce competition legislation in all sectors as and when competition issues arise. Opening up the conveyancing market may well give rise to competition issues in which case I would expect the OFT to play a vigorous role. But many aspects of monitoring will not involve competition issues.

I am not convinced that self regulatory organisations (SROs) (your option 2) are the best way forward, however. It is not clear that the various organisations would consider

conveyancing as a sufficiently important part of their business to warrant separate SROs. If they did not, the Government's objective of opening up the market would have been frustrated. If they did form SROs, there would then be a multiplicity of regulatory organisations in conveyancing. We could not be sure the regulation we thought necessary was being enforced consistently ; it would also be very confusing for consumers whose interests we are seeking to protect.

My view is that a single regulatory body and ombudsman system should be set up to provide the regulation we think appropriate. This body would have primarily a policing role. It would ensure that those who wished to enter the market met the "fit and proper" tests laid down in paragraph 5.8 of the White Paper including the code of conduct. The body would investigate any subsequent breaches which came to its attention. The ombudsman would deal with third party complaints and close liaison would obviously be needed between the two. In enacting the legislation, it would be very important to ensure we get the right balance between effective regulation and an over-regulatory approach which would be contrary to our wider policies. A clear "fit and proper" test will be needed and prudential controls already exercised by other regulatory bodies could be taken into account. Given our experience on financial services, my view is that the new regulatory body should not be given rule making powers but should be able to advise you on changes to the code of conduct. You would then make any new rules with advice from the Director General of Fair Trading on potential competition issues. The legislation could also require any rules not to be more regulatory than necessary for the purposes of consumer protection.

No one will go into conveyancing unless they see financial returns for themselves. If we go down the route I have suggested, I think the new regulatory body should cover its costs as soon as possible. However unlike financial services, where those concerned had to meet the new regulatory conditions to continue their business, the conveyancing market is an optional one for the financial institutions to take up. I therefore think there is a case for providing the regulatory body with some initial limited pump priming finance by government. This would not need to be very expensive or last very long. If you agree with this approach in principle, our officials and those from the Treasury could discuss the details further. I would also suggest that you should make some or all of the appointments to the regulatory body; in doing so you could ensure that the members reflect the right mix of experience and sympathy for a light regulatory touch.

There are two further points I would like to make on the conveyancing proposals. Firstly in my view, the Government will come in for a lot of criticism during the passage of the legislation if, in opening up the conveyancing market, it creates two groups of practitioners (independent solicitors and others) subject to different rules. This would be confusing to the consumer (whom the rules are supposed to protect) and contrary to the Government's policy, that where a new market is opened up, the players in it should all be subject to the same conditions. I recognise that the Law Society has its own well established rules governing conveyancing and that you are concerned, as far as possible, not to denigrate the tradition of professional self regulation. I am not therefore suggesting that independent solicitors involved in conveyancing should be subject to the new regulatory body and the code of conduct. I do, however, think that the legislation should require the Law Society to satisfy you that their rules on conveyancing are, where applicable, consistent with and incorporate the principles of any "fit and proper" test and the code of conduct.

My final point concerns the proposals to prevent authorised practitioners from offering conveyancing services below their true costs. I recognise that you were willing to drop this proposal but it was reinstated after the discussion of the White Paper in E(CP) in July to prevent financial institutions subsidising conveyancing from other parts of their business. I fully support your concern that the large financial institutions should not jeopardise the existence of the Solicitors' network by predatory pricing in conveyancing. However, I do not think that the requirement to provide a true cost certificate is either practical or necessary. The Bank of England, the Building Societies Commission and the OFT have all baulked at regulating a true cost provision. Any other regulatory body is likely to take the same view. In response to the Green Paper, the Institute of Chartered Accountants in England and Wales, where members would have to certify true cost, expressed doubts as to its value and indicated that Government would have to provide clear guidance on what was meant by true cost. It is far from clear that such guidance can be drawn up.

More important, the necessary protection will exist in the system in any case by virtue of two factors:-

a) the code of conduct will require practitioners to price each service separately (paragraph 9 of the draft code) and to offer conveyancing on its own at the stated price. An unrealistically low price could be a commercial liability and would be immediately apparent;

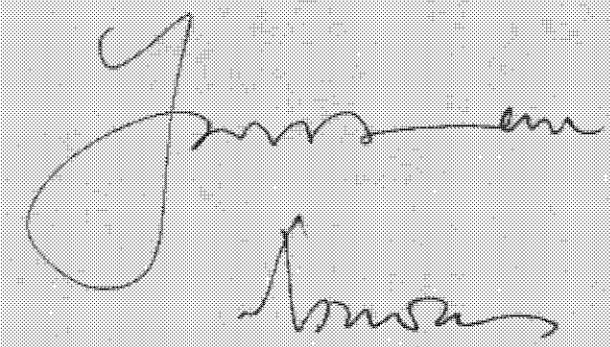
dti

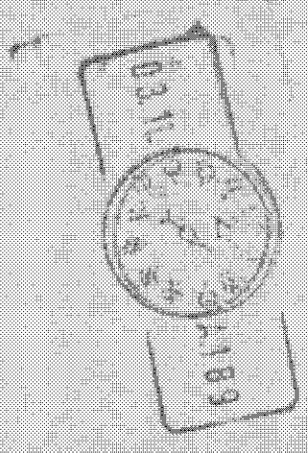
the department for Enterprise

b) where there is an attempt to distort the market through predatory pricing the existing competition legislation is available and I would have no hesitation in supporting its vigorous application.

I hope therefore colleagues will agree to dropping this proposal from the legislation. If not, I do not think we could justify imposing the "true costs" provision only on new entrants to the market; independent solicitors too would have to satisfy auditors they were pricing their services at "true costs".

I am copying this letter to the Prime Minister, the Lord President of the Council, the Chancellor of the Exchequer, Secretaries of State for Scotland and Northern Ireland, the Attorney General, the Lord Advocate, the Minister of State at the Privy Council Office, and to Sir Robin Butler.





FROM THE RIGHT HONOURABLE THE LORD MACKAY OF CLASHFERN

HOUSE OF LORDS
LONDON SW1A 0PW

CONFIDENTIAL

20 October 1989

Dear Nigel,

COURTS AND LEGAL SERVICES BILL

CONVEYANCING BY AUTHORISED PRACTITIONERS

A problem has arisen in connection with the regulatory role, if any, to be exercised by the Bank of England and the Building Societies Commission over those banks and building societies wishing to become authorised practitioners under the conveyancing proposals in the White Paper on legal services.

The White Paper proposed that there should be two classes of authorised practitioner: the first class comprising banks and building societies who would become authorised practitioners provided that they could certify to their regulatory authorities that they could comply with the requirements for authorisation; the second class consisting of other bodies and organisations who would have to satisfy the Lord Chancellor that they met the requirements for recognition and could ensure their members compliance with the code of conduct for authorised practitioners. We decided that the existing prudential regulation of banks and building societies justified giving them what would amount to privileged status in order that they could enter the conveyancing market as quickly as possible.

In putting forward this proposal in respect of the banks and building societies, I had certainly envisaged, as I am sure you had, that the appropriate regulatory bodies would be the Bank of England and the Building Societies Commission; the only issue being the need to ensure that the Bank's and the BSC's existing wide statutory powers of intervention and supervision were adequate to cover the conveyancing activities of the relevant institutions. I envisaged that the Bank's and the BSC's role over their bank and

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

building society authorised practitioners would be primarily a reactive rather than a proactive one; in other words, their regulatory powers would come into play only when it had been brought to their attention (for instance, by the Ombudsman) that this was necessary.

Both the Bank and the Building Societies Commission have, however, now taken the firm and clear line at official level that they are not prepared to assume even this level of regulatory role. They wish disciplinary powers over bank and building society authorised practitioners, including that of removal of authorisation to do conveyancing, to be exercised by an Ombudsman; and they wish the Director General of Fair Trading, rather than the regulatory body (para 5.14 of the White Paper), to be the only recipient of the annual certificates confirming that an authorised practitioner's conveyancing prices have been settled on a fair and reasonable basis. You may remember that I had suggested to E(CP) last July that this requirement be dropped because of the difficulty of defining "true cost", but you and other colleagues considered it to be so important that it was re-instated in the White Paper proposals.

It is clear from a meeting at official level with the Office of Fair Trading on 12 October that the OFT are not content to receive such certificates. They say that it should be for the regulator to regulate its members and that receipt and examination of the annual certificate is part of this function. They say further that their own Competition Act powers to investigate allegations of predatory pricing, which would be available to them in any event, are not appropriate for what we intend these annual certificates to achieve, namely to prevent cross-subsidisation by authorised practitioners. There could, they point out, be cross-subsidisation which did not amount to predatory pricing in Competition Act terms.

I am extremely concerned by the developments which I have outlined above. It seems to me that we cannot allow bank and building society authorised practitioners to be regulated effectively by an Ombudsman instead of by a regulatory body. We would be accused in the House both of inconsistency and of causing undue prejudice to the competitive position of independent solicitors and licensed conveyancers. Furthermore, giving the sort of draconian powers envisaged by the Bank and Building Societies Commission to an Ombudsman would be quite unique and could, if exercised, lead to him being judicially reviewed in the courts on the grounds of unreasonableness or breaches of the rules of natural justice. There could also be challenges in Europe for possible breaches of the property and civil rights articles of the European Convention.

Against this background, it seems to me that there are three options available to us if we wish to allow banks and building societies to operate as authorised practitioners:

1. The Bank and the Building Societies Commission could be required to take on a proper regulatory role in respect of

bank and building society authorised practitioners. This would mean making sure that their existing statutory powers of intervention and supervision were extended to conveyancing. Amendments to the relevant Acts might be necessary (the sole basis of the current powers is to protect the interests of depositors and investors). The Bank and the Building Societies Commission would also have to receive the annual costs certificates and be prepared to look at these if necessary. In addition, the power to remove authorisation or place conditions on authorisation would rest with the Bank or the Building Societies Commission; this would mean that the Ombudsman's powers would not need to extend to disqualification from undertaking conveyancing work.

2. We could treat banks and building societies like other authorised practitioners and require them to set up their own regulatory bodies separate from the Bank and the Building Societies Commission. Although at first sight this might appear to slow down the entry of banks and building societies into the conveyancing market, in fact it need not do so given the legislative timescale involved; the enabling legislation will not be through Parliament before next July and I shall then have to make the code of conduct by subordinate legislation. I should have thought that this gave banks and building societies ample time to set up regulatory bodies if they so wished. I can see definite attractions in this route if the first suggestion proves to be too difficult on political or practical grounds.

3. We could risk allowing banks and building societies to be regulated in effect only by an Ombudsman; and require the Director General of Fair Trading both to receive the annual cost certificates and investigate them as necessary. This would mean giving new powers, additional to those already in existence under the Competition legislation, to the Director in respect of conveyancing. I suspect that singling out the conveyancing market for special treatment by the Director in this way would cause difficulty on general competition policy grounds.

My own view is that the third option is totally inappropriate because it leaves banks and building societies without an effective regulator. My preference between the other two options is for the second one - given the obvious reluctance of both the Bank and the Building Societies Commission to take on the sort of regulatory role required if the public is to have confidence in the system we intend proposing to Parliament. Unless you and copy recipients can agree at once that we should adopt option 2, it might perhaps be sensible if we had an early meeting to discuss this. We have already agreed that the Bill must be ready for introduction immediately after the Queen's speech on 21 November. I must therefore give final instructions to Parliamentary Counsel on this matter by the end of this month. This obviously means that we must settle this issue between us within the next ten days.

Copies of this letter go to the Prime Minister, the Lord President of the Council, the Secretary of State for Trade and Industry, the Secretary of State for Scotland, the Secretary of State for Northern Ireland, the Attorney General, the Lord Advocate and Sir Robin Butler.

Yours ever,

Jim.

NORTHERN IRELAND OFFICE
WHITEHALL
LONDON SW1A 2AZ

SECRETARY OF STATE
FOR
NORTHERN IRELAND

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

4 October 1989

Dear Nigel,

THE LEGAL PROFESSION IN SCOTLAND

I have seen Malcolm Rifkind's letters of 8 September and 2 October to you about his proposals in respect of the legal profession in Scotland. I note that the differences in approach from that proposed for England and Wales stem from the differences in the respective systems, structures and traditions between the two legal systems, but that the general aim is consistent with the Government's stated objectives. As such I am content with the proposals.

I should say that the consultation period in Northern Ireland on our Supplement to James' three Green Papers ended on 14 September and comments are currently being subjected to detailed analysis by my officials. I would hope to be in a position to communicate with colleagues on various issues raised in consultation shortly.

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

Yours

Peter

PB

chex.ps/jmt2/8

Treasury Chambers, Parliament Street, SW1P 3AG
01-270 3000

4 October 1989

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

Dear Secretary of State

THE LEGAL PROFESSION IN SCOTLAND

Thank you for your letter of 2 October. I agree with your revised statement subject to one point. I would like to suggest that the last paragraph of the foreword should be recast as follows:

> "The Statute will make it clear that the new arrangements will have the express purpose of ensuring the development of fresh ways of providing legal services to meet clients' needs, especially for conveyancing, litigation work and for representation in the courts, and of ensuring that clients have a wider choice of providers of such legal services. In particular, the statute will state a clear intention that the extended rights of audience it confers will be put into practical effect as soon as the necessary conditions have been met".

The purpose of this revision - and in particular a reference to the need to set the objectives out in the statute - would be to bring the paragraph into line with paragraph 2.4 of the White Paper setting out the proposed arrangements for England and Wales. It would also help underline the Government's commitment to reform, and would be useful if any aspect of the implementation of the Government's proposals was ever subject to judicial review.

You will recall that paragraph 2.4 of the White Paper was discussed in some detail at Cabinet on 12 July, when it was

specifically agreed that it would be desirable to include in the legislation a clear statement of the intention to extend rights of audience.

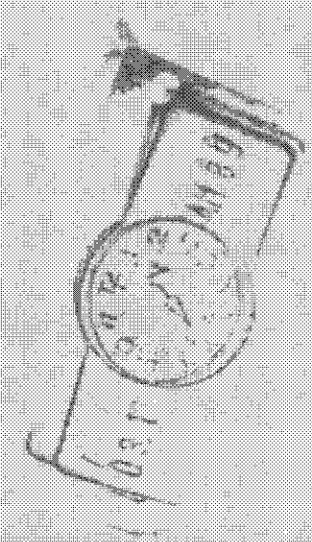
I am copying this letter to the Prime Minister, Members of E(CP), the Lord Chancellor, the Lord Advocate, the Secretary of State for Northern Ireland, the Attorney General and Sir Robin Butler.

Yours sincerely

Jonathan Taylor

pp **NIGEL LAWSON**

[Agreed by the Chancellor and signed on his behalf]



CAROLYN SINCLAIR
POLICY UNIT

THE LEGAL PROFESSION IN SCOTLAND

While you were away from the office this week, Malcolm Rifkind's letter to the Chancellor dated 2 October, attaching the revised draft of the Scottish statement, came round. They were seeking urgent comments by Wednesday, 4 October. I know that you will not be back until Thursday, and I have assumed that in view of your earlier advice you see no need for the Prime Minister to intervene. But perhaps you would let me know urgently on your return if we do need to chip in.

PAUL GRAY
3 October 1989

SECRETARY OF STATE FOR SCOTLAND

SCOTTISH OFFICE
WHITEHALL, LONDON SW1A 2AU

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

2 October 1989

Dear Nigel,

THE LEGAL PROFESSION IN SCOTLAND

I was grateful for Peter Lilley's letter of 25 September about the outcome of my review of the legal profession in Scotland.

I have had a very useful meeting with James Mackay, which took place after officials from Treasury, LCD, DTI and NIO had discussed with mine a number of points on my text. I now attach a revised text which I think takes full account of the various points which have been made, including the concern expressed in Peter's letter. The changes which have been made to the text I circulated on 8 September are sidelined.

I now wish to proceed as soon as possible to publication of the statement, and to provide the draftsman with instructions, which are urgently required.

I would therefore be glad to have any further comments from colleagues by close of play on Wednesday 4 October, in the absence of which I trust I may assume their agreement to my proposals.

I am sending copies of this letter to the Prime Minister, members of E(CP), the Lord Chancellor, the Lord Advocate, the Secretary of State for Northern Ireland, the Attorney General and to Sir Robin Butler.

Yours ever,

MALCOLM RIFKIND

MAB272L4

CONTENTS

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FOREWORD

By the Secretary of State for Scotland

This paper sets out the conclusions I have reached in the light of responses to my consultation papers "The Legal Profession in Scotland" and "The Practice of the Solicitor Profession in Scotland". I am grateful to all those who took the trouble to submit what were generally thoughtful and well argued views. In reaching conclusions I have taken account of the quality of the arguments put forward on the various issues.

It is the function of Government not merely to respond to complaints or problems, but also to take the initiative where there is an opportunity to improve on existing arrangements. That is an important aspect of my approach in this paper. I have also sought to broaden the choice available to the public wherever consistent with the interests of justice.

In developing my present proposals, I have had particular regard to the need to maintain, and where possible improve, the efficient and economical disposal of business by the courts and I propose to ensure that, so far as possible, the changes proposed in this Paper should be introduced in such a way as to further these objectives.

These proposals are not presented as all that there is to be said about lawyers and legal services. A considerable number of legal and procedural reforms have been introduced in recent years and this programme of reform will continue. While our arrangements for legal aid have recently been reformed I recognise the need to keep questions of eligibility and scope under review. The proposals set out here should play a useful part in improving the provision of legal services by removing unnecessary restrictions while upholding the interests of justice.

As I said in my consultation paper, I have conducted my review with a clear focus on Scottish needs and a recognition of the importance of Scotland's distinctive legal system. Of course there are certain points of similarity between my conclusions and those published by the Lord Chancellor (Cm 740). Just as the common factors of our proposals reflect the Government's policies, so the differences in our approaches bear witness to the differences in existing systems, structures and traditions, and to the differing options available for achieving similar objectives. My conclusions are the product of a quite separate consultation process conducted with the Scottish legal system as the frame of reference.

I look forward to bringing before Parliament legislative proposals which will:

(a) promote a wider choice of legal adviser for clients subject only to such restrictions as are necessary in the interests of justice; and, in that regard

(b) provide that standards, and in particular standards of advocacy, are set which ensure a fully competent service, and which facilitate the proper and efficient administration of justice.

These proposals will have the express purpose of ensuring the development of fresh ways of providing legal services to meet clients' needs, especially for conveyancing, litigation work and for representation

in the courts, and of ensuring that clients have a wider choice of providers of such legal services. They will enable the extended rights of audience to be put into practical effect as soon as the necessary conditions have been met.

1. THE ROLE OF THE SECRETARY OF STATE

1.1 The proposal in the Consultation Paper that the Secretary of State might take a power to make regulations setting a framework within which professional and Court Rules might be made was criticised by the legal profession and also by some consumer interests on the grounds that it would undermine the independence of the profession and introduce undesirable Executive control. There are particular issues in which the public interest goes wider than the responsibilities of individual institutions might appear to recognise. The Secretary of State has concluded however that, in view of the other proposals contained in this Paper, it will not be necessary for general powers over the legal profession to be vested in his office. He proposes to take specific powers to enable him to ensure the satisfactory implementation of extended rights of audience in the courts, and to preserve the entitlement of the Faculty and the Law Society of Scotland to prohibit certain forms of organisation for advocates and solicitors respectively.

2. RIGHTS OF AUDIENCE

2.1 The Secretary of State has decided to implement the proposal in the consultation paper that those solicitors who can demonstrate prescribed standards of training and experience should be granted rights of audience in the supreme courts.

2.2 The responses to the consultation paper placed great emphasis on the need for representation of a high quality in the supreme courts. The Secretary of State fully shares this view. The public interest lies both in protecting clients from inadequately trained legal representatives and in the greatest freedom of choice for clients among pleaders of the requisite competence. The efficient use of court resources is also important. Some have argued that the only way to guarantee quality in advocacy is through maintaining the exclusive right to practise of members of the Faculty of Advocates, whose training requirements, based on devilling, produce the high standard of pleading in the Supreme Courts on which our system of justice depends. The Secretary of State is not persuaded that this is the only way to secure the necessary standards and believes that satisfactory arrangements can be set in place for the recognition as supreme court pleaders of those individual solicitors of the calibre required to safeguard the interests of justice. The effect of this change would be to offer clients a wider choice of representative.

2.3 The Secretary of State proposes that solicitors should be entitled, on satisfying the requirements of appropriate post-entry training regulations, to plead in the higher courts. These regulations would be made by the Law Society of Scotland with the approval both of the Lord President of the Court of Session and of the Secretary of State. In this way the standard of performance achieved in training will be the sole test for the right of audience in the higher courts. It should be possible under such regulations for a solicitor to be admitted to plead in the High Court (and Court of Criminal Appeal) or in the Court of Session (and thus the House of Lords), or in both. The role of the Lord President would be no different from that which he exercises at present whereby he gives approval to training regulations and rules relating to professional practice, conduct and discipline made by the Law Society.

2.4 It is necessary to ensure that this right of audience is not negated or undermined by unreasonable constraints on the solicitor's conduct of cases in the higher courts. The Secretary of State therefore intends that any professional rule or requirement which would, directly or indirectly, inhibit the solicitor's freedom to undertake all the actions necessary for the preparation and presentation of the client's case - insofar as he or she has a right of audience - should require the approval of the Secretary of State and of the Lord President of the Court of Session. Before giving his approval the Secretary of State would wish to be satisfied that the rule was no more restrictive than necessary to safeguard the interests of clients or was essential to the efficient administration of justice. In reaching his decision he would seek the advice of the Director General of Fair Trading on the likely effect of the rule on competition in the provision of legal services.

2.5 A particular matter most appropriately dealt with in this way by professional rules concerns the degree of separation required

between the person precognoscing witnesses before the evidence comes before the court, and the person questioning them in court. In the consultation paper it was suggested that there should be complete separation between the two in cases coming before the supreme courts. Some respondents supported this view, while others suggested that it was not founded on any recognisable principle of Scots law and did not currently apply in the Sheriff Courts. After further consideration the Secretary of State has decided that this preliminary view requires to be refined and that the proper concern of the profession is to observe the principle that no one, including the person to present the case in court, should do or say anything which would have the effect of, or could be construed as, inducing a witness (or the client) to tailor his or her evidence, or suggest that the witness should give evidence other than in accordance with his or her honest recollection or opinion. He believes it will be sufficient for the Law Society to make rules in this area as the Faculty of Advocates already does. It will be for each professional body to consider whether a general prohibition on the interviewing of witnesses is necessary to achieve adherence to this principle of professional conduct.

2.6 The Secretary of State expects that the Law Society of Scotland will establish a mechanism, to operate in parallel or in co-operation with that of the Faculty of Advocates, to ensure that no client who requires a Supreme Court solicitor-advocate goes unrepresented.

2.7 In due course it may become appropriate for other professional bodies to be authorised by the Secretary of State to grant to their members rights of audience or to handle litigation work. The Secretary of State proposes therefore that appropriate powers should be included in statute and that it would be for him to be satisfied that the body could offer adequate client protection. Both he and the Lord President would be involved in approving its training regulations and professional practice rules on the same basis as set out above as respects solicitors' rights of audience in the supreme courts. Before granting recognition the Secretary of State would have access to the advice of the Director General of Fair Trading on any anti-competitive effect of the proposed arrangements.

Queen's Counsel

2.8 Although the consultation paper did not discuss the point, it would be wholly consistent with the Secretary of State's conclusion on rights of audience that those solicitors who had been granted rights of audience in the High Court and the Court of Session should be eligible for appointment in due course as Queen's Counsel.

Borrowing of Court Process

2.9 Section 29 of the Solicitors (Scotland) Act 1980 places restrictions on the borrowing of processes in civil court proceedings. In Court of Session cases, solicitors may not borrow the process unless they have a place of business in Edinburgh. Solicitors from out of Edinburgh have to employ a firm of Edinburgh solicitors (who may borrow the process) as their correspondents. So far as concerns the Sheriff Courts, a solicitor is not entitled to borrow the process in a case still in court unless he has a place of business within the jurisdiction of the court. The Secretary of State invited

comment on the possible repeal of this section in his 1987 discussion paper "The Practice of the Solicitor Profession in Scotland". The Secretary of State has concluded that, with modern transport and communications, solicitors should be able to choose between conducting their own case or employing a firm of correspondents. It would be particularly incongruous to maintain this restriction while enabling out-of-Edinburgh solicitors to qualify to plead in the Court of Session. The Secretary of State therefore proposes to make the necessary changes to the primary legislation. Some court rules may need to be amended in consequence.

3. LAWYERS' PARTNERSHIPS

3.1 Solicitors are prevented by statute from forming partnerships (or otherwise sharing fees) with non-solicitors although they may form partnerships with one another. The statutory prohibition is replicated in professional practice rules. For advocates there is no statutory restriction but partnerships are prohibited under the Faculty's own rules. The Secretary of State has considered in full the representations made to him following publication of his consultation paper "The Practice of the Solicitor Profession in Scotland" and has concluded that there is no need for absolute statutory barriers to the formation of partnerships between solicitors and others.

3.2 Nevertheless, those who practise in the courts owe duties to the court in the interests of justice. It may be that the professions will continue to regard rules to limit forms of organisation among their members as necessary in order to safeguard those interests. Since such rules could have an impact on the way in which the members of the professions compete, the Secretary of State has decided that such rules should require his approval.

3.3 There will accordingly be provision in the proposed legislation for the Secretary of State to approve rules made by the professional bodies in respect of the groupings or legal relationships in which their members who are engaged in the conduct of proceedings in court may practise. In granting approval, he will wish to ensure that such rules are no more restrictive than necessary to safeguard the interests of justice and in reaching his conclusions he will have the benefit of advice from the Director-General of Fair Trading on the extent to which the rules may be expected to prevent, restrict or distort competition. As noted in the Government's White Paper "Opening Markets: New Policy on Restrictive Trade Practices" (Cm 727), rules which are required by legislation to receive Ministerial approval in this way will not fall within the proposed prohibition on anti-competitive agreements.

4. ADVOCATES' PROFESSIONAL PRACTICE

4.1 The consultation paper (at paragraph 5.11) stated the Secretary of State's preliminary view that the professional rules of the Faculty should not impose unnecessary restrictions on the way advocates offer their services. He has now concluded that in general the Faculty's rules should not be given any particular protection from consideration under the proposed legislation on restrictive trade practices. Among the practice rules which would be subject to scrutiny in this way are the following.

4.2 Employed Advocates: The Secretary of State is not persuaded by arguments that the existing restrictions on the professional activities of employed advocates are essential.

4.3 Instruction of Advocates: The Secretary of State does not believe that the right to instruct an advocate, currently restricted to solicitors and a very limited number of other groups, should be denied to a range of professional agents who are competent to do so. The Faculty has indicated that a change in its rules to this effect is under active consideration. Any remaining restrictions on instruction by lay clients would be subject to consideration under the proposed restrictive trade practices legislation.

4.4 Advertising by Advocates: While the Secretary of State sees merit in some relaxation of the Faculty of Advocates' restriction on advertising, their rules on this subject will fall to be considered in terms of the restrictive trade practices legislation and the Secretary of State sees no need to interfere with that process.

4.5 Solicitors' Attendance on Counsel: The question of whether a solicitor's attendance in court is necessary to the conduct of the case is one for the advocate, the client and the solicitor, and the court. A solicitor's presence in court is not required under existing professional rules and the Secretary of State is satisfied that the reforms being introduced to the professions' procedures will ensure that unnecessary attendance can be dealt with accordingly.

4.6 Court Practitioners' Immunity from Suit: In the interests of maintaining the integrity of court decisions, the Secretary of State proposes, as indicated in the consultation paper to maintain court practitioners' immunity from suit in matters relating to the conduct of a case in court.

5. JUDICIAL APPOINTMENTS

5.1 The Secretary of State considers that the general principle underlying all judicial appointments should be that eligibility should depend not on the particular branch of the legal profession to which an individual belongs but on the relevance to the work of the post of an individual's qualifications, abilities and experience. This general principle was widely welcomed in the consultation.

5.2 In the application of this general principle at present, considerable emphasis in judicial appointments is placed not only on legal qualifications but also, in the case of Senators, on the acquisition of extensive and successful experience in advocacy before the Supreme Courts and, in the case of Sheriffs, before the Supreme Courts or Sheriff Courts or both. In practice, therefore, appointments to the post of Senator have hitherto been made exclusively from the ranks of advocates whilst appointments to the post of Sheriff have been made from amongst the ranks both of advocates and of solicitors. The proposed extension to solicitors of rights of audience in the Supreme Courts will result in solicitors having the opportunity to acquire experience in advocacy in the Supreme Courts and, under the general principle set out above, these solicitors should become eligible for appointment as Senators.

5.3 In the earlier consultation, it was noted that, in recent years, an increasing number of solicitors have gained very considerable judicial experience in the Sheriff Courts and Tribunals and it was questioned whether it was reasonable that, no matter the high quality and extent of their judicial work, they were not eligible for higher judicial office. There was support for the view that solicitors who had served as Sheriffs Principal and Sheriffs should be eligible for appointment to the Supreme Courts on the basis of their judicial experience in the lower courts. On the other hand, it was argued strongly that the judicial experience of a Tribunal member relates to a narrow field of law, much narrower than that of a Sheriff Principal or a Sheriff, and that factor, coupled with the lack of any experience of advocacy before the Supreme Courts acts as a double disadvantage. The Secretary of State accepts this view.

5.4 He accordingly proposes to extend the conditions for appointment to the office of Senator to include solicitors who have exercised full rights of audience in the Supreme Courts or who have served as Sheriffs Principal or Sheriffs, in each case for a minimum period of five years. The eligibility requirements for a number of other judicial appointments will need to be amended in line with this approach and some transitional provisions may be required.

6. COMPLAINTS ABOUT LAWYERS

6.1 The Secretary of State believes that in the first instance supervision of the legal profession should be in the hands of the profession's own governing bodies but that there also needs to be an effective independent supervisor to make sure that the lay client's complaints are adequately dealt with. He intends to strengthen the existing arrangements for handling complaints against the legal profession by requiring the professions own complaints machinery to meet acceptable minimum standards. In addition he intends to extend the office of the Lay Observer to include the handling of complaints against advocates and to rename the post "Legal Complaints Ombudsman."

6.2 The Secretary of State believes that the present arrangements work well in most cases and that the recently acquired statutory powers of the Law Society of Scotland to deal with complaints about inadequate professional services will go a long way towards meeting the need of complainers for a simple remedy to their problem with their solicitor. The Lay Observer is now able to report cases to the Scottish Solicitors Discipline Tribunal where she is dissatisfied with the conclusion reached by the Law Society.

6.3 Further improvements which the Secretary of State intends to make would include putting the professional bodies under a specific statutory duty to investigate complaints about a lawyer (at present such a duty is imposed only on the Law Society, and only in relation to complaints of inadequate professional services of solicitors). The proposed duty - which reflects the existing practice of the Faculty and the Law Society - will be accompanied by a requirement that, in disposing of complaints, the professional body should inform both the complainer and the lawyer of the facts as they have found them, and of their conclusions and any recommendations or proposed action. It is also important that the professional bodies should be free to re-open their consideration of a case following receipt of a report or opinion from the new Ombudsman. The Law Society has experienced difficulties in this area, and the Secretary of State wishes to ensure that the matter is put beyond doubt. This is of particular importance as, like the Lay Observer, the Ombudsman will not be re-investigating the original complaint against the solicitor.

6.4 These measures will set the standards for the investigation of complaints. Some complainers will remain dissatisfied and for them it is important that someone who is clearly outside the profession should be able to review what happened. The Legal Complaints Ombudsman will fulfil this role; and will be empowered to require an explanation from the professional body where an investigation has not been concluded within a specified period - which might be set initially at 3 months.

6.5 The Secretary of State has concluded that the Ombudsman should not have powers to impose awards of compensation. This proposition attracted little support on consultation. Where the question of a remedy for the complainer arises, the Law Society has established procedures whereby it can and does attempt to reach a conciliated outcome where the complainer asks for compensation. Since January this year those procedures have been reinforced by new powers for the Society to require the solicitor to waive fees or make good the defective work at his or her expense. The Secretary

of State welcomes the steps which have already been taken to use the powers fully and constructively and so achieve a satisfactory outcome in a significant number of complaints cases. He does not want to prejudice the useful application by the Law Society of its new powers by imposing on them a power to require compensation. Such an approach might also lead to provision for hearings, and possibly for appeals to the Discipline Tribunal. It will be open to the Ombudsman to comment on the Law Society's conclusions and recommendations for a settlement and if not satisfied that the Law Society's (or Faculty's) investigation had adequately dealt with questions of negligence and compensation, he or she could of course say so. Where the complaint involves the loss of small sums of money, the small claims procedure in the Sheriff Court may, on occasion, be suited to actions to recover the lost money.

6.6 The Secretary of State also intends to improve the complaints system by requiring the Law Society, in concluding a case, to provide the complainer and the solicitor with an account of the relevant facts as it has found them, distinguishing what is agreed from what is disputed, together with a statement of its own conclusions and any action taken or proposed to be taken. It would then be for the complainer to consider whether to take further action. The Secretary of State also intends to discuss with the Lord President of the Court of Session whether there are changes which might be made to the existing role and procedures of the Scottish Solicitors Discipline Tribunal to make it more effective.

7. CONVEYANCING

7.1 The consultation paper stated as an objective that "conveyancing services should be as reliable, swift, cost effective and flexible as possible consistent with the minimum necessary safeguards for consumers". Three options to meet this objective were set out for comment, first, that the market in conveyancing be open to practitioners authorised as being (a) competent (b) able to provide sufficient financial safeguards. Initially it would be necessary for authorised practitioners to employ solicitors to carry out, or at least supervise, the work. Secondly, there could be created a new category of conveyancers who were not fully qualified solicitors but who had undertaken a prescribed course of study and training. The third option was to maintain the status quo.

7.2 Those respondents to the consultation paper who supported the ending of the present reservation of conveyancing to lawyers included the Scottish Consumer Council, the National Association of Estate Agents, the Royal Institution of Chartered Surveyors in Scotland (who did not, however, wish to see conveyancing being offered by lending institutions), the Building Societies Association and the Association of British Insurers. Opposition to the proposed change came from the legal profession. The Scottish Banks were divided.

7.3 Responses to the consultation paper revealed concern about a number of aspects of the property transfer process and not simply those related to the narrow statutory definition of conveyancing as the process by which rights over property are created, extinguished or transferred by means of some form of writing or deed. Views were expressed on the important role played by the independent solicitor in offering unbiased financial advice to clients in connection with house purchase. One area of particular concern was the process of "churning" whereby prospective purchasers are encouraged to take out new endowment policies in circumstances where top up policies might be sufficient and less expensive. The value of advice on how the terms of the property transaction might relate to the client's general circumstances was also mentioned. There was widespread support from outwith the legal profession for the introduction of licensed conveyancers although it was recognised, that, in the short term at least, numbers were not likely to be large. While many respondents favoured the concept of a "one stop" service it was stressed that the gain to clients would be jeopardised if there was insufficient regulation and, therefore a serious risk of clients being put under undue pressure to accept a package of services from a singie supplier. The Law Society of Scotland expressed concern about the impact of increased competition for conveyancing work on the viability of many of their members' practices, and the possibility that this might lead to the loss of a solicitor presence in rural areas.

7.4 The Secretary of State has given careful consideration to all the representations which have been made, recognising the need for clients' interests to be fully safeguarded in what is often the main financial transaction of their lives. The Government has already announced a number of measures which it has taken, or will be taking, to improve aspects of the house transaction market in order to protect the consumer. In June 1989 Mr Eric Forth MP,

Parliamentary Under Secretary of State for Industry and Consumer Affairs, published a report entitled "Review of Estate Agency". The estate agency industry will cooperate with the Director-General of Fair Trading to introduce a Code of Practice for estate agency and provision will be made under the Estate Agents Act 1979 to specify "undesirable" practices by estate agents including tie in sales, where agents refuse to pass on bids unless the buyer agrees to arrange finance through them; unfair or misleading contract terms; misleading advertising; and bidding up prices. Those found engaging in such practices will be liable to being banned from estate agency by the Director-General of Fair Trading. Allegations about the practice of "churning" have been brought to the attention of Securities and Investment Board which is responsible for regulating the provision of investment advice. The Board has announced new rules concerning the provision of advice to clients which are intended to improve standards in this area.

7.5 These measures meet many of the concerns expressed in response to the consultation paper. Moreover changes are already taking place to the registration of property transfers in Scotland with the gradual move from the Register of Sasines to the simpler Land Register. With this simplification the technical aspect of conveyancing becomes more straightforward. The Secretary of State does not consider it right to keep in force the current statutory reservation particularly as it applies only to a limited part of the process. Clients should not be constrained to use only one kind of service provider on such grounds. His conclusion is that change to permit greater choice for clients is desirable but requires to embody important protective measures so that clients can be assured of receiving appropriate advice, a competent service and protection against loss of funds.

7.6 The Secretary of State has therefore decided to remove the existing statutory reservation to solicitors of the right to charge a fee for the preparation of a conveyancing writ. Individual banks and building societies which can certify to their regulatory authorities that they can comply with the requirements for authorisation and with a statutory code of conduct will be able to operate as authorised practitioners. In addition the Secretary of State proposes to seek statutory powers for recognition to be granted to professional bodies and other organisations as competent to authorise their members to provide conveyancing services. Bodies which seek recognition will have to satisfy the Secretary of State that they have made adequate provision for their members to offer financial protection to clients, for resolving disputes between their members and clients and for disciplining their members in appropriate circumstances. The statutory code of conveyancing conduct will require that conveyancing services are provided by or under the supervision of suitably qualified persons.

7.7 The statutory code of conduct, binding on conveyancing practitioners, will follow the draft code set out at Annex C to the consultation paper extended and clarified, in the light of comments received during consultation, in the following ways:

7.7.1 Authorised practitioners will be required to offer their prospective conveyancing clients an interview with a solicitor.

At this interview the solicitor will have to review any possible conflict of interest between him and the client; explain that his primary duty is to the client and not his employer; and explain the scope of the service being provided. After the interview the solicitor will have to give the client a written statement that these matters were discussed.

7.7.2 It will be put beyond doubt that conveyancing cannot be done for more than one party in a transaction and that conveyancing for one party precludes the provision of estate agency for another party in the transaction.

7.7.3 At the outset, authorised practitioners will require to use solicitors qualified in Scots law and conveyancing to carry out or supervise conveyancing of Scottish properties;

7.7.4 Authorised practitioners will be required to submit to their regulatory bodies, each year, details of the prices they charge for conveyancing services, certifying that those prices have been settled on a fair and reasonable basis to provide a reasonable rate of return on the cost of providing those services alone.

7.8 The Secretary of State also intends to seek powers to make it possible for conveyancing services to be provided by people who are not qualified as solicitors but who have undertaken an appropriate course of study and training. Such people would require to be proficient in the areas of law and practice relevant to a property transaction. The Secretary of State will require to be satisfied with the arrangements for certifying competence before granting recognition to any category of non-solicitor conveyancers.

7.9 Provision will also be made for conveyancing by an authorised practitioner to be done or supervised by a member of this new group of conveyancers.

7.10 The Secretary of State has also decided to proceed with the proposal in the Annex to his consultation paper "The Practice of the Solicitor Profession in Scotland" that the present reservation to solicitors of the right to charge a fee for the preparation of writs relating to moveable estate should be removed. There would in future be no restriction on who could charge for this work. Responses to the consultation paper suggested that the restriction may not at present always be observed. The Secretary of State recognises that the work in question may call for the exercise of particular expertise but he does not believe only solicitors are competent to do so. Clients, many of whom are businesses rather than private individuals, should be free to make their choice of professional adviser for this work.

8. CONFIRMATION OF EXECUTORS

8.1 In paragraph 3.2 of "The Practice of the Solicitor Profession in Scotland", the Secretary of State proposed that the law governing the preparation of papers on which to found an application for a grant of confirmation in favour of executors should be amended. He suggested that anyone might be permitted to charge a fee for this work although, in the event of dispute, only a solicitor could represent a client in court. The later consultation document sought views on whether the preparation for a fee of applications for appointment as an executor dative should continue to be reserved to solicitors; and on whether the requirement for applicants for confirmation as executors to swear on oath could be replaced by a requirement to sign a declaration to the same effect.

8.2 The Secretary of State does not consider that the exclusive reservation of this work to solicitors is in the public interest. On the other hand to safeguard the public against unscrupulous or incompetent practitioners some degree of regulation should remain. He proposes therefore to take powers to grant recognition to other bodies whose members will be able to charge a fee for the preparation of applications for appointment as an executor. Initially it is likely that the bodies recognised would be those such as banks and building societies already active in executry work. The Secretary of State also envisages that the arrangements governing application for appointment as an executor dative should be simplified. These changes would apply only in those cases in which, and for so long as, there is no difficulty or dispute requiring legal argument or appearance in court.

8.3 The Government also propose to replace the requirement that applicants for confirmation should have to swear an oath with a requirement that they sign a declaration. It seems likely that this could be embodied in the application submitted to the court. The penalties for submitting a false declaration could be set out on the application form, but the Secretary of State does not intend to create a specific statutory offence, as the common law of fraud provides adequate protection against deliberate falsification.

9. LAWYERS' FEES

9.1 Role of Court in Prescribing Lawyers' Fees: The consultation paper sought views on whether lawyers' fees in non-legal aided civil litigation should continue to be limited by the prescription of fees by the Court of Session. The Secretary of State has decided that the powers of the Court to regulate fees should be restricted to the setting of maximum fees that may be claimed from the other side when an award of expenses is made. Clients should be free to negotiate feeing arrangements with their solicitors, and the existence and nature of any prior agreement should be taken into consideration if an account is subsequently disputed. In any such dispute, however, the relevant questions should include (a) whether the solicitor misled the client (eg as to "the going rate") and (b) whether the agreement was one a knowledgeable client would reasonably have entered.

9.2 Resolution of Fees Disputes: The Secretary of State has decided not to proceed with the proposal in the consultation paper that responsibility for arbitration in fee disputes should lie with the Law Society of Scotland. The independence of the auditor of court is valued both by legal practitioners and by their clients and the Secretary of State therefore wishes to see the office and its independence preserved. He considers, however, that the choice of auditors available to clients may be unduly restricted. He therefore intends to look into the possibility of opening up appointments as court auditors to all those qualified to undertake it, rather than leave it reserved to (in the typical case) one individual in each Sheriff Court district. For the sheriff courts, auditors would still require to be appointed by the Sheriff Principal and only those so appointed could undertake taxation of party and party accounts. The Secretary of State is aware, however, that taxations of accounts for purposes other than assessing a court's award of expenses (extra judicial taxations) are undertaken by auditors of court in their own time for a freely negotiated fee; and that no one is obliged to use their services. (Many choose to do so because a solicitor may only sue for fees that have been "taxed" by an auditor of court.) A greater degree of competition could be introduced into the market for extra-judicial taxations if all those qualified to offer the service were entitled to apply for appointment.

9.3 Speculative Actions and Contingency Fees: The Secretary of State does not believe that the introduction of contingency fees, where the lawyer receives a proportion of the damages awarded, would be in the public interest. In speculative actions, it would be open to a client and solicitor, under the more flexible regime for feeing agreements outlined above, to agree to a percentage uplift of the usual fee, which would be payable only in the event of success. The Secretary of State proposes that the Lord President of the Court of Session should have powers to prescribe an upper limit on such an uplift.

10. ADMISSION OF SOLICITORS AND NOTARIES PUBLIC

10.1 The procedures for the admission of solicitors and Notaries Public were considered in the discussion paper "The Practice of the Solicitor Profession in Scotland". In the light of responses to that paper the Secretary of State has concluded that the procedures are in need of rationalisation.

10.2 Section 6 of the Solicitors (Scotland) Act 1980 provides that a person is admitted to the roll of solicitors in Scotland if he or she is able to satisfy the Council of the Law Society of Scotland that he or she is a fit and proper person to be a solicitor. The Council then petitions the Court of Session for admission. The court is bound to order admission once a petition is made and the Council is bound to admit the new solicitor once the order to do so is issued by the Court.

10.3 Under section 57 of the Act, any solicitor may be enrolled as a Notary Public on application to the court, which orders the Keeper of the Registers of Notaries Public to enter his or her name on the register. Since in practice any solicitor can choose to become a Notary, this second procedure is unnecessarily complicated and costly for those entering the profession.

10.4 The Secretary of State therefore proposes that responsibility for the Register of Notaries Public be transferred to the Council of the Law Society of Scotland. The office of Clerk to the admission of notaries public would pass to the Secretary to the Council of the Law Society. New entrants to the profession could then apply for admission both as a solicitor and as notary in a single procedure. This would not be mandatory, however; and those already admitted as solicitors would remain entitled to apply for admission as a notary. The Council would be responsible for ensuring the administration of the oath to those being admitted as notaries, and for the removal of names from the Register of Notaries in appropriate circumstances - for example, if a solicitor is struck off the roll.

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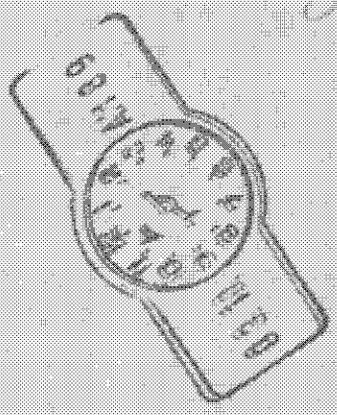

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Treasury Chambers, Parliament Street, SW1P 3AG

The Rt Hon Malcolm Rifkind QC MP
Secretary of State for Scotland
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25 September 1989

Dear Malcolm,

THE LEGAL PROFESSION IN SCOTLAND

The Chancellor was grateful for your letter of 8 September on this subject. He has asked me to reply. I have seen a copy of James Mackay's letter of 14 September.

I understand that officials have discussed some of the main differences between the approach you are advocating for Scotland and that applicable to England and Wales set out in the White Paper published in July, and that there is a good chance that you will be able to resolve any remaining difficulties at your meeting with James later this week.

There is, however, one particular point I would like to mention at this stage. Paragraph 2.4 of the White Paper says:

> "The statute will make it clear that the framework it will create has the express purpose of ensuring the development of fresh ways of providing legal services to meet clients' needs, especially in advocacy and litigation, and of ensuring that clients have a wider choice of providers of such legal services. In particular, the statute will state a clear intention that the extended rights of audience it confers will be put into practical effect as soon as the necessary conditions had been met".

I think it would be extremely desirable to include a similar paragraph in your paper (a draft of which was attached to your letter). It might be included in Section 2 (or just possibly Section 1). This would ensure consistency between what we are advocating for England and Wales on the one hand and Scotland on the other. It would also make abundantly clear to all concerned that the purpose of the exercise is to improve the service to the client through increasing consumer choice, and that a particular aim will be to extend rights of audience as soon as reasonably possible. A paragraph on these lines would be particularly helpful if, at a future date, an aspect of the implementation of the legal reform was subject judicial review.

I take it we shall have an opportunity to look at a further draft of your paper following your discussions with James.

I am sending copies of this letter to the Prime Minister, Members of E(CP), the Lord Chancellor, the Lord Advocate, the Secretary of State for Northern Ireland, the Attorney General and Sir Robin Butler.

Yours ever

Peter

PETER LILLEY

CAROLYN SINCLAIR
POLICY UNIT

LEGAL PROFESSION IN SCOTLAND

I put the papers to the Prime Minister over the weekend, under cover of my minute attached. As you will see, she is content to leave the Lord Chancellor and Malcolm Rifkind to sort this out and will only intervene if a significant obstacle emerges. I do not, therefore, propose to send out any minute at this stage. Perhaps you would let me know if you think we do need to put the issue back to the Prime Minister in the light of the planned discussions.

PAUL GRAY
18 September 1989

PRIME MINISTER

THE LEGAL PROFESSION IN SCOTLAND

Malcolm Rifkind has now circulated (Flag A) the results of his review of the legal profession in Scotland. You will recall it is a parallel exercise to that carried out by the Lord Chancellor. Earlier in the year you intervened at the 'Green' stage of the exercise to urge Malcolm Rifkind to be more radical.

The Lord Chancellor (Flag B) has now suggested there should be detailed discussions between his officials and the Scots to ensure that the latest Scottish proposals do sit well with his English approach. ~~But~~ Carolyn Sinclair (Flag C) suggests this should cause no great problems; the Scots have taken on board the earlier request to be more radical, and indeed in some respects the Scottish 'White Paper' now looks more reforming than its English counterpart.

Are you therefore content now to leave the Lord Chancellor to sort out the details with Malcolm Rifkind and only intervene if a significant obstacle emerges?

Yes

PLCC

PAUL GRAY
15 September 1989

SL2AXQ

CONFIDENTIAL

PRIME MINISTER

15 September 1989

THE LEGAL PROFESSION IN SCOTLAND

Malcolm Rifkind has written to Nigel Lawson enclosing his proposed response to consultation on legal reform in Scotland. This is equivalent to the White Paper on the English reforms published in July.

Comment

Back in February the Scottish approach to reform looked mealy-mouthed compared with the English Green Papers. By contrast, the Scottish "White Paper" now looks more reforming in some respects than its English counterpart.

In part this is a question of drafting. The compromises and grey areas which were necessary to keep the judiciary and Patrick Mayhew on board in England could not be expressed too clearly in the White Paper. The Scottish drafters had an easier task insofar as the reforms have caused rather less controversy in the context of Scottish law.

Malcolm Rifkind's officials say that they are aiming at the same goals as the English White Paper. The differences in approach reflect the different systems - in particular, the fact that the Secretary of State is not the head of the judiciary in Scotland. James Mackay and Nicholas Ridley will want to check the details carefully to ensure that the Scottish response does not cut across their policies on legal reform in England, and competition generally. But subject to that, they are unlikely to have much trouble with the Rifkind paper.

CONFIDENTIAL

? Advocate

The Lord President will be the key Scottish judicial figure whose concurrence will be needed on certain matters - such as the training of advocates - in addition to that of the Secretary of State. As you know, from next month the Lord President will be David Hope, currently Dean of the Faculty of Advocates.

? Advocate

Conclusion

Subject to sorting out any detailed points which may be raised by James Mackay or Nicholas Ridley, agree that the Rifkind draft should issue.

CAROLYN SINCLAIR

FROM THE RIGHT HONOURABLE THE LORD MACKAY OF CLASHFERN

HOUSE OF LORDS,
SW1A 0PW

The Right Honourable
Malcolm Rifkind QC MP
Secretary of State for
Scotland
Scottish Office
Whitehall
London
SW1A 2AU

14 September 1989

Dear Malcolm,

The Legal Profession in Scotland

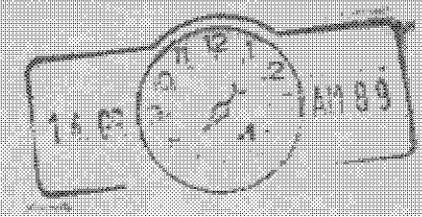
Thank you for my copy of your letter to Nigel Lawson of 8 September, received yesterday, asking for comments on the paper you enclosed in a fortnight.

The differences between your proposals and those which I have announced for England and Wales will obviously need to be carefully considered to make sure that they do not lay us open to accusations of inconsistencies which cannot be justified by the differences in the legal systems in the two countries. I would therefore like an opportunity to discuss the proposals and their handling with you before they are published. I understand that they have not been discussed in detail at official level: can I suggest officials from your department and mine (and others as necessary) should do so urgently, whilst our offices fix a meeting.

I am sending copies of this letter to the Prime Minister, members of E(CP), the Secretary of State for Northern Ireland, the Attorney General, the Lord Advocate and to Sir Robin Butler.

Yours ever,

Jam.



Legal Res. Rec.

SCOTTISH OFFICE
WHITEHALL, LONDON SW1A 2AU

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

5 September 1989

Dear Nigel,

THE LEGAL PROFESSION IN SCOTLAND

I have now completed my review of the legal profession in Scotland, and seek the agreement of colleagues to my instructing the draftsman to prepare such legislation as is necessary to give effect to my conclusions. These are set out in the enclosed paper which I propose to publish early in October.

Like the Lord Chancellor I propose to extend rights of audience in the supreme courts to solicitors with the necessary competence; to open up conveyancing to authorised practitioners; and to allow certain non-solicitors to prepare the papers necessary for confirmation of executors. I would do away with the need for parties to use an Edinburgh correspondent in Court of Session cases, and simplify the process of admission as a notary public.

The legislation I propose would confer the necessary minimum of new powers on me. I intend that my approval should be necessary for the training regulations under which solicitors will qualify for a right of audience in the supreme courts; and that any rules of the professional bodies restricting the forms of practice their members may adopt should also require my approval. I intend that the Faculty of Advocates should be able to continue to require advocates to practise as individuals; and that the Law Society of Scotland should be able to ban multi-disciplinary partnerships where the solicitors engage in court work. All other professional rules would be subject to scrutiny by the competition authority in the normal way.

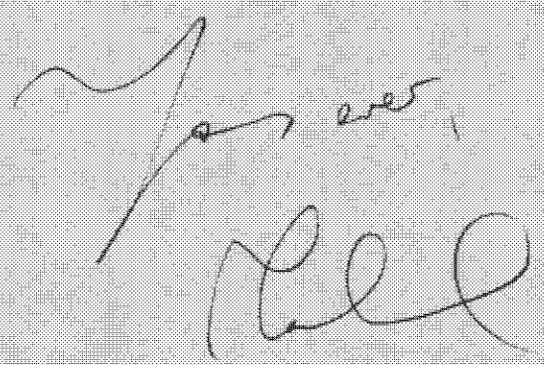
I propose to deregulate solicitors' fees for court work, except insofar as a party other than the client is liable for them, and to create more competition in the (small) market for arbitrating upon disputes over solicitors' fees. I propose measures to strengthen the mechanisms for complaining about lawyers: these will affect both the "first instance" handling by the professional body, and the second tier reviews by the

new Ombudsman (replacing the present post of Lay Observer) and the Scottish Solicitors' Discipline Tribunal.

Consistent with the extension of rights of audience, I propose that a solicitor who has exercised full rights of audience, or who has served as a Sheriff or Sheriff Principal, should after a period be eligible for appointment as a Senator of the College of Justice.

I should be grateful to have the agreement of colleagues to these proposals so that drafting for these and incidental purposes can be instructed. I should in any case be grateful for any comments within two weeks of the date of this letter.

I am sending copies of this letter to the Prime Minister, members of E(CP), the Lord Chancellor, the Lord Advocate, the Secretary of State for Northern Ireland, the Attorney General and to Sir Robin Butler.



MALCOLM RIFKIND

THE LEGAL PROFESSION IN SCOTLAND

FOREWORD

By the Secretary of State for Scotland

This paper sets out the conclusions I have reached in the light of responses to my consultation papers "The Legal Profession in Scotland" and "The Practice of the Solicitor Profession in Scotland". I am grateful to all those who took the trouble to submit what were generally thoughtful and well argued views. In reaching conclusions I have taken account of the quality of the arguments put forward on the various issues.

It is the function of Government not merely to respond to complaints or problems, but also to take the initiative where there is an opportunity to improve on existing arrangements. That is an important aspect of my approach in this paper. I have also sought to broaden the choice available to the public wherever consistent with the interests of justice.

In developing my present proposals, I have had particular regard to the need to maintain, and where possible improve, the efficient and economical disposal of business by the courts and I propose to ensure that, so far as possible, the changes proposed in this Paper should be introduced in such a way as to further these objectives.

These proposals are not presented as all that there is to be said about lawyers and legal services. A considerable number of legal and procedural reforms have been introduced in recent years and this programme of reform will continue. While our arrangements for legal aid have recently been reformed I recognise the need to keep questions of eligibility and scope under review. The proposals set out here should play a useful part in improving the provision of legal services by removing unnecessary restrictions while upholding the interests of justice.

As I said in my consultation paper, I have conducted my review with a clear focus on Scottish needs and a recognition of the importance of Scotland's distinctive legal system. Of course there are certain points of similarity between my conclusions and those published by the Lord Chancellor (Cm 740). Just as the common factors of our proposals reflect the Government's policies, so the differences in our approaches

bear witness to the differences in existing systems structures and traditions, and to the differing options available for achieving similar objectives. That the Lord Chancellor holds a judicial office while I do not is a significant factor which has influenced our separate approaches, my conclusions being the product of a quite separate process conducted with the Scottish legal system as the only frame of reference.

I look forward to bringing legislation before Parliament to enable the providers of legal services in Scotland to respond to the needs of clients with fewer restrictions, but without any diminution in the quality of service in which they, and we, rightly take pride.

1. STATUTORY FRAMEWORK

1. The proposal in the Consultation Paper that the Secretary of State might take a power to make regulations setting a framework within which professional and Court Rules might be made was criticised by the legal profession and also by some consumer interests on the grounds that it would undermine the independence of the profession and introduce undesirable Executive control. There are, however, particular issues in which the public interest goes wider than the responsibilities of individual institutions might appear to recognise. The Secretary of State has concluded that, in view of the other proposals contained in this Paper, it will not be necessary for general powers over the legal profession to be vested in his office. He does, however, propose to take specific powers to enable him to ensure the satisfactory implementation of extended rights of audience in the courts, and to preserve the entitlement of the Faculty and the Law Society of Scotland to prohibit certain forms of organisation for advocates and solicitors respectively.

2. RIGHTS OF AUDIENCE

1. The Secretary of State has decided to implement the proposal in the consultation paper that those solicitors who can demonstrate prescribed standards of training and experience should be granted rights of audience in the supreme courts.

2. The responses to the consultation paper placed great emphasis on the need for representation of a high quality in the supreme courts. The Secretary of State fully shares this view. The public interest lies both in protecting clients from inadequately trained legal representatives and in the greatest freedom of choice for clients among pleaders of the requisite competence. The efficient use of court resources is also important. Some have argued that the only way to guarantee quality in advocacy is through maintaining the exclusive right to practise of members of the Faculty of Advocates, whose training requirements, based on devilling, produce the high standard of pleading in the Supreme Courts on which our system of justice depends. The Secretary of State is not persuaded that this is the only way to secure the necessary standards and believes that satisfactory arrangements can be set in place for the recognition as supreme court pleaders of those individual solicitors of the calibre required to safeguard the interests of justice. The effect of this change would be to offer clients a wider choice of representative.

3. The Secretary of State proposes that solicitors should be entitled, on satisfying the requirements of appropriate post-entry training regulations, to practise in the higher courts. These regulations would be made by the Law Society of Scotland with the approval both of the Lord President of the Court of Session and of the Secretary of State. In this way the standard of performance achieved in training will be the sole test for practice in the higher courts. It should be possible under such regulations for a solicitor to be admitted to practise in the High Court (and Court of Criminal Appeal) or in the Court of Session (and thus the House of Lords), or in both.

4. It is clearly necessary to ensure that this right to practise is not negated or undermined by unreasonable constraints on the

solicitor's conduct of cases in the higher courts. The Secretary of State therefore intends that any professional rule or requirement which would, directly or indirectly, inhibit the solicitor's freedom to undertake all the actions necessary for the preparation and presentation of the client's case - insofar as he or she has a right of audience - should require the approval of the Secretary of State and of the Lord President of the Court of Session. Before giving his approval the Secretary of State would wish to be satisfied that the rule was no more restrictive than necessary to safeguard the interests of clients or was essential to the efficient administration of justice.

5. A particular matter most appropriately dealt with in this way by professional rules concerns the degree of separation required between the person precognoscing witnesses before the evidence comes before the court, and the person questioning them in court. In the consultation paper it was suggested that there should be complete separation between the two in cases coming before the supreme courts. Some respondents supported this view, while others suggested that it was not founded on any recognisable principle of Scots law and did not currently apply in the Sheriff Courts. After further consideration the Secretary of State has decided that this preliminary view requires to be refined and that the proper concern of the profession is to observe the principle that no one, including the person to present the case in court, should do or say anything which would have the effect of, or could be construed as, inducing a witness (or the client) to tailor his or her evidence, or suggest that the witness should give evidence other than in accordance with his or her honest recollection or opinion. He believes it will be sufficient for the Law Society to make rules in this area as the Faculty of Advocates already does. It will be for each professional body to consider whether a general prohibition on the interviewing of witnesses is necessary to achieve adherence to this principle of professional conduct.

6. The Secretary of State expects that the Law Society of Scotland will establish a mechanism, to operate in parallel or in co-operation with that of the Faculty of Advocates, to ensure that no

client who requires a Supreme Court solicitor-advocate goes unrepresented.

7. In due course it may become appropriate for other professional bodies to be authorised to grant rights of audience to their members. The Secretary of State therefore proposes that he should be able to grant recognition to such bodies and that a power for him to do so, and to define the court proceedings to which the recognition applies, should be included in statute. The professional rules and training regulations of such bodies in respect of court work and the duties of their members to their client will require to have the approval of the Lord President.

Queen's Counsel

8. Although the consultation paper did not discuss the point, the Secretary of State has concluded that it would be wholly consistent with his conclusion on rights of audience that those solicitors who had been granted rights of audience in the High Court and the Court of Session should be eligible for appointment in due course as Queen's Counsel.

Borrowing of Court Process

9. Section 29 of the Solicitors (Scotland) Act 1980, places restrictions on the borrowing of processes, in civil court proceedings. In Court of Session cases, it is necessary for solicitors either to have a place of business in Edinburgh or to employ a firm of Edinburgh solicitors as their correspondents. So far as concerns the Sheriff Courts, a solicitor is not entitled to borrow the process in a current case unless he has a place of business within the jurisdiction of the court. The Secretary of State invited comment on the possible repeal of this section in his 1987 discussion paper "The Practice of the Solicitor Profession in Scotland". The Secretary of State has concluded that, with modern transport and communications, solicitors should be able to choose between conducting their own case or employing a firm of correspondents. It would be particularly incongruous to maintain this restriction while enabling out-of-Edinburgh solicitors to qualify

to plead in the Court of Session. The Secretary of State therefore proposes to make the necessary changes to the primary legislation. Some court rules may need to be amended in consequence.

3. LAWYERS' PARTNERSHIPS

1. Solicitors are prevented by statute from forming partnerships (or otherwise sharing fees) with non-solicitors although they may form partnerships with one another. The statutory prohibition is replicated in professional practice rules. For advocates there is no statutory restriction but partnerships are prohibited under the Faculty's own rules. The Secretary of State has considered in full the representations made to him following publication of his consultation paper "The Practice of the Solicitor Profession in Scotland" and has concluded that there is no need for absolute statutory barriers to the formation of partnerships between solicitors and others.

2. Nevertheless this is not simply a question of competition. Those who practise in the courts owe duties to the court in the interests of justice. The Secretary of State therefore intends that provision should be made to ensure that rules made by the professions in respect of partnerships among those of their members who engage in the conduct of proceedings in court are excluded from the prohibition on anti-competitive agreements proposed in the White Paper "Opening Markets: New Policy on Restrictive Trade Practices" (Cm 727).

3. This provision will take the form of a statutory power for the Secretary of State to approve rules made by the professional bodies in respect of the groupings or legal relationships in which their members may practise. Once approved these rules will not be capable of being struck down as anti-competitive. In giving his approval the Secretary of State will wish particularly to ensure that, in respect of practitioners who engage in the conduct of proceedings in court, the professional bodies may continue to prohibit certain forms of business practice. Thus the Faculty would continue to be able to require advocates to practise only as individuals; and the Law Society could prohibit multi-disciplinary partnerships of solicitors and others where any solicitor was a court practitioner.

4. ADVOCATES' PROFESSIONAL PRACTICE

1. The consultation paper (at paragraph 5.11) stated the Secretary of State's preliminary view that the professional rules of the Faculty should not impose unnecessary restrictions on the way advocates offer their services. He has now concluded that in general the Faculty's rules should not be given any particular protection from consideration under the proposed legislation on restrictive trade practices. Among the practice rules which would be subject to scrutiny in this way are the following.

2. Employed Advocates: The Secretary of State is not persuaded by arguments that the existing restrictions on the professional activities of employed advocates are essential.

3. Instruction of Advocates: The Secretary of State does not believe that the right to instruct an advocate, currently restricted to solicitors and a very limited number of other groups, should be denied to a range of professional agents who are competent to do so. The Faculty has indicated that a change in its rules to this effect is under active consideration. Assuming that such a change is made the remaining restrictions on instruction by lay clients would be subject to consideration under the proposed restrictive trade practices legislation.

4. Advertising by Advocates: While the Secretary of State sees merit in some relaxation of the Faculty of Advocates' restriction on advertising, their rules on this subject will fall to be considered in terms of the restrictive trade practices legislation and the Secretary of State sees no need to interfere with that process.

5. Solicitors' Attendance on Counsel: The question of whether a solicitor's attendance in court is necessary to the conduct of the case is one for the advocate, the client and the solicitor, and the court. A solicitor's presence in court is not required under existing professional rules and the Secretary of State is satisfied that the reforms being introduced to the professions' procedures will ensure that unnecessary attendance can be dealt with accordingly.

6. Court Practitioners' Immunity from Suit: In the interests of maintaining the integrity of court decisions, the Secretary of State proposes, as indicated in the consultation paper to maintain court practitioners' immunity from suit in matters relating to the conduct of a case in court.

5. JUDICIAL APPOINTMENTS

1. The Secretary of State considers that the general principle underlying all judicial appointments should be that eligibility should depend not on the particular branch of the legal profession to which an individual belongs but on the relevance to the work of the post of an individual's qualifications, abilities and experience. This general principle was widely welcomed in the consultation.

2. In the application of this general principle at present, considerable emphasis in judicial appointments is placed not only on legal qualifications but also, in the case of Senators, on the acquisition of extensive and successful experience in advocacy before the Supreme Courts and, in the case of Sheriffs, before the Supreme Courts or Sheriff Courts or both. In practice, therefore, appointments to the post of Senator have hitherto been made exclusively from the ranks of advocates whilst appointments to the post of Sheriff have been made from amongst the ranks both of advocates and of solicitors. The proposed extension to solicitors of rights of audience in the Supreme Courts will result in solicitors having the opportunity to acquire experience in advocacy in the Supreme Courts and, under the general principle set out above, these solicitors should become eligible for appointment as Senators.

3. In the earlier consultation, it was noted that, in recent years, an increasing number of solicitors have gained very considerable judicial experience in the Sheriff Courts and Tribunals and it was questioned whether it was reasonable that, no matter the high quality and extent of their judicial work, they were not eligible for higher judicial office. There was support for the view that solicitors who had served as Sheriffs Principal and Sheriffs should be eligible for appointment to the Supreme Courts on the basis of their judicial experience in the lower courts. On the other hand, it was argued strongly that the judicial experience of a Tribunal member relates to a narrow field of law, much narrower than that of a Sheriff Principal or a Sheriff, and that factor, coupled with the lack of any experience of advocacy before the Supreme Courts acts as a double disadvantage. The Secretary of State accepts this view.

4. He accordingly proposes to extend the conditions for appointment to the office of Senator to include solicitors who have exercised full rights of audience in the Supreme Courts or who have served as Sheriffs Principal or Sheriffs, in each case for a minimum period of five years. The eligibility requirements for a number of other judicial appointments will need to be amended in line with this approach and some transitional provisions may be required.

6. COMPLAINTS ABOUT LAWYERS

1. The Secretary of State believes that in the first instance supervision of the legal profession should be in the hands of the profession's own governing bodies but that there also needs to be an effective independent supervisor to make sure that they lay client's complaints are adequately dealt with. He intends to strengthen the existing arrangements for handling complaints against the legal profession by requiring the professions own complaints machinery to meet acceptable minimum standards. In addition he intends to extend the office of the Lay Observer to include the handling of complaints against advocates and to rename the post "Legal Complaints Ombudsman."

2. The Secretary of State believes that the present arrangements work well in most cases and that the recently acquired statutory powers of the Law Society of Scotland to deal with complaints about inadequate professional services will go a long way towards meeting the need of complainers for a simple remedy to their problem with their solicitor. The Lay Observer is now able to report cases to the Scottish Solicitors Discipline Tribunal where she is dissatisfied with the conclusion reached by the Law Society.

3. Further improvements which the Secretary of State intends to make would including putting the professional bodies under a specific statutory duty to investigate complaints about a lawyer (at present such a duty is imposed only on the Law Society, and only in relation to complaints of inadequate professional services of solicitors). The proposed duty - which reflects the existing practice of the Faculty and the Law Society - will be accompanied by a requirement that, in disposing of complaints, the professional body should inform both the complainer and the lawyer of the facts as they have found them, and of their conclusions and any recommendations or proposed action. It is also important that the professional bodies should be free to re-open their consideration of a case following receipt of a report or opinion from the new Ombudsman. The Law Society has experienced difficulties in this area, and the Secretary of State wishes to ensure that the matter is put beyond doubt. This is of particular

importance as, like the Lay Observer, the Ombudsman will not be re-investigating the original complaint against the solicitor.

4. These measures will set the standards for the investigation of complaints. Some complainers will remain dissatisfied and for them it is important that someone who is clearly outside the profession should be able to review what happened. The Legal Complaints Ombudsman will fulfil this role; and will be empowered to require an explanation from the professional body where an investigation has not been concluded within a specified period - which might be set initially at 3 months.

5. The Secretary of State has concluded that the Ombudsman should not have powers to award compensation. This proposition attracted little support on consultation. Where the question of a remedy for the complainer arises, the Law Society can already require the solicitor to waive fees or make good the defective work at his or her own expense. In addition the Law Society can and does attempt to reach a settlement by means of a conciliated outcome where the complainer asks for compensation. The Secretary of State does not want to prejudice this by giving the Law Society a power to impose compensation. That approach would also lead to provision for hearings, and possibly for appeals to the Discipline Tribunal. Rather it seems preferable, where agreement cannot be reached, to give the complainer the Law Society's account of the facts and its conclusions and recommendations. It would then be for the complainer to consider whether to take further action. Where the sums involved are small the small claims procedure may, on occasion, be suited to such actions.

6. In such a scheme the Ombudsman could comment on the Law Society's conclusions and recommendations for a settlement; but to involve the Ombudsman in quantifying loss, or even in reaching a view as to whether the solicitor had been negligent in order to make a recommendation, would be to load an essentially legal judgment onto an essentially non-legal office, adding to cost and delay in return for very little. If the Ombudsman was not satisfied that the Law Society's (or Faculty's) investigation had adequately dealt with

questions of negligence and compensation, he or she could of course say so.

7. The Secretary of State also intends to discuss with the Lord President of the Court of Session whether there are changes which might be made to the existing role and procedures of the Scottish Solicitors Discipline Tribunal to make it more effective.

7. CONVEYANCING

1. The consultation paper stated as an objective that "conveyancing services should be as reliable, swift, cost effective and flexible as possible consistent with the minimum necessary safeguards for consumers". Three options to meet this objective were set out for comment, first, that the market in conveyancing be open to practitioners authorised as being (a) competent (b) able to provide sufficient financial safeguards. Initially it would be necessary for authorised practitioners to employ solicitors to carry out, or at least supervise, the work. Secondly, there could be created a new category of conveyancers who were not fully qualified solicitors but who had undertaken a prescribed course of study and training. The third option was to maintain the status quo.

2. Those respondents to the consultation paper who supported the ending of the present reservation of conveyancing to lawyers included the Scottish Consumer Council, the National Association of Estate Agents, the Royal Institution of Chartered Surveyors in Scotland (who did not, however, wish to see conveyancing being offered by lending institutions), the Building Societies Association and the Association of British Insurers. Opposition to the proposed change came from the legal profession. The Scottish Banks were divided.

3. Responses to the consultation paper revealed concern about a number of aspects of the property transfer process and not simply those related to the narrow statutory definition of conveyancing as the process by which rights over property are created, extinguished or transferred by means of some form of writing or deed. Views were expressed on the important role played by the independent solicitor in offering unbiased financial advice to clients in connection with house purchase. One area of particular concern was the process of "churning" whereby prospective purchasers are encouraged to take out new endowment policies in circumstances where top up policies might be sufficient and less expensive. The value of advice on how the terms of the property transaction might relate to the client's general circumstances was also mentioned. There was widespread support from outwith the legal profession for

the introduction of licensed conveyancers although it was recognised, that, in the short term at least, numbers were not likely to be large. While many respondents favoured the concept of a "one stop" service it was stressed that the gain to clients would be jeopardised if there was insufficient regulation and, therefore a serious risk of clients being put under undue pressure to accept a package of services from a single supplier. The Law Society of Scotland expressed concern about the impact of increased competition for conveyancing work on the viability of many of their members' practices, and the possibility that this might lead to the loss of a solicitor presence in rural areas.

4. The Secretary of State has given careful consideration to all the representations which have been made, recognising the need for clients' interests to be fully safeguarded in what is often the main financial transaction of their lives. The Government has already announced a number of measures which it has taken, or will be taking, to improve aspects of the house transaction market in order to protect the consumer. In June 1989 Mr Eric Forth MP, Parliamentary Under Secretary of State for Industry and Consumer Affairs, published a report entitled "Review of Estate Agency". The estate agency industry will cooperate with the Director-General of Fair Trading to introduce a Code of Practice for estate agency and provision will be made under the Estate Agents Act 1977 to specify "undesirable" practices by estate agents including tie in sales, where agents refuse to pass on bids unless the buyer agrees to arrange finance through them; unfair or misleading contract terms; misleading advertising; and bidding up prices. Those found engaging in such practices will be liable to being banned from estate agency by the Director-General of Fair Trading. Allegations about the practice of "churning" have been brought to the attention of Securities and Investment Board which is responsible for regulating the provision of investment advice. The Board has announced new rules concerning the provision of advice to clients which are intended to improve standards in this area.

5. These measures meet many of the concerns expressed in response to the consultation paper. Moreover changes are already taking place to the registration of property transfers in Scotland

with the gradual move from the Register of Sasines to the simpler Land Register. With this simplification the technical aspect of conveyancing becomes more straightforward. The Secretary of State does not consider it right to keep in force the current statutory reservation which applies only to a limited part of the process. Clients should not be constrained to use only one kind of service provider on such grounds. His conclusion is that change to permit greater choice for clients is desirable but requires to embody important protective measures so that clients can be assured of receiving appropriate advice, a competent service and protection against loss of funds.

6. The Secretary of State has therefore decided to remove the existing statutory reservation to solicitors of the right to charge a fee for the preparation of a conveyancing writ. He proposes to seek statutory powers to grant recognition to professional bodies and other organisations as competent to authorise their members to provide conveyancing services. Applicants for recognition will have to satisfy the Secretary of State that they have made adequate provision for financial protection, discipline and the resolution of disputes between clients, and that their members are trained to offer a competent service.

7. A statutory code of conduct binding on conveyancing practitioners will be prescribed. This will follow the draft code set out at Annex C to the consultation paper extended and clarified, in the light of comments received during consultation, in the following ways:

7.1 Authorised practitioners will be required to offer their prospective conveyancing clients an interview with a solicitor. At this interview the solicitor will have to review any possible conflict of interest between him and the client; explain that his primary duty is to the client and not his employer; and explain the scope of the service being provided. After the interview the solicitor will have to give the client a written statement that these matters were discussed.

7.2 It will be put beyond doubt that conveyancing cannot be done for more than one party in a transaction and that

conveyancing for one party precludes the provision of estate agency for another party in the transaction.

7.3 At the outset, authorised practitioners will require to use solicitors qualified in Scots law and conveyancing to carry out or supervise conveyancing of Scottish properties;

7.4 Authorised practitioners will be required to submit to their regulatory bodies, each year, details of the prices they charge for conveyancing services, certifying that those prices have been settled on a fair and reasonable basis to provide a reasonable rate of return on the cost of providing those services alone.

8. The Secretary of State also intends to seek powers to make it possible for conveyancing services to be provided by people who are not qualified as solicitors but who have undertaken an appropriate course of study and training. Such people would require to be proficient in the areas of law and practice relevant to a property transaction. The Secretary of State will require to be satisfied with the arrangements for certifying competence before granting recognition to any category of non-solicitor conveyancers.

9. Provision will also be made for conveyancing by an authorised practitioner to be done or supervised by a member of this new group of conveyancers.

10. The Secretary of State has also decided to proceed with the proposal in the Annex to his consultation paper "The Practice of the Solicitor Profession in Scotland" that the present reservation to solicitors of the right to charge a fee for the preparation of writs relating to moveable estate should be removed. There would in future be no restriction on who could charge for this work. Responses to the consultation paper suggested that the restriction may not at present always be observed. The Secretary of State recognises that the work in question may call for the exercise of particular expertise but he does not believe only solicitors are competent to do so. Clients, many of whom are businesses rather

than private individuals, should be free to make their choice of professional adviser for this work.

8. CONFIRMATION OF EXECUTORS

1. In paragraph 3.2 of "The Practice of the Solicitor Profession in Scotland", the Secretary of State proposed that the law governing the preparation of papers on which to found an application for a grant of confirmation in favour of executors should be amended. He suggested that anyone might be permitted to charge a fee for this work although, in the event of dispute, only a solicitor could represent a client in court. The later consultation document sought views on whether the preparation for a fee of applications for appointment as an executor dative should continue to be reserved to solicitors; and on whether the requirement for applicants for confirmation as executors to swear on oath could be replaced by a requirement to sign a declaration to the same effect.

2. The Secretary of State does not consider that the exclusive reservation of this work to solicitors is in the public interest. On the other hand to safeguard the public against unscrupulous or incompetent practitioners some degree of regulation should remain. He proposes therefore to take powers to grant recognition to other bodies whose members will be able to charge a fee for the preparation of applications for appointment as an executor. Initially it is likely that the bodies recognised would be those such as banks and building societies already active in executry work. The Secretary of State envisages that the procedures governing application for appointment as an executor dative, which at present involve a petition to the court, should be simplified. He will initiate consultations as to the best means of achieving this. These changes would apply only in those cases in which, and for so long as, there is no difficulty or dispute requiring legal argument or appearance in court.

3. The Government also propose to replace the requirement that applicants for confirmation should have to swear an oath with a requirement that they sign a declaration. It seems likely that this could be embodied in the application submitted to the court. The penalties for submitting a false declaration could be set out on the application form, but the Secretary of State does not intend to

create a specific statutory offence, as the common law of fraud provides adequate protection against deliberate falsification.

9. LAWYERS FEES

1. Role of Court in Prescribing Lawyers' Fees: The consultation paper sought views on whether lawyers' fees in non-legal aided civil litigation should continue to be limited by the prescription of fees by the Court of Session. The Secretary of State has decided that the powers of the Court to regulate fees should be restricted to the setting of maximum fees that may be claimed from the other side when an award of expenses is made. Clients should be free to negotiate feeing arrangements with their solicitors, and the existence and nature of any prior agreement should be taken into consideration if an account is subsequently disputed. In any such dispute, however, the relevant questions should include (a) whether the solicitor misled the client (eg as to "the going rate") and (b) whether the agreement was one a knowledgeable client would reasonably have entered.

2. Resolution of Fees Disputes: The Secretary of State has decided not to proceed with the proposal in the consultation paper that responsibility for arbitration in fee disputes should lie with the Law Society of Scotland. The independence of the auditor of court is valued both by legal practitioners and by their clients and the Secretary of State therefore wishes to see the office and its independence preserved. He considers, however, that the choice of auditors available to clients may be unduly restricted. He therefore intends to look into the possibility of opening up appointments as court auditors to all those qualified to undertake it, rather than leave it reserved to (in the typical case) one individual in each Sheriff Court district. For the sheriff courts, auditors would still require to be appointed by the Sheriff Principal and only those so appointed could undertake taxation of party and party accounts. The Secretary of State is aware, however, that taxations of accounts for purposes other than assessing a court's award of expenses (extra judicial taxations) are undertaken by auditors of court in their own time for a freely negotiated fee; and that no one is obliged to use their services. (Many choose to do so because a solicitor may only sue for fees that have been "taxed" by an auditor of court.) A greater degree of competition could be introduced into the market

for extra-judicial taxations if all those qualified to offer the service were entitled to apply for appointment.

3. Speculative Actions and Contingency Fees: The Secretary of State does not believe that the introduction of contingency fees, where the lawyer receives a proportion of the damages awarded, would be in the public interest. In speculative actions, it would be open to a client and solicitor, under the more flexible regime for feeing agreements outlined above, to agree to a percentage uplift of the usual fee, which would be payable only in the event of success. The Secretary of State proposes that the Lord President of the Court of Session should have powers to prescribe an upper limit on such an uplift.

10. ADMISSION OF SOLICITORS AND NOTARIES PUBLIC

1. The procedures for the admission of solicitors and Notaries Public were considered in the discussion paper "The Practice of the Solicitor Profession in Scotland". In the light of responses to that paper the Secretary of State has concluded that the procedures are in need of rationalisation.

2. Section 6 of the Solicitors (Scotland) Act 1980 provides that a person is admitted to the roll of solicitors in Scotland if he or she is able to satisfy the Council of the Law Society of Scotland that he or she is a fit and proper person to be a solicitor. The Council then petitions the Court of Session for admission. The court is bound to order admission once a petition is made and the Council is bound to admit the new solicitor once the order to do so is issued by the Court.

3. Under section 57 of the Act, any solicitor may be enrolled as a Notary Public on application to the court, which orders the Keeper of the Registers of Notaries Public to enter his or her name on the register. Since in practice any solicitor can choose to become a Notary, this second procedure is unnecessarily complicated and costly for those entering the profession.

4. The Secretary of State therefore proposes that responsibility for the Register of Notaries Public be transferred to the Council of the Law Society of Scotland. The office of Clerk to the admission of notaries public would pass to the Secretary to the Council of the Law Society. New entrants to the profession could then apply for admission both as a solicitor and as notary in a single procedure. This would not be mandatory, however; and those already admitted as solicitors would remain entitled to apply for admission as a notary. The Council would be responsible for ensuring the administration of the oath to those being admitted as notaries, and for the removal of names from the Register of Notaries in appropriate circumstances - for example, if a solicitor is struck off the roll.

DFA

STATEMENT ON THE FUTURE OF THE LEGAL PROFESSION

Mr Speaker, with the leave of the House, I will now repeat a statement which has been made today in another place by my right honourable and learned friend, the Lord Chancellor. The statement is as follows:-

"When I published the Government's Green Papers on the legal profession, which were designed to remove any unnecessary restrictions in the provision of legal services, I undertook to make a statement to the House before the Summer Recess. I have received over 2000 responses to the Green Paper, and held discussions with many of those directly involved. I would like to take this opportunity to thank all those who helped in that process. All the points which were put to me in writing or orally have been carefully considered. The Government is today publishing a White Paper containing its own proposals for legislation.

Advocacy

The Government proposes to introduce legislation which will set out broad objectives designed to further the interests of the administration of justice, to increase access to justice and to extend the range of those possessing rights of audience before the courts. All those involved in granting rights of audience will be required by the statute to have regard to these objectives. An independent statutory Advisory Committee on Education and Conduct will give advice on the achievement of these objectives. Again there will be a statutory requirement for all those involved in granting rights of audience to have regard to this advice. The Advisory Committee will have a membership broadly as set out in the Green Paper, but, in order to emphasise its independence from the Government, it will have the power to appoint its own staff.

The Government proposes that both the Bar and the Law Society should have a statutory entitlement to grant rights of audience to their members in all courts. All those called to the Bar should receive rights of audience in all courts. On qualification solicitors will continue to receive rights of audience equivalent to those they now possess. Solicitors will, however, also be eligible to progress to rights of audience in some or all of the higher courts, if they have achieved the necessary standards of competence and conform to appropriate rules of conduct.

All rules relating to the competence and conduct of advocates will continue to be made by the professional bodies, but, building on the current arrangements for the Law Society's rules, all changes in such rules will in the future require the concurrence of the Lord Chancellor and each of the four Heads of Division (the Lord Chief Justice , the Master of the Rolls, the President of the Family Division and the Vice-Chancellor). All these will be required to have regard to the statutory objectives and the Advisory Committee's advice.

Other professional boldies might subsequently be empowered by Order in Council, approved in draft by both Houses of Parliament, to grant rights of audience in particular classes of business in particular courts, provided their competence and conduct requirements satisfied the Lord Chancellor and the four Heads of Division.

Similar arrangements will apply for the future to any professional body which might want to have the right to issue legal process or to take steps in proceedings on behalf of others. These rights are at present reserved by statute to solicitors.

Partnerships and multi-disciplinary practices

The importance of ensuring that both a wide range of barristers generally and an adequate choice of specialist barristers are available to take cases in court requires that the Bar should continue to be able to make its own rules about partnerships and multi-disciplinary practices. Considerable concern was expressed in the responses to the consultation that removing such rules might threaten the future viability of the Bar. The Government attaches great importance to the continued existence of a vigorous independent Bar.

Solicitors, who are also frequently involved in litigation, ought to be treated on an equal basis to barristers. The Government therefore proposes to remove the existing statutory restrictions which prevent solicitors forming multi-disciplinary partnerships, but to provide that the Law Society will henceforth be allowed to make its own rules about partnerships and multi-disciplinary practices.

Except in so far as such rules are related to advocacy and the conduct of litigation and are approved as necessary in the interests of justice by the Lord Chancellor and the Heads of Division, they will be subject to review under the new restrictive trade practices legislation proposed in the DTI White Paper "Opening Markets: New Policy on Restrictive Trade Practices". The links between the two sets of proposals, including an extended role for the Director General of Fair Trading, are set out in the two White Papers.

The Government proposes also to remove the present statutory obstacles to multi-national practices and to ensure that lawyers from Scotland and Northern Ireland will have the same rights in England and Wales (and vice versa) as lawyers from other European jurisdictions will have under Community Directives.

Conveyancing

The Government proposes to legislate, as the Green Paper suggested, to replace the provisions in the Building Societies Act 1986 with a power to allow the Lord Chancellor to recognise professional bodies as competent to authorise their members as authorised practitioners to undertake conveyancing for their borrowers. Conveyancing by such practitioners will be subject to the existing requirement that it is supervised by a solicitor or licensed conveyancer; and every such authorised practitioner will be required to offer its clients a personal interview with the solicitor or licensed conveyancer having conduct of the transaction. Throughout the transaction, that solicitor or licensed conveyancer will have a paramount duty towards the borrower.

There will be a detailed code of conduct laid down by statutory instrument by which authorised practitioners will have to abide. Moreover authorised practitioners will be prohibited from providing conveyancing services to both seller and buyer in the same transaction (except in very limited circumstances) and from providing estate agency services to the seller and conveyancing services to the buyer in the same transaction. Making the provision of one service conditional upon taking another (so called "tying-in") in connection with house purchase will be prohibited. Authorised practitioners will be required to charge for their conveyancing services on a basis that is not less than the true cost of providing them.

These arrangements are designed to provide adequate protection for individual clients and also to ensure that all those who want to provide conveyancing services, whether small firms of solicitors or large financial institutions, can compete on fair terms.

Conditional fees

Litigation will be permitted to be undertaken on the speculative basis now allowed in Scotland. It will also become possible in such cases for there to be a moderate percentage uplift on the ordinary taxed costs otherwise payable, within a maximum to be prescribed by statutory instrument. There should, however, be no introduction of any kind of contingency fee linked to a proportion of the damages received.

I have dealt with these issues in particular because they are those about which there has been most public comment. These proposals, and others, are presented in more detail in the White Paper. Taken together, these proposals, which are in integral part of the Government's wider programme of improving access to justice, represent an appropriate balance between the encouragement of competition and the maintenance of standards in the administration of justice and the provision of legal services. I believe these proposals provide a satisfactory framework for the future."

CONFIDENTIAL

Northern Ireland Office
Stormont Castle
Belfast BT4 3ST

The Rt Hon Lord Mackay of Clashfern
Lord Chancellor
House of Lords
LONDON
SW1

10 July 1989

Dear James.

THE NORTHERN IRELAND SUPPLEMENT TO THE THREE GREEN PAPERS ON THE FUTURE OF THE LEGAL PROFESSION ETC

I note that you have decided, subject to colleagues' approval, that the public announcement of the Government's proposals in respect of England and Wales should be in the form of a White Paper. In the light of this I have decided to extend the consultation period on the Northern Ireland Supplement by six weeks to 14 September. This extension will provide consultees in Northern Ireland with adequate time to reflect upon the Government's decisions in respect of England and Wales. I would aim to announce it at the same time.

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

Yours ever

TK

PRIME MINISTER

CABINET: DISCUSSION OF THE LEGAL REFORMS

The papers for the meeting are:

Flag A - The Lord Chancellor's Cabinet paper. His covering memorandum flags up the issues raised at last week's E(CP) discussion and seeks authority to publish the White Paper, accompanied by an oral statement, next Wednesday 19 July. Further back in the paper are drafts of his proposed oral statement and the White Paper.

Flag B - You may like to have to hand the convenient summary taken from last week's E(CP) paper which compared the original Green Paper proposals and the latest package.

Flag C - Cabinet Office briefing setting out the key points to cover.

Flag D - Brief by Carolyn Sinclair urging you to press for one further element of tightening up in the package.

Flag E - A letter from the Department of Trade and Industry concerning the link between the Legal White Paper and the Restrictive Trade Practices White Paper. You had asked for a final decision on the timing of the latter to be deferred. DTI now propose that the two White Papers should be published together on 19 July.

One further point to settle, not mentioned in the Cabinet Office briefing, is what Bernard should say following Cabinet. Having discussed this with him, we suggest he should be authorised simply to say that a White Paper and oral statement will be coming next week setting out the Government's conclusions on the way forward.

PAUL GRAY
11 July 1989

GREEN PAPERS	WHITE PAPER (underlining denotes changed proposal)
1. **Advisory Committee**	
Committee to report annually to the Lord Chancellor on: lawyers' education and conduct; the professions' codes of conduct for advocacy and legal advice; and areas of specialisation. Committee to be chaired by a judge, and have a lay majority. Secretariat to be provided by the Lord Chancellor's department.	Committee to report annually to the Lord Chancellor on lawyers' education and conduct; publicly to advise the Lord Chancellor and the Heads of Division and the professions on the education and conduct rules put forward by professional bodies wishing to grant their members rights of audience or the right to conduct litigation, to which advice they will be bound to have regard; to consider any matter specifically referred to it by any member of the public, the Lord Chancellor or a judge; to advise upon the merits of schemes for specialisation put forward to it by the professions and other bodies. Committee to be chaired by a Judge and have a lay majority. Committee to appoint its own secretariat.
2. **Competence**	
Advisory Committee to keep under review the education and a training of lawyers at all stages of their careers. Lord Chancellor, following advice from the Advisory Committee and after consulting the judiciary, to prescribe training requirements for advocacy.	Advisory Committee to keep under review the education and training of lawyers at all stages of their careers. Lord Chancellor, following advice from the Advisory Committee, with the concurrence with Heads of the Division, and in accordance with the statutory principles, to approve training regulations put forward by the Bar, the Law Society and other professional bodies who wish to grant either the right to conduct litigation or rights of audience to their members.

ANNEX A

	GREEN PAPERS	WHITE PAPER (underlining denotes changed proposal)
3.	**Codes of Conduct**	
	Lord Chancellor, on advice of the Advisory Committee, to prescribe by Statutory Instrument principles to be included in Codes of Conduct for all providers of (a) legal advice and assistance; and (b) advocacy and ancillary matters. All professional bodies whose members would wish to provide advice and/or advocacy services would be required to submit draft codes, incorporating these principles, to the Advisory Committee for its approval.	Existing codes of conduct of Bar and Law Society to remain valid until amended. Professional bodies, on advice of the Advisory Committee, and in accordance with the statutory principles, to make Codes of Conduct relating to (a) the conduct of litigation; and/or (b) advocacy. Both codes to be approved by the Lord Chancellor and Heads of Division having regard to the advice of the Advisory Committee and in accordance with the statutory principles, if the professional bodies wish to grant their members the right to conduct litigation and /or rights of audience. Directory General of Fair Trading to advise the Lord Chancellor on codes in draft.
4.	**Legal Services Ombudsman**	
	Lay Observer to be replaced by Legal Services Ombudsman with enhanced jurisdiction to investigate the handling of complaints by all professional bodies, to reinvestigate cases where necessary (including cases of negligence) and to recommend the payment of compensation by the professional body.	Lay Observer to be replaced by Legal Services Ombudsman with enhanced jurisdiction to investigate the handling of complaints by all professional bodies, to reinvestigate cases where necessary (including cases of negligence) and to recommend the payment of compensation by the professional body and/or individual practitioner.

GREEN PAPERS	WHITE PAPER (underlining denotes changed proposal)
5. **Rights of Audience**	
Rights of Audience to be dependent upon a certificate of competence issued by a professional body authorised for this purpose by the Lord Chancellor, following the advice of the Advisory Committee and after consulting the judiciary. All practitioners to commence with limited rights and progress to full rights after satisfactory completion of a specified period of practice. Lord Chancellor to lay down by Statutory Instrument, following the advice of the Advisory Committee and after consulting the judiciary, the educational qualifications and training appropriate to each level of court. No individual or class to lose any existing rights of audience.	Rights of audience to be granted by professional bodies. The Law Society and the Bar to be authorised for this purpose by statute; other bodies to be able to seek authorisation by Order in Council, subject to affirmative resolution, made on the recommendation of the Lord Chancellor, having regard to the advice of the Advisory Committee, with the concurrence of the Heads of Division, all of whom will act in accordance with statutory principles. All barristers and solicitors to retain the rights they already enjoy upon initial admission to their respective professions; for the future, the Law Society to be empowered to grant rights of audience before each particular level of court, subject to new training and conduct regulations to be approved by the Lord Chancellor and the Heads of Division, having regard to the advice of the Advisory Committee and acting in accordance with statutory principles. No individual class to lose any existing rights of audience.

GREEN PAPERS	WHITE PAPER (underlining denotes changed proposal)
6. The Conduct of Litigation	
No proposal was made to relax the solicitors' monopoly over the conduct of litigation.	By analogy with rights of audience, the right to conduct litigation to be granted by professional bodies. The Law Society to be authorised for this purpose by statute; other bodies to be able to seek authorisation by Order In Council, subject to a affirmative resolution, made on the recommendation of the Lord Chancellor, acting on advice of the Advisory Committee, with the concurrence of the Heads of Division, all of whom will act in accordance with statutory principles.
7. Conveyancing	
Authorised practitioners (eg banks and building societies) to be permitted to offer conveyancing services to their clients. Requirements for authorisation to be prescribed by statute; practitioners also to observe conveyancing code of conduct to be laid down in Statutory Instrument. All organisations to demonstrate that they are providing conveyancing services at not less than their true cost.	It will be prohibited to make the offer of any one service in a house purchase conditional upon the provision of another. Authorised practitioners (eg. banks and building societies) to be permitted to offer conveyancing services to their clients, save that if conveyancing is offered to one party to a transaction, neither estate agency nor conveyancing may be offered to any other party to the same transaction. Requirements for authorisation to be prescribed by statute: practitioners also to observe conveyancing code of conduct contained in Statutory Instrument, and to offer all clients a personal interview with the solicitor or licensed conveyancer who will be supervising the transaction.

	GREEN PAPERS	WHITE PAPER (underlining denotes changed proposal)
8.	**Organisation of the Profession** Multi-disciplinary and Multi-national Practices to permitted for all lawyers. Barristers to be permitted to accept instructions direct from clients, to form partnerships and to be enabled to sue for their fees. The requirements to practise from chambers and to employ a clerk to be removed. All restrictions on the form and content of advertising beyond those contained in the British Code of Advertising Practice to be removed.	Multi-national practices to be permitted for all solicitors. The Bar to be allowed to prohibit partnerships between barristers and both the Bar and the Law Society to be allowed to prohibit partnerships with members of other professions. Barristers to be enabled to sue for their fees. All other statutory constraints on the ways in which lawyers may offer their services to be removed.
9.	**Silk** Solicitors to be eligible for appointment as Queen's Counsel.	Solicitors to be eligible for appointment as Queen's Counsel.
10.	**Judicial Appointments** Solicitors with full advocacy certificates to be eligible for appointment to the High Court Bench. Barristers to be eligible for appointment for County Court Registrars.	Solicitors of ten years' standing who enjoy rights of audience before the High Court to be eligible for appointment to the High Court Bench. Barristers to be eligible for appointment as County Court Registrars.

GREEN PAPERS	WHITE PAPER (underlining denotes changed proposal)
11. Conditional and Contingency Fees	
The Government asked for views on whether either the Scottish speculative action or American-style contingency fees should be permitted. It was not proposed to alter the rule that costs follow the event.	Speculative actions to be permitted, with power for the Lord Chancellor, in consultation with the professions, to prescribe an uplift to the fees by Statutory Instrument which may be charged to recognise the risk undertaken by the practitioner. The rule of costs following the event to remain unaltered.
12. Probate	
Applications for grants of probate or letters of administration be prepared by trust corporations, licensed conveyancers, authorised practitioners and accountants. The requirement to swear an oath to abolished.	Applications for grants of probate or letters of administration to be prepared by trust corporations and subsequently by other organisations who satisfy the Lord Chancellor, having regard to the advice of the Advisory Committee that they are competent to do the work. A new criminal offence of making a false declaration to be created, so as to make it possible subsequently to abolish the requirement to swear an oath.

PRIME MINISTER 11 July 1989

CABINET 12 JULY: LEGAL REFORM

Following discussion in E(CP), the Lord Chancellor has circulated a revised draft of the legal reform White Paper to Cabinet.

E(CP) broadly endorsed the Lord Chancellor's approach. But it has been toughened in one respect. It will now be made clear on the face of the Bill that the intention is to widen rights of audience. This is an important counterweight to the power being given to the four Heads of Division to determine whether or not change takes place.

But there is still room for much judicial foot-dragging. This could be limited by setting a timetable:

(a) for the Advisory Committee to produce its views;

(b) for the four Heads of Division to pronounce on the rules governing advocacy etc.

A timetable for decisions, plus a statutory commitment to wider rights of audience, will make it easier to refute arguments that the Government has simply caved in to the Bar. This is important given this week's decision on the brewers.

RECOMMENDATION

Agree that White Paper should issue provided there is a clear timetable for decisions:

(a) by the Advisory Committee;

(b) by the Heads of Division.

CAROLYN SINCLAIR

A089/1877

PRIME MINISTER

THE FUTURE OF THE LEGAL PROFESSION

Memorandum by the Lord Chancellor
C(89)10

DECISIONS

The Lord Chancellor has circulated for the approval of Cabinet a draft White Paper and oral statement on the future of the legal profession. He proposes to publish the White Paper and make the statement on 19 July.

BACKGROUND

2. The Lord Chancellor published three Green Papers on legal reform in January. The White Paper now circulated sets out the Government's decision in the light of the public response.

3. The most important areas are as follows:

i. rights of audience. The Green Paper proposed that rights of audience would be granted by professional bodies under rules approved by the Lord Chancellor's Advisory Committee on Legal Education and Conduct. Under the White Paper, the rules are to be agreed by the Lord Chancellor and four Heads of Divisions, having regard to the advice of the Advisory Committee.

ii. partnerships. The Green Papers said that the Government expected both the Bar and the Law Society to allow their members to form partnerships with each other or with other professionals. The White Paper proposes to abolish the statutory bar on formation of partnerships by solicitors but leave the Bar and Law Society free to make their own rules. The rules would however be subject to the new Restrictive Trade Practices legislation except insofar

as they were related to advocacy or rights of litigation and therefore required the approval of the Lord Chancellor.

iii. conveyancing. The Green Papers proposed that the Lord Chancellor could allow lenders such as banks and building societies to provide conveyancing services for their clients. This is substantially unchanged in the White Paper although there will be further detailed safeguards against conflicts of interest.

iv. contingency fees. The Green Paper floated the ideas of relating lawyers' fees to the award received (as in the USA) or of providing that their remuneration would depend on whether they were successful (as in Scotland). The White Paper proposes only the Scottish system, but with a percentage uplift based on costs, not damages.

4. On 6 July, E(CP) broadly endorsed the Lord Chancellor's proposals, subject to the following changes, all of which have been reflected in the White Paper:

i. the Bill should make clear the intention that rights of audience would be extended;

ii. the professions' rules should be subject to the new Restrictive Trade Practices legislation except in so far as they concerned rights of advocacy;

iii. on contingency fees, it should be made clear in the Parliamentary debate that the uplift on costs would not exceed a low percentage;

iv. on conveyancing, the requirement that building societies should not offer conveyancing services below true cost - which the Lord Chancellor had proposed to drop- should be reinstated.

ISSUES

Rights of Audience

5. This is the biggest issue. In their public comments, the senior judges have been hostile to extension of rights of audience for solicitors. In E(CP) some Ministers - Mr Clarke, Mr Fowler, Mr Parkinson - were concerned that it would look like a major concession to give them an effective veto over such an extension. If this concern is pressed, you might say that:

i. in their new role, the judges will be subject to public and Parliamentary pressure;

ii. they will have to take account of the advice of the Advisory Committee, which will have a lay majority, and will be subject to judicial review if they do not;

iii. the statute will now state a clear intention that rights of audience should be extended.

Multi-disciplinary partnership and RTP

6. There could be criticism of the Government for leaving it to the professions in the first place to decide their rules on partnership. On this:

i. the public response showed no pressure for more partnerships;

ii. the rules will be subject to the Restrictive Trade Practices legislation except insofar as they are related to advocacy and the conduct of litigation. If they are so related, they will need the Lord Chancellor's agreement.

Conveyancing

7. Solicitors will be anxious about giving building societies the right to offer conveyancing services. On this:

i. it will be very helpful to the consumer to have a one-stop shop for house purchase;

ii. at E(CP)'s request, the White Paper restores the prohibition on offering conveyancing services below cost.

Contingency fees

8. When Cabinet discussed the Green Papers in January some members were afraid that contingency fees would increase litigation. Mr Clarke repeated this at E(CP). On this:

i. contingency fees will make it much easier for people who are not rich but are above the Legal Aid limits to go to Court;

ii. the White Paper rejects the extreme American version and recommends only the system which has worked well in Scotland.

Scotland

9. The Scottish Office have had in mind a slower timetable, possibly with a White Paper after the Recess. You could ask Mr Rifkind what his plans are and whether he will ensure reasonable consistency with England.

Presentation and announcement

10. The opening Chapter of the White Paper describes the changes from the Green Paper, and Annex B sets them out in detail. You may wish to ask whether it is necessary for the White Paper to highlight the Government's changes of mind.

11. The Lord Chancellor proposes an oral statement in the House of Lords on 19 July. The Lord President and Lord Privy Seal have agreed this date. You will wish to consider the arrangements for the Commons. The Lord Chancellor's Department expect the Attorney-General to make the statement there. Anything else would attract attention.

12. The legal White Paper refers to the Restrictive Trade Practices White Paper, which the Lord Chancellor says Lord Young intends to publish, apparently by Written Answer, not later than 19 July. You may wish to ask:

i. whether simultaneous publication would be desirable to ensure that the first White Paper does not provide ammunition for the oral statement on the second;

ii. whether an oral statement on restrictive trade practices is also necessary.

HANDLING

13. You will wish to ask the Lord Chancellor to introduce his paper. The Chancellor of the Exchequer may wish to comment as Chairman of E(CP). The Lord President of the Council and Lord Privy Seal will be interested in the Parliamentary handling and the Secretary of State for Trade and Industry in the link with the Restrictive Trade Practices White Paper. The Attorney-General has been invited for this item.

R.B.

ROBIN BUTLER
Cabinet Office
11 July 1989

CONFIDENTIAL

PRIME MINISTER

27 June 1989

LEGAL REFORMS

You are discussing the legal reforms with Nigel Lawson tomorrow. The Lord Chancellor had a meeting with Nigel Lawson today.

There are two key issues:

(a) whether the power of the four Heads of Division to block change should be limited in some way;

(b) the relationship between the new Competition Authority, the Lord Chancellor, the four Heads of Division and the lawyers' professional bodies.

(a) Powers of the four Heads of Division

Patrick Mayhew's position is that implementation of the proposals on wider rights of audience should be entirely at the discretion of the judiciary.

He would, for example, oppose a proposal that the Act should state that suitably qualified solicitors in partnership could act as advocates in any court. Nicholas Lyell takes the same view.

James Mackay's main concern is to prevent Patrick Mayhew from resigning. He has not been prepared to try to drive a wedge between the judiciary and the Attorney General on the basis that the judiciary might settle for less.

Nigel Lawson is not happy with the approach proposed by James Mackay. He would prefer to put something in the Act

which would limit the judiciary's ability to block the key changes needed to make wider rights of audience a reality. Without this it will be very difficult to refute arguments in the Commons and the press that the Government has simply caved in to the Bar. This will make relations with solicitors - who have written in strong terms about the Heads of Division proposal - very difficult.

Conclusion

- In terms of the wider audience of MPs, the press, solicitors and the public, it makes sense to be able to demonstrate that the reform of rights of audience is not a sham. Nigel Lawson's approach would achieve this while still giving a role to the judiciary.

- But if the overriding object is to keep Patrick Mayhew on board, James Mackay's riskier route is the only one.

(b) Relationship with the new Competition Authority

The proposed role for the four Heads of Division could cause problems with the new Competition Authority. For the first time the latter will be examining the rules made by professional bodies. There will be some statutory exceptions, but the aim of the Government's competition policy is to limit these as much as possible.

Rules specifically approved by Ministers will be exempt from scrutiny by the Competition Authority. It is now proposed that the draft rules and codes of practice of the legal professional bodies should be submitted in full to the Lord Chancellor and to the four Heads of Divisions. This could be a way of ensuring that the legal profession escaped the

attention of the Competition Authority completely. Other groups, eg doctors, would be likely to press for similar treatment.

One way through might be to limit the issues submitted to the Lord Chancellor and the four Heads of Division to truly ethical matters. This would leave other rules open to examination by the Competition Authority.

Conclusion

- We must find an approach which does least damage to the Government's competition policy. The latter should not be put in hock to the judiciary.

CAROLYN SINCLAIR

CONFIDENTIAL

cc Backup

PRIME MINISTER

LEGAL REFORMS

You will wish to see the latest progress from Carolyn Sinclair (attached). Carolyn suggests there is a need to pull together before the forthcoming E(CP) discussion the links between the Lord Chancellor, the four heads of division on the one hand and the restrictive trade practices Competition Authority on the other in determining the rules of the Law Society and the Bar. She advises that you might authorise me to send out a letter asking for this relationship to be addressed.

You will want to consider whether to take this step now or adopt an alternative approach of first discussing the latest position with the Chancellor of the Exchequer. Your next scheduled bilateral with him is on Wednesday, and there would be advantage in any event in your exchanging views with him then on the legal reforms; you have already had a talk with the Lord Chancellor and the two Chancellors are I gather having a talk next Tuesday.

(i) Do you want me to minute out in the terms suggested by Carolyn; No

Or

(ii) prefer first to discuss the position with the Chancellor of the Exchequer next Wednesday? Yes

AT

ANDREW TURNBULL

23 June 1989

DA1ADL

CONFIDENTIAL

MR GRAY Prime Minister 23 June 1989

cc: ~~Mr~~ Turnbull

LEGAL REFORMS

This note deals with the correspondence on Multidisciplinary Practices, and reports on developments more widely.

Multidisciplinary Practices

The Lord Chancellor and David Young have written proposing to exclude the Bar Council's ban on barristers joining partnerships from the provisions of the restrictive trade practices (RTP) legislation proposed for 1990-91. David Young does not, however, want to prevent MDPs by solicitors. ~~MT~~

Nigel Lawson has come out against this. He thinks we should leave it to the Competition Authority to decide whether a particular rule is consistent with free competition and the best interests of the consumer.

This correspondence is overtaken to some extent by the proposal to give the four Heads of Division an important role in implementing the extension of wider rights of audience.

The main argument for allowing the Bar to continue its ban on partnerships without the risk of falling foul of the Competition Authority was to give some reassurance that an independent Bar would continue. It was essentially a political concession.

We are now contemplating a much wider concession which could be a real brake on the speed with which solicitors are admitted as advocates. This should be of considerable comfort to barristers.

The political argument for making this exception to the RTP legislation is thus reduced. At the same time the proposal involving the four Heads of Division raises the possibility of a series of confrontations between the Government (Lord Chancellor), the judiciary and the Competition Authority on various rules which may be held anti-competitive.

There is now a strong case for looking at this issue more widely. Under our original proposals it would have been for the Bar Council and the Law Society to get their rules past the Competition Authority. Now that the judiciary (and the Lord Chancellor) are to be involved, it will be harder for the Government to stand on one side. We could have one part of Government outlawing what another has sanctioned.

Latest Developments

The Lord Chancellor has had meetings this week with the Attorney General, and the four Heads of Division.

The latest thinking is that properly qualified solicitors would be admitted right away as advocates in the Crown Courts in a limited number of cases. This is partly to demonstrate that change is on the way, and partly to give Crown Court judges some experience of solicitor-advocates. The change is modest and the Attorney General is content.

The meeting with the four Heads of Division did not go well. They do not relish the prospect of being under a spotlight, and are arguing that they do not represent all judges ....

Meanwhile the Law Society has written to the Lord Chancellor in strong terms criticising the role proposed for the four Heads of Division.

Conclusion

- There is no need for the Prime Minister to take sides in the correspondence between the Lord Chancellor, David Young and Nigel Lawson on multidisciplinary partnerships.

- There is a need for the E(CP) paper to address the issue of the relationship between the Lord Chancellor, the four Heads of Division and the Competition Authority more generally. If the Prime Minister agrees, a letter from you could get this moving.

CAROLYN SINCLAIR

FROM THE PRESIDENT OF THE LAW SOCIETY

PRESIDENTS ROOM
THE LAW SOCIETY'S HALL
CHANCERY LANE
LONDON WC2A 1PL

TELEPHONE 01 242 1222

The Rt. Hon. Lord Mackay of Clashfern
Lord Chancellor
House of Lords
London SW1A 0PW

21 June 1989

Dear Lord Chancellor,

It was good of you to spare so much time when I came to discuss rights of audience with you last Friday, and it was very useful to hear the formula you now have in mind for dealing with the matter. However, I thought I should follow up our conversation with a letter so that there can be no doubt about the Law Society's likely response.

We very much welcome your proposal that primary legislation should empower the Law Society to grant rights of audience, subject to solicitors complying with rules governing competence and conduct. That proposal accords with two of the principles we emphasised in our main response to the Green Papers: namely that rights of audience should be a matter for primary legislation and that the Law Society should retain responsibility for regulating the solicitors' profession.

We are however strongly opposed to the suggestion that the Law Society will have to secure the concurrence of the Heads of Division to the rules. That would permit the Heads of Division to require sole practice, or separation of preparation from advocacy, as a condition of approving the rules. The judges' response has made it quite clear to us and to everyone else that they cannot be viewed as independant arbiters on this issue. They ought to recognise that they cannot be expected to exercise an impartial role and they ought properly to decline to be put in such a position. The judges have made it clear that given the opportunity they would seek to impose unnecessary conditions to protect the Bar and stifle clients' right to choose a solicitor advocate under the guise of safeguarding the administration of justice. The suggestion therefore that they would only be permitted to withhold approval on specified grounds will not help: no doubt those grounds would relate to the administration of justice on which phrase as we know much can be founded. The prospect of our threatening or taking judicial review proceedings against the Heads of Division cannot be regarded as a realistic remedy.

I must also reiterate our opposition to any requirement that preparation of the case be separated from advocacy. It is not a question of the level at which a separation is necessary: the principle is a bogus one derived from a false analogy with the Philips Commission's recommendation that those responsible for investigating an offence should not also be responsible for prosecuting the alleged offender. To impose a separation of preparation from advocacy at any level would deprive clients of a choice to which they are entitled. It would also call into question the propriety of existing arrangements for legal aid in the magistrates court, which could have very serious consequences for public expenditure.

The judges suggest that if some advocates were also responsible for preparing the case there would be an increased risk of coaching of witnesses or manufacturing of evidence. We naturally entirely agree that such conduct would be wholly unacceptable. The Guide to the Professional Conduct of Solicitors already makes that perfectly clear, and we would be willing to consider any strengthening of the provision which seemed desirable. But any restriction imposed on the profession should be the minimum necessary to secure its purpose. Since in this area improper conduct can be prohibited directly, there is no justification for adopting the oblique means of constraints on the way cases are prepared.

I should also like to clarify our views on your suggestion that a single disciplinary tribunal be established for those doing advocacy work. We do have doubts about whether a locally based tribunal would have enough work to do, and we are conscious that it will be important to ensure consistency of approach in dealing with any complaints. But we have no objection in principle to establishing a single tribunal - containing solicitors, barristers and judges - to deal with alleged breaches of a common advocacy code. Such a tribunal should concern itself only with breaches of the common code, and not with any restrictions imposed by individual professions such as the Bar's rules on direct access. We would hope that any announcement in July will be in sufficiently general terms to permit all those concerned to work up an agreed model.

I am sorry to have to write in such blunt terms about some of the matters we discussed on Friday. The fact is that we - and, I am sure, the public generally - would see any proposals which left the judges with the power to block extensions of solicitors' rights of audience as a surrender by the Government in the face of a powerful vested interest which had relied on confrontation rather than constructive dialogue to promote its cause.

Yours ever

Richard

SIR RICHARD GASKELL
PRESIDENT

Contd. Contd.

CONFIDENTIAL

Prime Minister
This sets out clearly some of the issues involved in the Lord Chancellor's proposals on rights of audience

16 June 1989

MR TURNBULL

cc. Professor Griffiths
Mr Gray

Thank you - the issues are clear now

LEGAL REFORMS

At his meeting with the Prime Minister last week, the Lord Chancellor outlined a proposal on rights of audience designed to keep both the Law Officers and the judiciary on board. I have been discussing this with Derek Oulton.

The proposal is attractive as a way out of a political problem (the Attorney General's resignation). But it will be criticised as a major cave-in on the main plank of the Government's reforms. In the longer run (two to three years) it could present the Government with some nasty dilemmas.

The Proposal

(i) The Bill giving effect to the legal reforms would vest the ability to grant rights of audience in the Bar Council and the Law Society. Individuals belonging to either professional body could act as advocates in any court provided they had completed appropriate training and were bound by appropriate Codes of Conduct.

(ii) The proposed Advisory Committee - with a lay majority - would advise the professional bodies on the principles which should be reflected in training and Codes of Conduct. The Bar Council and the Law Society would be bound to have regard to such advice. This means that they would be free to reject it, but would have to give reasons for doing so.

(iii) The Bar Council and the Law Society would (separately) submit their proposals for training and Codes of Conduct to the Lord Chancellor and the other four Heads of Division (in effect, the most senior judges.) All five would need to concur in the professional bodies' proposals.

(iii) is the new element designed to appeal to the judges. It is crucial to keeping the Attorney General.

How (iii) would work

The Lord Chancellor does not envisage collective discussion with the four other Heads of Division. He would give his concurrence (or objection) independently, direct to the Bar Council and Law Society.

In theory the four other judges would also act independently. In practice, they will act together, and it is likely that the strong personality of the Lord Chief Justice (Lord Lane) will prevail over the others. Lord Lane is a bastion of conservatism.

There will be a time limit within which the Heads of Division must respond (senior judges are notorious for simply ignoring communications they do not like). It is quite possible that they could take a different view from the Lord Chancellor.

Implications

The Lord Chancellor is well aware of the risks in his proposal. It puts a great deal of power in the hands of the Heads of Division. For example, they could reject a Code of Conduct from the Law Society which allowed solicitors in partnerships to act as advocates in the higher courts. This would frustrate the main element in the Government's reforms.

One way of limiting this danger would be to specify in the Legal Reform Act that solicitors in partnership could practice in all courts provided they were qualified advocates. The Attorney General would not buy this; but possibly the judiciary would.

The Lord Chancellor's officials are seeking to persuade him to float this option at his meeting next Friday with the four Heads of Division. The Lord Chancellor may not agree. Even if he does, the judiciary may not. But if he did, and they did, the Attorney General could begin to look unreasonable in demanding more than the judiciary (whom the Bar regard as the leaders of their profession).

It is a long shot.

If the proposal at (iii) is not circumscribed in this way, the following could happen:

- Some two years hence the Lord Chancellor and the four Heads of Division disagree over whether solicitors in partnership can act as advocates in the higher courts.

- The Government wrings its hands while being roundly criticised by the Law Society and the media for allowing the judiciary to block reform; or

- The Government legislates to remove the ability of the Heads of Division to block reform, leading to cries of interference by the executive etc.

More immediately

- The Law Society and the legal correspondents in the media will quickly spot that the Government is giving the Heads of Division an effective veto on wider rights of audience.

- The Government will be criticised for caving into the Bar.

- Solicitors will be doubly enraged: they will be forced to accept the conveyancing proposals while the Bar get off lightly. This could make it more difficult to get the conveyancing proposals through the Commons (at least some solicitors see wider rights of audience as a new opportunity to balance the loss of work on conveyancing to building societies).

Interaction with the new Competition Authority

You asked whether, under the proposed arrangements, the Government might find itself at odds with the new Competition Authority over the rules governing lawyers.

The present restrictive trade practices legislation does not extend to the professions. But under new legislation which the Government is proposing to introduce in 1990-91, professional bodies will have to justify their rules to the Competition Authority unless particular rules are statutorily exempted from its scope.

David Young is proposing to exempt certain (not all) of the barristers' rules on the grounds that they are necessary to the continuation of the independent Bar. But he will want to keep such exemptions to a minimum.

A clash between the Heads of Divisions and the Competition Authority is a possibility. It is more likely than a direct clash between the Lord Chancellor and the Competition Authority. It is, for example, hard to conceive of the Lord Chancellor supporting a rule which prohibits solicitors in partnership from acting as advocates. But the Heads of Divisions could well do so.

If, however, the Government took no action in such circumstances it would be implicated. It would be seen as acquiescing in a decision of the judiciary which was anti-competitive.

CAROLYN SINCLAIR

CONFIDENTIAL

10 DOWNING STREET
LONDON SW1A 2AA

From the Principal Private Secretary

15 June 1989

REVIEW OF THE LEGAL PROFESSION

Thank you for your letter of 12 June pointing out the defect in the way I had described the composition of the Advisory Committee. I will amend my record to say "... but the majority of members would not necessarily be practising lawyers".

I am copying this letter to Sir Robin Butler.

(ANDREW TURNBULL)

Paul Stockton, Esq.,
Lord Chancellor's Department.

CONFIDENTIAL

FROM THE PRIVATE SECRETARY

CONFIDENTIAL

HOUSE OF LORDS,
SW1A 0PW

12 June 1989

Andrew Turnbull Esq
10 Downing Street
LONDON SW1A 2AA

Dear Andrew,

REVIEW OF THE LEGAL PROFESSION

Thank you for your letter of 9 June, which I have shown to the Lord Chancellor.

The Lord Chancellor only has one point on the letter. In the third line from the bottom of page 1 you attribute to the Lord Chancellor the assertion that the majority of the members of the Advisory Committee would be non-practising lawyers. He thinks a more accurate rendering of his point would be to say that the majority of members of the Advisory Committee would not necessarily be practising lawyers. The point is that the majority of the Advisory Committee could all be non-lawyers but he would wish to leave open the possibility of appointing some members of the legal profession as well as the ones which he would be obliged to appoint on the nomination of the professional bodies.

I am copying this letter to Sir Robin Butler.

Yours ever,

Paul Stockton

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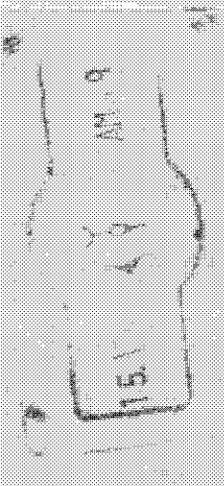

Mtg Record.

Subject filed on Legal Procedure : Review Pt 3

cc MASTER.

Private

CONFIDENTIAL

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

9 June 1989

Dear Paul,

REVIEW OF THE LEGAL PROFESSION

The Lord Chancellor came to see the Prime Minister to discuss the way in which the Government should proceed in the light of the responses to the Green Paper.

I would be grateful if this letter could be seen only by Ministers and officials directly concerned with handling this subject.

On rights of audience, the Lord Chancellor said the Bar continued to oppose any extension giving solicitors rights of audience in the higher courts which they believed would lead eventually to the destruction of the independent Bar. The Judges had taken a similar position and were prepared to support rights of audience only where solicitors became sole practitioners, ie where in effect they became Barristers. The Lord Chancellor said he continued to believe that solititors should have the right of audience in the higher courts, provided they were properly qualified to conduct advocacy. He pointed out that, under the Civil Justice Review, the position of solicitors would be strengthened because the scope of the County Courts, where they already had rights of audience, was being extended. Nevertheless, their rights of audience should be extended further. Law students had narrowly supported his proposals and there was strong support from consumer interests.

The Lord Chancellor said he had discussed the position with the Attorney General and the Solicitor General. He then set out his revised proposals for resolving the difficulties which remained.

First, he would set up an Advisory Committee on Legal Education and Conduct as originally envisaged. This would be chaired by a Judge and would have representatives of the legal professions on it, but the majority of members would be non-practising lawyers. It would report to Parliament, but its role would now be purely advisory. In formulating its rules of conduct, the Bar would be required to have regard to

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the views of the Advisory Committee, but would not be obliged to implement them. The Bar would then have to seek the approval of its rules by the Heads of Division. No additional licensing or certification would be required for existing members of the Bar.

The Law Society would also be able to grant rights of audience to solicitors provided they had the necessary qualifications in advocacy. In drawing up its rules for this it too would be required to have regard to the advice of the Advisory Committee and to seek the concurrence of the Heads of Division. Questions of partnership would be considered as matters of conduct. There was already some judicial control of solicitors' rules and so no new point of principle was to be established.

The Prime Minister asked whether this, in effect, gave a veto to the Heads of Division. The Lord Chancellor said they would be very influential in the process, but the way matters were being structured made it difficult for them to stand out obstinately against the views of the Advisory Committee and the Law Society without good reason. They would have to make their reasons public and these, via the Advisory Committee, would be drawn to the attention of Parliament. The Lord Chancellor said he had discussed this approach with the Attorney General and he believed he would be willing to support it.

The Lord Chancellor expressed satisfaction at the way in which the challenge of the Green Papers had forced the Bar to improve access to the profession, eg through paid pupilages and through the Library arrangements.

The Lord Chancellor then set out his views on conveyancing. In principle, it was desirable to ensure a level playing field between solicitors and the financial institutions but he had concluded that it was virtually impossible to find a workable system to define and enforce this. One could do no more than rely on the general competition powers of the Director General of Fair Trading. The Lord Chancellor proposed that any financial institutions wished to provide conveyancing as part of a "one-step shop" should be required to offer the purchaser a face to face interview with a qualified solicitor or legal conveyancer. At the interview they would inform the client whether there were any potential conflicts of interest in the transaction and advise on whether there were any other legal issues on which the client should seek separate legal advice.

The Lord Chancellor said he was concerned about some of the practices which were developing in estate agencies, eg requiring purchasers to take up insurance or mortgages with particular institutions. These potential abuses existed even under the present arrangements with independent solicitors; it was important to ensure that any changes did not make the position worse. He was proposing to link his proposals with DTI work on estate agencies.

The Lord Chancellor said that little enthusiasm had been expressed for multi-disciplinary partnerships. He did not propose to push this issue; his solution was to allow the Bar to develop its own rules.

On the way forward, the Lord Chancellor said his officials were preparing a synopsis of the responses to the Green Papers and his working group, on which the Law Officers were represented, was preparing a paper for a meeting of E(CP) on 6 July. The Attorney General would attend E(CP) though he hoped that it would be possible for any issues outstanding between them to have been resolved in the course of drafting the paper. Following the Cabinet discussion, the E(CP) paper could be edited into a White Paper for publication before the Recess.

The policy issues relating to judicial pensions and the Civil Justice Review had largely been resolved and drafting was proceeding. It should be possible to complete drafting of the clauses on the legal profession in time to introduce he Bill in the Lords in November.

Concluding the discussion, the Prime Minister welcomed the Lord Chancellor's revised proposals and the way in which they were to be carried forward.

I am copying this letter to Sir Robin Butler.

Yours ever

Andrew Turnbull

ANDREW TURNBULL

Paul Stockton, Esq.
Lord Chancellor's Department

1 MF Gray
2 CF

FROM: THE PRESIDENT OF THE LAW SOCIETY

Telephone: 01 242 1222

PRESIDENT'S ROOM
THE LAW SOCIETY'S HALL
CHANCERY LANE
LONDON WC2A 1PL

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

AZ/dw

7th June 1989

Dear Lord Chancellor,

I mentioned to you on 29th May that we would be making a further submission responding to some of the points made by the Bar and the Judges, and I am pleased to enclose this.

IN ATTACHED FOLDER

Thank you for your official note of our meeting. I am reported as saying, in the final paragraph, that any proposal to restrict solicitors' audience rights to those who had not prepared the case would have serious effects on those cases in which we already have rights of audience. No doubt I said that, but as our present submission makes clear, our objection goes considerably wider. Any such proposal would destroy the continuity of representation which many clients want, which we cannot now provide, and which any extension of rights of audience must include.

Yours ever

Richard

R K H Gaskell
President

SOLICITORS IN THE HIGHER COURTS

INTRODUCTION

1. The Green Paper "Work and Organisation of the Legal Profession" proposed that suitably qualified solicitors should have full rights of audience in all Courts. In its response to the Green Paper the Council welcomed that proposal. The Council accepted that solicitors should not acquire full rights of audience in all Courts immediately upon admission to the profession, but should require an additional qualification. The Council suggested that in the case of Crown Court proceedings the additional qualification should be:-

(i) a minimum of two years experience, practising regularly in the lower Courts; and

(ii) the satisfactory completion of an approved training course covering the additional knowledge and skills required to practise effectively in criminal cases in the higher Courts, such as the procedural differences and any different techniques of advocacy required in jury trials.

In civil cases the requirement proposed by the Council was a minimum of two years substantial experience of civil litigation, and perhaps an interview by a certifying panel. The Council suggested that membership of one of the specialist panels established by the Society should automatically entitle a practitioner to full rights of advocacy for the subject concerned.

PRINCIPLES

2. The Government's approach had been that rights of audience should be restricted to those who are properly trained, suitably experienced, and subject to Codes of Conduct which maintain standards, but that subject to those criteria the public should have the widest possible choice of advocates. The Council endorsed that approach. The Council's proposals for additional qualifications

before solicitors acquire full rights of audience in the higher Courts, combined with the existing Code of Conduct to which all solicitor advocates are already bound, would ensure that the necessary criteria were met. However, in the light of the response to the Green Papers made by the Bar Council and by the Council of Judges, the Council consider it desirable to supplement their response.

3. The main arguments which have been deployed by the Bar Council and the Judges are:-

(i) all advocates in the higher Courts should practise singly rather than in partnership;

(ii) all advocates in the higher Courts should operate on a consultant basis and not take lay clients direct;

(iii) the same laywer should not both prepare the case and act as advocate;

(iv) large commerical firms would recruit barristers and carry out advocacy in-house, thus destroying the commercial Bar.

(v) allowing solicitors full rights of audience would substantially increase costs;

4. Each of these arguments deserves to be examined in turn, but there is a common thread of unreality running through them. That is that they ignore the fact that solicitors already have rights of audience in most Courts. Experience shows that solicitors exercise their rights of audience responsibily. Furthermore, they instruct independent Counsel in a very large number of cases both for advocacy and advice, where there is no requirement for them to do so. In other words, solicitors have demonstrated over decades that they will use the services of Counsel where it is in the interests of their client to do so, whether or not the solicitor is permitted to do the work personally. There is no reason to believe that that would suddenly change if solicitors' rights of audience extended to all Courts.

PARTNERSHIP

5. The Bar have suggested that if rights of audience were to be extended to solicitors it would be necessary to ensure that solicitor advocates practise singly, rather than in partnership. It is said that that is necessary to ensure that the cab-rank rule, under which barristers must take any client who seeks their services in the field of law in which they practise, applied also to solicitor advocates. The Bar argues that partnerships are incompatible with the cab-rank rule. That is misguided. If the cab-rank rule were to apply to solicitors, it could apply equally to those practising in partnership as to those practising alone. Solictors' professional obligations already override what would otherwise be the incidents of partnership in many respects; if they were subject to a cab-rank rule the same would apply.

6. But there is in any event no reason why the cab-rank rule should apply to solicitor advocates. The rule is designed to ensure that clients are not denied access to justice, particularly where their cause offends important interest groups or their alleged offence is particularly repellant. That could in theory be an important safeguard when representation is in the hands of a small specialist consultant profession, although it is in fact by no means faithfully observed by the Bar. However, with a wider choice of advocates the importance of the rule is diminished. It has never applied to solicitors, but there has been no suggestion that it has ever been difficult for clients, however unpopular, to find competent solicitors to represent them. If such difficulties were to arise, the Law Society would certainly be willing to help find a suitable solicitor. There is no reason of substance why solicitor advocates should be required to practise alone in order to have rights of audience in the higher Courts, when no difficulties have arisen from them practising in partnership so far as advocacy in other Courts is concerned. The Bar's urging that such a requirement should be imposed is a transparent attempt to obstruct the Green Paper's proposals for extending clients' rights to choose their advocate.

ACTING AS A CONSULTANT

7. The Bar argue that advocates in the higher Courts should be required to act solely as consultants rather than to take instructions direct from lay clients. The Bar suggest that competition would be unfair if solicitors had rights of audience whilst also having direct access to clients. If that were

the case, the Bar could simply permit direct access. But the argument does not withstand scrutiny. It rests on the assertion that solicitors would carry out advocacy themselves, contrary to the interests of their clients, in order to earn higher fees. That is an extraordinary assertion. Solicitors already use barristers for County Court and Magistrates' Court work in which solicitors have full rights of audience. The Planning Bar, which is wholly unprotected by any restrictions on advocacy at enquiries, continues to flourish. Solicitors are already under a duty to conduct the case in the best interest of their client, and that duty covers selection of an appropriate advocate. Neither that duty, nor solicitors' integrity, will be any lower when solicitors have rights of audience in higher Courts.

8. The Society would support the Bar if it wished to continue to work only on a consultant basis. That would enable the Bar to retain its specialisation in narrow areas of law where appropriate, as well as its comparatively low overheads. But that does not mean that all advocates in the higher Courts need to follow that method of working. Once again, the Bar's arguments ignore the experience of the lower Courts and simply seek to obstruct the extension of rights of audience.

SEPARATING PREPARATION FROM ADVOCACY

9. The Judges suggest that separation of the advocate from the lawyer responsible for preparation of the case for the defence has been a major factor in keeping ethical standards high. The implication is that chicanery would be increased if the same lawyer were to undertake both functions, and that rights of audience for solicitors should thus depend upon the solicitor concerned not having been involved in preparation of the case.

10. Such a rule would be absurd. One reason clients often want their solicitor to represent them is precisely to secure the continuity and familiarity with their case which comes from the same solicitor conducting the whole case. All too often, defendants in the Crown Court are represented by Counsel who have failed to familiarise themselves with their client's case. It is difficult to believe that it is the interests of justice for clients to be denied the right to choose representation by the lawyer who has prepared the case.

11. Solicitors already act as advocates in cases they have prepared. In the Magistrates' Court, the Government's Legal Aid Regulations, which generally prohibit the assignment of Counsel, make it inevitable that the majority of defendants will be represented by solicitor advocates who have prepared the case. Solicitors' rights of audience in appeals to the Crown Court depend upon a solicitor in the firm having represented the client in the Magistrates' Court. The fact that these long-standing arrangements have proved satisfactory demonstrates that the Judges' concern is unwarranted.

12. Experience overseas confirms this view. It is the norm in Australasia and North America for the lawyer who prepares the case to act also as advocate, and the same applies to jury trials in the Sheriff Court in Scotland. Those jurisdictions do not report any problem of manufacturing evidence. The suggestion that the lawyer who prepared the case should not also act as advocate is a wholly unjustified attempt to raise to the status of a principle a working method which arises from the present artificial restrictions on rights of audience.

THE COMMERCIAL BAR

13. The Judges suggest that commercial pressures would lead to the larger firms, both in London and elsewhere, creating their own in-house advocacy departments. They consider that as those grew in size the Bar would become progressively less attractive to would-be advocates and would eventually largely disappear. It has been suggested that that might occur even though using in-house advocates would be more expensive than an outside barrister, on the grounds that commercial firms compete for clients on quality rather than on price. That argument misunderstands the current reality. Commercial firms compete vigorously for work. Their clients are certainly interested in quality, but they are also determined to secure value for money. A firm which used in-house advocates inappropriately would not keep clients for long.

14. Even City firms are unlikely to have enough advocacy work in a particular specialist field to make it worthwhile recruiting leading members of the commercial Bar. Those firms do not instruct the same barrister for all their commercial work; they pick horses for courses, and no barrister is likely to be the leader in a wide range of matters. If firms took commercial barristers in-house, they would find themselves unable to use them full time on their areas of speciality. They would either be under-employed, or used in areas where

others were more expert. That would not be an attractive prospect either for the firm or its clients, and that is why commercial firms are most unlikely to wish to take leading members of the commercial Bar into partnership. The Law Society opposes multi-disciplinary partnerships, whether of solicitors and barristers or of solicitors and other professionals. Retaining the prohibition of such partnerships would reinforce the position of the commercial Bar.

COST OF ADVOCACY

15. The Bar have argued that if solicitors were to appear as advocates in the Crown Court, the cost to Legal Aid would be substantially increased. But their arguments are based on absurd assumptions. They have assumed that if solicitors were to undertake advocacy on a guilty plea they would take twice as long to prepare for the hearing as the hearing itself would take. So if a guilty plea lasted two hours, the Bar have assumed solicitors would take four hours to prepare for the advocacy. In fact it is unlikely that much additional time at all would be involved. Solicitors must already prepare the case thoroughly. If they were also to carry out the advocacy the time spent preparing for that would to a large degree be offset by saving the time taken to prepare the brief for Counsel. The Bar know this perfectly well. They are represented on the Lord Chancellor's Efficiency Commission which has concluded that in the more straightforward guilty pleas it would be more economical for a solicitor to appear.

16. The annex to this note provides some illustrations of the comparative costs of Crown Court advocacy based on more realistic assumptions. They show that for a typical five-hour jury trial, it is likely to be slightly cheaper to use a solicitor than a barrister, but that for longer cases the cost advantage would disappear. The same pattern applies to guilty pleas. The overall effect of increasing solicitors' advocacy in the Crown Court is thus likely to be a small saving in Legal Aid expenditure. The size of the saving is difficult to predict since it will depend on the extent to which solicitors actually undertake the advocacy. There will also be a saving in CPS expenditure, as the Andrew Report on the Government Legal Service made clear.

17. The Law Society fully accepts that there are a number of cases in which it would be cheaper to use a barrister advocate. On the whole, the longer a case lasts, the more likely it is that it would be cheaper for a barrister to be used. That is one of the factors which solicitors and their clients now take

into account in considering whether or not to brief Counsel, and they will continue to do so when rights of audience are extended. The fact that solicitor advocacy would in some cases be more expensive is no reason to prohibit it. Cost is not the only factor which should be taken into account in determining which advocate to brief. For example, the recent report of the National Audit Office explains that the Crown Prosecution Service continues to use solicitor advocates in the Magistrates' Court, even though they cost substantially more than barristers on current fees, because it is necessary to use solicitors to secure adequate quality.

CONCLUSION

18. The Society does not consider that there is substance in any of the arguments which have been put forward against properly qualified solicitors acquiring full rights of audience in all Courts. The Society is confident that extending solicitors rights of audience in this way would not threaten the continuation of a separate Bar. As it said in its response to the Green Paper, "the specialist expertise, convenience, and in some cases comparative cost effectiveness of the Bar assure it of a continuing future". The Bar does not need to be protected by unnecessary restrictions on those who can carry out advocacy; and clients are entitled to a wider choice.

SOLICITORS IN THE HIGHER COURTS - COSTING

1. The following tables illustrate the cost of legally aided cases in the Crown Court under the present system in which barristers must carry out the advocacy compared with the likely cost if solicitors could do so. The figures are derived from the rates prescribed under the current Legal Aid Regulations.

2. The figures show that for run-of-the-mill Crown Court cases, it would usually be cheaper if the solicitor carried out the advocacy personally rather than employing a barrister to do so. For jury trials, solicitors would be cheaper if the case lasted up to one day. For example, a three-hour case would cost £404 if a solicitor dealt with the case in Court, compared with £491 if a barrister was used. Just over half of jury trials last one day or less. The same principle applies to guilty pleas. Solicitors would be cheaper if the case lasted up to two hours. For example a half-hour case would cost £200 if the solicitor dealt with it and £282 if a barrister was used. Two-thirds of guilty pleas last half an hour or less, and over 90% are dealt with within two hours.

A. JURY TRIALS

Advocacy by Barrister

Hearing Time (hrs)	Barristers' Costs	Solicitors' Costs	Total Costs
1	192	263	455
2	192	281	473
3	192	299	491
5	192	334	526
7	258	384	642
10	319	438	757

Advocacy by Solicitor

Hearing Time (hrs)	Advocacy Costs	Other Costs	Total Costs
1	53	245	298
2	106	245	351
3	159	245	404
5	265	245	510
7	371	266	637
10	530	266	796

Notes

1. The higher standard fee for solicitor's preparation is assumed throughout.

2. Waiting time of one hour, and travelling time of one hour per day is assumed throughout.

3. Where a barrister advocate is used, an allowance of £12 has been made for pre-trial conference fee. Such fees are paid in 35% of cases, and average £34. Half an hour's time in conference has been allowed for solicitors.

4. Where a solicitor advocate is used, it is assumed that the rate for a senior solicitor would be paid.

B. GUILTY PLEAS

Advocacy by Barrister

Hearing Time (hrs)	Barristers' Costs	Solicitors' Costs	Total Costs
0.5	114.5	167.5	282
1	114.5	167.5	282
1.5	114.5	167.5	282
2	114.5	167.5	282
3	114.5	167.5	282

Advocacy by Solicitor

Hearing Time (hrs)	Advocacy Costs	Other Costs	Total Cost
0.5	26.5	174	200
1	53	174	227
1.5	79.5	174	253
2	106	174	280
3	159	174	333

1. The figures for advocacy by barrister assume that Counsel will not be accompanied by a solicitor's representative. The cost would in most cases be higher if the barrister were accompanied.

2. Barrister's costs include £3.50 for conferences. This is based on a payment of about £30 in about 12% of cases.

3. The principal standard fee is assumed for solicitor's preparation, and the cost of advocacy is based on rates for senior solicitors.

4. Waiting time of half an hour and travelling time of an hour is assumed where a solicitor advocate is used.

MISS SINCLAIR

cc Professor Griffiths
Mr. Gray

MEETING WITH THE LORD CHANCELLOR

Could I offer some comments on your brief for the Prime Minister?

(i) Purely on structure, I think the brief would be easier to read if under each issue you included the relevant comment before moving on to the next. As it is one has the impression of tramping through the four issues several times.

(ii) On substance, the justification given in the conclusions for pressing on with rights of audience for Solicitors is pretty feeble. As drafted it amounts to no more than

- the Government will lose face if it turns back
- the Solicitors will be angry

On an issue as important as this, we must determine the merits. The political arguments can only be used as support.

(iii) You have not sought to identify whether there is any variant of rights of audience short of the Green Paper solution. Would there be sufficient benefits to litigants if rights of audience were given only to Solicitors who set up in independent practices and who took instructions on the same basis as that decided for Barristers.

(iv) Do we really want to give up so easily on MDPs where non-lawyers are being brought in? Why would it be so catastrophic if solicitors were able to ~~employ~~ accountants and tax experts? The fundamental issues relating to MDPs seem to me to stem from bringing together the two branches of the legal profession.

AT

ANDREW TURNBULL
7 June 1989

PRIME MINISTER

MEETING WITH LORD CHANCELLOR

The papers are

Flag A - Policy Unit note on the outstanding issues

Flag B - The speaking note given to the Lord Chancellor

Flag C - A Cabinet Office note on the issues

Flag D - Mark Lennox-Boyd's account of his talk with Desmond Fennell.

The central issue remains unresolved - is there an extension of rights of audience which Bar and Attorney would accept. If not, should Government press ahead with its own proposals.

pp (ANDREW TURNBULL)
7 June 1989

PRIME MINISTER P 03462

REFORM OF THE LEGAL PROFESSION
(Meeting with the Lord Chancellor on Thursday 8 June)

1. This meeting provides an opportunity to find out the Lord Chancellor's latest thinking on his Green Paper proposals for legal reform. The most difficult issue is rights of audience about which the Attorney General and the Solicitor General are reported to feel most strongly. You may wish to ask whether he intends to modify any of his proposals and, if so, in what way.

2. You may also wish to have a word with Lord Mackay about procedure. On present plans his proposals will go to E(CP), chaired by the Chancellor of the Exchequer, on 6 July followed by Cabinet on 13 July. He would then make a statement before the Recess, perhaps publishing a White Paper at the same time. He may also wish to publish a broader White Paper in November.

MAIN POINTS

Rights of Audience

3. The Green Paper proposed that all Courts should be open to advocates with appropriate training and experience, whether they were barristers, solicitors or others. We understand the Attorney General has told the Lord Chancellor that he supports the Bar Council's view that rights of audience in the higher Courts should be restricted to barristers and to solicitors who operate as sole practitioners. This would leave the present position virtually unchanged, since most solicitors operate in partnerships and would therefore be excluded. We also understand that the Attorney General has told the Lord Chancellor that he will take this issue to E(CP) and Cabinet, and that he has threatened to resign if his view is not accepted. He has the support of the Solicitor General.

4. The Lord Chancellor has been trying to find an accommodation. One possibility might be for the Law Society to issue certificates allowing solicitors to plead in the higher Courts, but to make this subject to the agreement of the Lord Chancellor and the senior judiciary. The hope is that the involvement of the judiciary would reassure the Law Officers, but that when it came to the point the judges would not want to be seen in public to take a restrictive view. The Lord Chancellor is to discuss this option with the Attorney General later today. Whether he mentions it at his meeting with you will probably depend on the Attorney's reaction.

Other Reforms

5. You may also wish to run through the Lord Chancellor's current thinking on the other major issues:

a. conveyancing. A separate Green Paper proposed that leading institutions should be allowed to undertake conveyancing, because of the substantial advantage to consumers of having "one stop-shop" house buying services. The Lord Chancellor has been concerned that solicitors and institutions should compete on equal terms for this business, but we understand that he now fears that there is no practical means of ensuring this, and may be content to allow the broadening in conveyancing anyway. He is, however, hoping that DTI will be able to bring forward proposals for an Estate Agents code by July, so that the recent concern that consumers should continue to have access to independent financial advice can be met.

b. partnerships of barristers and multi-disciplinary practices involving solicitors and barristers. The Green Paper proposed to remove the statutory prohibitions on solicitors in multi-disciplinary practices, and said it was the Government's view that the Bar Council and Law Society

should change their Practice Rules so that barristers could choose to operate in partnership and both barristers and solicitors could join multi-disciplinary practices. The Bar Council and the Law Society have said that they are unwilling to make these changes. The Lord Chancellor may deal with this by removing the statutory bar but leaving it to the rules of each profession whether such practices should continue to be allowed. Mixed practices would then continue to be disallowed, but it would be open to the new Competition Authority when it is set up to take proceedings against them on competition grounds.

c. certificates of advocacy. The Green Paper proposed that an Advisory Committee on Legal Education and Conduct should advise the Lord Chancellor on the education, training and qualifications of advocates, and that it should be satisfied about the Bar Council and Law Society's arrangements on these matters before it authorised them to issue certificates of advocacy. We understand the Lord Chancellor is now inclined to allow the Bar Council and Law Society to continue to take their own decisions on education, training and qualifications, subject to statutory criteria. The role of the Advisory Council would probably become strictly advisory.

d. contingency fees. We understand that the Lord Chancellor will propose that the regime on contingency fees in England and Wales should be broadened in line with the present Scottish arrangements. This would allow lawyers to take on speculative actions where their fees depended on the action being successful. The more far-reaching options under which lawyers shared in any damages awarded, as in the United States, would however be rejected.

e. legal reform in Scotland. Mr Rifkind is understood to wish to wait until decisions are taken on legal reform in

England and Wales before bringing forward his proposals for reform in Scotland. Rights of audience for solicitors are already wider in Scotland, so that issue may not prove so controversial there. Mr Rifkind may not manage to make a statement of his intentions before the summer recess; if he does not, his ability to introduce his legislation at the beginning of the next Session will need to be monitored. He may want to be seen to be following a different timetable from the Lord Chancellor, so as to emphasise that his review is separate.

Procedure

6. You will wish to confirm the proposed procedure: that is, E(CP) on 6 July followed by Cabinet on 13 July. You may also wish to consider the handling of the Law Officers. There could be a case for inviting them both to E(CP) and to Cabinet, to involve them fully in collective discussion.

R T J WILSON
Cabinet Office
7 June 1989

PAUL GRAY
CAROLYN SINCLAIR

1. Yesterday I saw Desmond Fennell and Peter Southwell, at their request. I explained that I was only able to listen, though I might ask a few questions and that I would be interested to know if there was anything they wished to tell me that was not in the Bar Council's response. I tried, throughout the meeting to concentrate the conversation on rights of audience.

2. The position on rights of audience to non-barristers reached by the Judges in their submission and supported by the Bar is:

a) That audience should be granted only to lawyers.
b) That all advocates should be subject to a single code of conduct under a single professional body.
c) That the conduct of advocates should be controlled by judges.
d) That all advocates should be self employed sole practitioners instructed by a professional, not a lay person.
e) That all advocates should be subject to the cab rank rule and available to do legal aid work. This latter point on legal aid does not, I believe, form part of the Judges' submission, but has been added by the Bar.

3. The Judges' position means, of course, that Solicitors can have full rights of audience provided they act entirely as Barristers do at present. The Bar would not object to such solicitor advocates practising from any address of their choice, though they would have access to the Inns of Court, if they wished, under the Library system proposed in the Bar's response to the Green Paper.

4. I indicated that item (d) was the most contentious from the Government's point of view. Their insistence that advocates should be self employed was to prevent conflict of interest. Their insistence that advocates should be sole practitioners not instructed by lay persons is, of course, to protect the future of an independent Bar.

5. They were not prepared to make any concessions on any part of item (d). However, while I made no comment whatever about any possible Government concessions, I cannot see why the Government could not concede items (a) (b) (c) and (e) and stand firm on (d). I believe the Judges and the Bar would look very foolish if they made a fuss over item (d) in the face of so many other concessions.

6. We briefly discussed other matters of concern, namely the extension of the Crown Prosecution Service, rights of audience of other employed lawyers (e.g. Customs and Excise) and multi-discipliniary practices. However, our discussion was really too brief for me to make any meaningful comments on these points in this note.

MARK LENNOX-BOYD
6 June 1989

CONFIDENTIAL A

PRIME MINISTER 5 June 1989

LEGAL REFORMS

The Lord Chancellor is coming to see you on 8 June to discuss the latest position on the legal reforms. A copy of his speaking note is attached. This note sets out the main issues and charts a way forward.

THE ISSUES

There are five key issues:

(a) rights of audience for solicitors in the higher courts;

(b) allowing banks and building societies to offer conveyancing;

(c) allowing barristers to retain certain restrictive practices;

(d) allowing barristers/solicitors to join multidisciplinary practices (MDPs) involving other professions such as accountants;

(e) the nature of the Lord Chancellor's Advisory Committee.

Contingency fees are likely to be the least troublesome issue. Consultations have revealed little or no enthusiasm for the American approach (which gives lawyers a percentage of any damages awarded). The Lord Chancellor is likely to propose that England and Wales adopt a variant of the Scottish speculative action. This should be relatively uncontentious (although the Bar are opposed to any change).

(a) RIGHTS OF AUDIENCE

This is the heart of the proposed reforms. The Green paper proposals would allow solicitors to practise in the higher courts (and become judges) provided they completed prescribed training in advocacy. Such a reform would finally resolve the debate about a divided profession.

Bar Council/Judiciary views

The Bar Council and most of the judiciary are totally opposed to rights of audience being extended to anyone who is not a "sole practitioner". This means that they would deny rights of audience - except perhaps for guilty pleas in the Crown Court - to anyone working in a firm of solicitors. Their argument is that without such a rule, the independent Bar would gradually disappear. They argue that this would reduce consumer choice, increase costs and fundamentally change the nature of our present legal system.

Law Society Views

The Law Society welcomes the proposal that those of their members who undertake prescribed training should have full rights of audience in the higher courts.

Attorney-General's views

The Attorney-General shares the view of the Bar Council on rights of audience. He has threatened to resign if the Lord Chancellor goes ahead with this aspect of his proposals.

COMMENT

The key difference between the Government and the barristers is whether or not the independent Bar will survive if rights of audience in the higher courts are extended to solicitors in partnerships.

It is not of course essential to have an independent Bar (the USA and Canada do not). But those who favour it argue

- that it promotes the highest standards in oral advocacy (practitioners gaining more experience from day-in day-out court work than would be possible for a solicitor working in a partnership);

- that it is crucial to the English system of justice in which the judge relies heavily on the legal expertise of advocates (judges in the USA have legal clerks to help them);

- that a divided profession is both cost-effective and good for consumer choice insofar as solicitors have access to any available barrister under the 'cab rank' rule.

- that it is the excellence of the commercial Bar, and the general efficiency of the English legal system, which attracts much international legal work to the English courts.

The Lord Chancellor is on record as saying that he favours the continuance of an independent Bar. He does not believe that his proposals would spell the Bar's demise. In the longer run he believes that they will help to ensure a high level of ability among advocates and judges. This is currently under threat as more and more of the best law graduates choose the solicitor route rather than the Bar. If nothing is done, the Lord Chancellor believes that standards in court will inevitably decline.

Nobody can say precisely what is going to happen as a result of the Green Paper proposals. Probably change will be gradual, with many existing barristers remaining as now, and most

existing solicitors choosing to instruct them rather than go to court themselves.

In the longer run the independent Bar will either survive because it does have the strengths its proponents claim; or it will not. The most likely result is a smaller Bar than otherwise, but possibly a better one (it has been argued that the rapid expansion of the Bar in recent years has led to lower standards).

It can be said confidently now that the Bar are wrong in saying that wider rights of audience would increase costs. The legal aid bill would not go up as a result of the proposals. It could well come down. It is less easy to say what would happen to the fees charged for commercial work. But market forces would be at work, and there would be competition between self-employed advocates and firms of solicitors offering specialist commercial advice.

(b) OPENING UP CONVEYANCING

The Green Paper proposes to give effect to the provision in the Building Societies Act 1986 which would allow banks, building societies and other institutions and individuals to offer conveyancing services. Practitioners would be authorised to offer such services provided they complied with a strict set of conditions.

The effect would be to enable financial institutions to offer a "one-stop shop" for sale and purchase of houses. While popular with consumer organisations, this proposal comes at a time when there is growing concern that the buying and selling of houses is not as well-regulated as it should be.

Law Society views

The Law Society's formal position is that they oppose allowing banks etc. to offer conveyancing services. They argue that

this would deprive consumers of independent advice, and, since conveyancing produces nearly a third of solicitors' income, would lead to a reduction in the number of independent firms of solicitors - again reducing choice.

Informally, the leaders of the Law Society accept that this change will happen. They say that the more go-ahead firms of lawyers are already looking to new areas of work to balance the loss of fees from conveyancing. The future they see would involve larger partnerships offering a wider range of services, including advocacy services.

Bar Council views

The Bar Council have lined up with the country solicitors in opposing the Green Paper proposals on conveyancing. This is an important alliance. The more traditional country solicitors have little interest in wider rights of audience.

COMMENT

The key issues here are whether the conveyancing proposals will

(a) limit access to legal advice by reducing the network of solicitors' firms;

(b) reduce the safeguards for the most important financial transaction in most people's lives.

Two points can be made about (a). First it is not clear that the number of outlets for legal services would be reduced as a result of the proposals. Small firms heavily dependent on conveyancing may be bought up by larger ones in the same area (this is happening already). But the larger firms may well keep the same number of branches. The demand for legal services is growing.

Second, the present network of solicitors' firms is not well matched to demand. Solicitors are heavily concentrated in areas with high property/home ownership. But much of the demand for legal services - for matrimonial and industrial tribunal cases etc - arises in urban areas where solicitor coverage is poor.

(b) is a problem which would exist without the conveyancing proposals. There is already concern at the extent to which building societies press new endowment policies supplied by their own insurance companies on those to whom they are supplying mortgage finance. 80-90 per cent of all new mortgages are now linked to endowment policies. The fact that this has happened despite the existence of independent legal advice on house purchase suggests that the safeguard provided by independent solicitors is not what the Law Society would claim.

The Lord Chancellor proposes that his conveyancing proposals should be accompanied by a package of measures designed to improve the position of consumers buying and selling houses. An important element will be proposals to regulate estate agents, now often owned by building societies but not subject to the same degree of regulation as the latter.

It will be vitally important to link the Green Paper proposals on conveyancing with visible improvements in the system for buying and selling houses.

(c) ALLOWING BARRISTERS TO RETAIN CERTAIN RESTRICTIVE PRACTICES

The Government's White Paper on Restrictive Trade Practices, due next month, will propose that professional organisations such as the Bar should have to satisfy the new competition authority that their rules are not anti-competitive. The Bar's rule that its members should be sole practitioners

who take instructions only from other lawyers could well fall foul of this test.

Bar Council Views

If the Government presses ahead with wider rights of audience for solicitors in partnerships, the Bar will argue that they should at least be able to maintain their present rules obliging their members to be self-employed, and denying direct access by lay clients.

Law Society Views

The Law Society would have no objection to the Bar continuing to impose restrictive practices on its own members provided that qualified solicitor-advocates in partnerships had rights of audience in all courts and were free to accept instructions from lay clients.

Comment

It is not clear why the Bar should want to continue to place restrictions on its own members if solicitor-advocates were free to operate without them. But if, as is likely, they do press for this, the Government will need to consider the effect on its competition policy. One option would be to legislate specifically to exempt the Bar from the restrictive trade practices legislation. But this could raise problems in relation to other professions such as the doctors.

The only argument for the Government making a concession to the barristers in this area is to give them some assurance that the independent Bar as they know it will continue. It is difficult to see how such a concession could be squared with competition policy under the proposed restrictive trade practices legislation. This is David Young's territory rather than that of the Lord Chancellor.

(d) MULTIDISCIPLINARY PRACTICES (MDPs)

The Green Paper says that the Government sees no reason why barristers or solicitors should be prevented from joining partnerships involving non-lawyers. Such partnerships are generally not permitted in other OECD countries.

Bar Council/Law Society views

Both the Bar Council and the Law Society are opposed to their members being allowed to form partnerships with non-lawyers. They fear that this would lead to the large City firms of accountants swallowing the legal profession whole. In the case of the barristers, this adds to their fears about the survival of the independent Bar.

COMMENT

The arguments against allowing lawyers to form partnerships with non-lawyers are not particularly convincing, although they have prevailed to date in other countries including the USA. On the other hand, this would be an area where the Government could offer a concession without affecting the thrust of its reform proposals. There is no real consumer pressure for such practices eg from business. The suggestion that lawyers should be allowed to join MDPs came originally from David Young. He has indicated that he would be prepared to drop it as far as barristers are concerned if the Lord Chancellor would find this helpful. He would probably not resist dropping it for solicitors as well if the Lord Chancellor judged that this was important politically.

(e) LORD CHANCELLOR'S ADVISORY COMMITTEE

The Green Paper proposes that the Lord Chancellor's Advisory Committee on Legal Education (set up in 1971) should be

"reconstituted as a vigorous and active standing committee, dealing with both education and conduct, which would meet regularly".

It would have a majority of lay members appointed by the Lord Chancellor after wide consultation. In addition there would be 2 academic lawyers; 2 barristers appointed after consultation with the Bar Council; and 2 solicitors appointed after consultation with the Law Society. The chairman would be a judge.

This proposal has been widely criticised as control of the judicial process by the executive eg by Lord Beloff.

Bar Council views

The Bar Council argue that the education and training of lawyers must be independent of government control. They link this to the independence of the judiciary. They object strongly to the proposed degree of influence of the Advisory Committee over the professional bodies representing the legal profession. They argue instead for a legal education committee dominated by lawyers, and serviced and financed by the professional bodies.

Law Society views

The Law Society welcome an independent advisory body with a lay majority to deal with the matters proposed in the Green Paper. But they think that the present proposal would put too much power in the hands of a Government Minister. They argue that the Committee should have more independence from the Lord Chancellor (eg in the matter of appointments to it).

COMMENT

The Lord Chancellor has already proposed to the judges that the Advisory Committee should be obliged by law to obtain

the concurrence of the Heads of Division on their recommendations. This has gone down well. Other changes could be made which would help to emphasise the Committee's independence from the Lord Chancellor. The key point for the Government is the lay majority (otherwise we will have the kind of deadlock which paralysed the Marre Committee).

CONCLUSIONS

The Government embarked on the legal reforms:

- to remove restrictive practices which limit the pool of talent from which advocates and judges are drawn.

- to improve consumer choice (the consumer organisations have long pressed both for changes which would allow people to be represented in court by a solicitor who knows them and their case intimately; for the "one-stop shop" for conveyancing).

- to cut through practices which involve duplication work and add unnecessarily to legal costs.

If the Government is to achieve these objectives - which are widely supported outside the legal profession - it must stand firm on its proposals on wider rights of audience for solicitors in partnerships, and on conveyancing.

The Bar's counter-proposal - that solicitors should have rights of audience provided they act as barristers do now - would not meet the bill because

- the requirement to be self employed would deter many lawyers, thus limiting the pool of advocacy and future judicial talent.

- it would not be possible for consumers to be represented in court (by the lawyer whom they knew).

- it would remain necessary to employ as many lawyers as now, thus removing the cost savings which should arise for shorter criminal cases under the Green Paper proposals.

It is important that the Government remains equally firm both on rights of audience and conveyancing. Although the majority of solicitors are not currently very interested in wider rights of audience, a concession to the barristers on this point while proceding with the conveyancing proposals would be bitterly received as evidence of the power of the ~~authority~~ minority branch of the profession. The Law Society are very nervous that this might happen. The Government would be pilloried in the media if it did.

Allowing barristers to retain their restrictive practices in a world in which solicitor-advocates practise without them looks difficult to reconcile with the Government's competition policy. But if the Lord Chancellor judged it important, in terms of relations with the Bar and the judiciary, to find some way through on this, David Young would be disposed to be helpful.

Concessions could be offered on MDPs and on the nature of the Advisory Committee, without affecting the main thrust of the reforms.

CAROLYN SINCLAIR

13

CONFIDENTIAL

D R A F T

SPEAKING NOTE FOR MEETING WITH THE PRIME MINISTER

1. The period of consultation has now ended and a detailed analysis of responses is under way. On a first and purely statistical view the majority of responses do not favour the proposals. But this is hardly surprising since 67 per cent of all responses are from lawyers. However there have been positive reactions from organisations representing consumer interests and even from some lawyers with independence of mind.

2. In the debate in the Lords and subsequently the Opposition have given their main attention to legal aid questions. This topic was not dealt with in the Green Papers since legal aid was the subject both of a White Paper and of legislation last year. The new Legal Aid Board has now taken up its responsibilities and has issued a first report. However, the question of any extension of the scope and eligibility for legal aid remains and will be addressed as part of a general White Paper proposed for the Autumn.

3. In that White Paper the Government's policy on access to justice will be set out - dealing with legislation concerning children leading to a family jurisdiction, the Civil Justice Review, legal aid and the reform of the legal profession. It is suggested that the Paper be published before the Courts and Legal Services Bill is introduced into the House of Lords.

4. Returning to the Green Papers some compromises are possible in the areas of the Advisory Committee and Competition Policy but the main issues are those of rights of audience and conveyancing. Whilst great play has been made with the threat of 'state control' in the debates there is every prospect that a revision of the original proposals for the Advisory Committee to make independence more manifest will dispose of this objection. The positions of the Bar and the Law Society will be given explicit statutory recognition.

5. But rights of audience remains the primary issue. The proposal now under discussion envisages that barristers should continue to achieve such rights without delay but that solicitors, to qualify, will have to undergo prescribed training over a period of some years. This has been accepted by the Law Society on the basis that solicitors have additional aspects of the law to study.

/Cont'd. ...

There is no intention of a series of licences rather it will be for the professional body concerned to authorise practitioners after satisfaction as to training. This should dispose of the criticism of licensing. The Bar, however, is totally opposed to any such extension even to qualified solicitors after a long period of training. The leaders of the Bar offer instead an improved transfer scheme so that any solicitor wishing to pursue advocacy can become a barrister. They point to the risks of partnership for advocates and stress the advantages of the 'cab-rank' rule. The Bar sees extension of rights of audience to solicitors and to employed lawyers in the Crown Prosecution Service, the Customs and Excise and the Inland Revenue as inimical to the survival of the independent Bar. The Director of Public Prosecutions has urged that qualified members of his staff should be given such rights. The Law Society is committed to achieve rights of audience.

6. The Attorney-General has expressed strong reservations on this question.

7. The response of the judges of the High Court and of the Court of Appeal broadly supports the Bar but makes much of the need for the concurrence of Heads of Division in any recommendations by the Advisory Committee. At a meeting on 25 May with a group of Judges nominated for discussions on the Green Papers the offer of a stipulation in legislation that such concurrence should be required was well received. Further meetings are to take place both with the Judges and the profession.

8. On Conveyancing the Law Society is concerned at the implications of opening up the market to the building societies and the banks - they also urge the need for regulation of estate agents. In fact, in co-operation with DTI and other concerned departments a review of the house purchase market is to be undertaken. The proposals for extension of conveyancing to the major financial institutions prescribe certain safeguards to preserve the network of legal services offered by solicitors' firms throughout the country, such as provisions concerning subsidisation and the need for the offer of a personal interview with the prospective purchaser.

9. Finally, on contingency fees the current proposal is for a modest extension of the Scottish speculative action to England and Wales with appropriate provisions as to costs. There is no question of any adoption of American systems.

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SUMMARY

The overall position is that considerable and significant variations have taken place in the light of the consultations following the publication of the Green Paper. But the principles of competence and conduct remain. The opposition of the majority of the judiciary and the Bar to any major reform on rights of audience is settled and determined yet the measure of support from the general public and from non-lawyer members of both Houses is re-assuring. The expectations of the Law Society as to rights of audience are high. There is a real need to resolve this long-standing demarcation dispute which brings discredit upon the legal profession and on the administration of justice.

Raymond Potter

CLSG
Rm 607 (TH)
210 8719
2 June 1989

10 DOWNING STREET

Paul,

I spoke to David Cullum about 6/6
Ecos. He prefers to arrange
two separate meetings. The
first, with the LC alone is
scheduled for 17.30 on
Thursday 8 June.

Can you liaise with
Paul Stephen to see if the LC
wants to put anything in
writing ahead of the meeting.
There is a political nuance
which I can explain
orally that may make him
reluctant to commit
anything to paper.

A.

1/2

Ref. A089/1416

MR TURNBULL

Legal Reforms

I mentioned to the Prime Minister that the Lord Chancellor was likely to seek a word with her about his further direction on the legal reforms after the Whitsun break.

2. A further point is that you might like to consider involving the Chancellor of the Exchequer, as Chairman of E(CP), when the Prime Minister and the Lord Chancellor talk about modifications to be made in the Green Paper proposals. It may be best to arrange the Prime Minister's talk with the Lord Chancellor in two stages: the first part on the most political and personal aspects between the Prime Minister and the Lord Chancellor on their own; and to bring in the Chancellor of the Exchequer for the second stage about specific modifications which might be made to the Green Paper proposals.

F.E.R.B.

ROBIN BUTLER

31 May 1989

CONFIDENTIAL

bcc Mark Lennox Boyd
Paul Gray

RA

10 DOWNING STREET

LONDON SW1A 2AA

R Potter Esq
Lord Chancellor's Department
Trevelyn House
30 Great Peter Street
LONDON SW1

18 May 1989

Dear Raymond,

LEGAL REFORMS

Having read the Bar Council's submission, talked to more lawyers and listened to the Lord Chancellor at a private dinner, I would like to float two changes to the proposals in the Green Papers over and above those contained in your draft E(CP) Paper.

Conveyancing

I am confident that we are right to go ahead with the proposals on conveyancing. The need here is to protect the consumer from being pressed by building societies into accepting an endowment mortgage which he does not need. This is happening already, so it is not clear that independent lawyers are in practice warning clients against such arrangements; or, if they are, that their advice prevails against pressure on the client from the building society.

Allowing banks and building societies to offer legal services in-house makes it all the more important to ensure that they cannot exert undue influence on their clients, eg to use tied insurance companies for house cover, or buy life insurance which they do not need. This is a matter for regulation under the Financial Services Act. You are already exploring options for tackling the problem.

But no-one has really been able to argue convincingly that "in-house" lawyers will lead to poor conveyancing as such.

Organisation of the legal profession

I am less confident that our other proposals will ensure the continuation of the Bar, or something like it, in the longer run. If this is something which the Government wants, and the Lord Chancellor has said that he does, I think we need to make some modifications to our proposals to give present and future members of the Bar greater confidence in its survival.

CONFIDENTIAL

We cannot budge on wider rights of audience for solicitors. This is the cornerstone of the Green Paper reforms. Any back-tracking, such as giving solicitors rights in the Crown Court but not in higher Courts, would be protrayed as a complete climb-down by the Government in the face of pressure by the Bar.

Moreover, rights of audience and access for solicitors to the highest judicial appointments are the essential counterpart, politically, to allowing banks and building societies to offer in-house conveyancing. The second will be very unpopular with solicitors. It would be intolerable to them if the Government were to ignore their views on conveyancing, but was swayed by the views of the Bar Council that solicitors should continue to be excluded from the top of the legal profession.

We therefore have to look for ways of ensuring the continuation of the Bar while opening up rights of audience and appointments to solicitors. Australian practice seems to offer a way forward.

The two changes I would suggest are:

(i) Continuing to allow the Bar Council to ban its members from joining practices involving other professions. No other OECD country appears to allow MDPs for lawyers. We have already talked about this, and you are looking at ways of squaring such an approach with the restrictive trade practices legislation.

(ii) Including a rule that, on appointment to Queen's Counsel, advocates should become sole practitioners. This would mean that advocates in firms of solicitors would need to cut their links and move to something like the independent Bar.

The Bar Council argue that independent Bars have survived in Australia because a rule on the lines of (ii) exists in all States (as well as in New Zealand). They might just be right. Insofar as the Lord Chancellor attaches importance to the type of specialised advocacy skills which characterise Court procedure in the UK, we should perhaps pause a little before going further than any other Common Law country which has a de facto split in the profession (Canada and the USA do not).

It seems to me that a rule on the lines of (ii) would still allow us to secure many of the advantages of the main reforms:

(i) The profession of advocacy (and ultimately the judiciary) would be opened up from the bottom. Law graduates could join firms of solicitors and only later make the change to independent practice on taking silk. This could help to ensure that the best graduates - who are increasingly taking the solicitor route - were not lost to advocacy and the judiciary.

(ii) Solicitors would compete on equal footing with barristers to become silks and judges. There would be no compromise on rights of audience for solicitors. But those who wished to become silks would need to make an important career decision to go into independent practice.

The justification for the rule would be that the effectiveness of the English (and Scottish) Court systems depend on a corps of senior advocates practising day in and day out without the distractions of running a business. If we value this, and the support which it gives to the judiciary, we need to find a way of squaring such a rule with the restrictive practices legislation. Perhaps the simplest answer would be to cover the rule specifically in the legislation on the Green Paper reforms.

The political attraction of this approach is that it would recognise the value of an independent Bar, while opening up the highest appointments in the legal profession to solicitors. It would clearly distinguish the post-reform legal professions in England (and Scotland) from the American. It would provide certainty that a corps of self-employed advocates would continue after the reforms.

I would very much welcome your views on the above. No doubt I have, in ignorance, glossed over a number of difficulties. But it seems to me that there are considerable advantages in not going further than the Australians who have maintained independent Bars de facto.

I am copying this letter to Paul Stockton.

Yours sincerely,

CAROLYN SINCLAIR

LORD CHANCELLOR'S DEPARTMENT
TREVELYAN HOUSE
GREAT PETER STREET
LONDON SW1P 2BY

11th May 1989

Dear Lord Chancellor,

I enclose a copy of an article which has appeared in this week's Private Eye. It may have been drawn to your attention already. It has caused great irritation and offence within the All Party Barristers' Group and also to Sir Gordon Borrie QC.

I enclose a copy of the Minutes of the meeting referred to. I am sure that you will agree that the Private Eye article is a gross misrepresentation of them.

I am sure that you would have taken the Private Eye article with a pinch of salt anyway: nevertheless I think it important to set the record straight, particularly when a slur is cast on such a distinguished and fair public servant as Sir Gordon.

Yours ever,

PA.

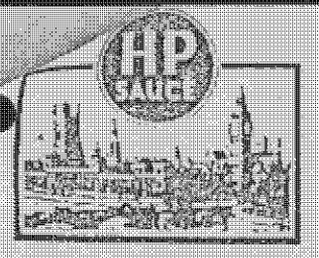
cc Mr. Cropp

Sir G Borrie appears to have gone much further in his criticisms of the Green Papers in talking to the All Party Barristers' Group than he did when he came to talk to us. I don't think the Private Eye article is far off the mark.

19/5

With the compliments of
W. ARNOLD

Lord may it in Parliament



● "EXCLUSIVE" was the *Observer*'s description of its story about bribery in the multi-billion dollar arms deal with Saudi Arabia — a story which of course had appeared several weeks previously in the *Eye* (number 712).

The fact that our story has at last been taken up by someone else bodes ill for the Government, since the Tornado deal is coming apart at the seams. The increasing evidence that the fighter-bomber planes don't work and are very easy to fly into the ground, especially when the pilots are not properly trained, has led Jordan, and even Thatcher's old benefactor the Sultan of Oman, to refuse Tornados that they had originally agreed to buy.

When Thatcher visited West Germany's Chancellor Helmut Kohl recently, the press concentrated on the leaders' disagreement over the arming of NATO. Mercifully for Thatcher the hacks left out the seething attack made by the Kohl on the secrecy and mendacity with which the Saudi arms deal (which includes the German government) has been handled by the British.

Meanwhile the National Audit Commission is anxious to find out the names of the two recent favourites in the Saudi court who cashed in on the bulk of the "commissions" (ie bribes) over the deal. The two men are said to be living in palatial conditions in west London.

lary of an MEP — at £24,106 that amounts to £8,035. On average the daily subsistence for being away from home on European business would be £15,900 — say 150 days at £106 per day — only a fraction of which need be spent.

In addition to this is an office and secretarial allowance of £48,120. This figure is made up of an office allowance of £18,360 and a research and secretarial allowance of £29,760. Although the latter is paid directly to the employee concerned, there is nothing to stop the MEP-cum-MP employing — without any questions asked — a wife, mistress, son, daughter or other relative. In addition to this are MP's expenses which amount to £22,588. Again relatives or friends could be employed.

When the MEP-cum-MP travels to Europe he or she is paid on the basis of using a first class air ticket. With cheap standby and "back to back" tickets, which many MEPs use, £2,000 extra can be made on basic travel.

While at home the MEP-cum-MP could make a further £2,000 year profit on car travel. And of course as an MP living outside Inner London there would be the additional allowance of £9,468.

So the MEP-cum-MP would coin it in each year as follows:

Salary as MP	£24,107
Salary as MEP (third of total)	£8,035
Daily subsistence as MEP	£15,900
Office and secretarial expenses as MEP	£48,120
Office and secretarial allowance as MP	£22,588
Additional allowance as MP	£9,468
Profit on basic travel as MEP	£2,000
Profit on car travel as MP	£2,000
TOTAL	£132,218

All of this except the salary would be tax [illegible]

THE all-party barristers' group in Parliament continues to hold packed meetings in defence of barristers' bulging wallets. But those at the meeting on 26 April may come to regret it.

They included Lord Ackner, Lord Airedale, Viscount Bledisloe, Lord Elwyn-Jones, Lord Grantchester, Lord Hailsham, Viscount Hanworth, Lord Lloyd of Hampstead, Lord Lowry, Lord Mayne, Lord Reay, Lord Renton and Lord Tranmire.

The problem these august gentlemen face is the constitutional row that is bound to arise when it becomes public knowledge that they summoned Sir Gordon Borrie QC, director-general of fair trading, to help them in their campaign against the Government.

Borrie did his stuff and, according to the minutes, strongly criticised many of the proposed Bar reforms saying they threatened the existence of the Bar and its independence and that they would lead to less consumer choice. He attacked the Lord Chancellor personally for not having done proper research and for not making any concessions during the House of Lords debate.

As an exercise in free speech all this is fine; but Borrie is a senior public servant who is paid out of public funds. Nobody can remember when a senior public figure last went along to a secret meeting of a pressure group and sought to undermine the position of the Lord Chancellor in particular and the Government in general.

The other problem the eminent barristers face is that when the DTI report into the takeover of the House of Fraser is published, Borrie's reputation will not be at its height. As one MP who is also a barrister put it: "We can't afford to have someone at the helm of the OFT who believes that the al Fayed standards of fair trading are those which should govern policy."

'Backbiter'

MINUTES OF THE MEETING OF THE ALL PARTY BARRISTERS GROUP
HELD ON TUESDAY 11th APRIL 1989

Present

Lord Ackner PC
Lord Airedale
Viscount Bledisloe QC
Sir Richard Body MP
Alex Carlile QC MP - Secretary
Lord Elwyn-Jones CH PC QC
Lord Grantchester CBE QC
Patrick Ground QC MP
Lord Hailsham of St Marylebone KG PC CH FRS DL
Viscount Hanworth
Dame Elaine Kellett-Bowman DBE MA MP
Ivan Lawrence QC MP - Chairman
Lord Lloyd of Hampstead QC
Lord Lowry PC
Rt Hon John Morris QC MP - Vice Chairman
Lord Moyne
Lord Reay
Lord Renton PC KBE TD QC
Ivor Stanbrook MP
John Taylor MP
Lord Tranmire PC KBE MC

In Attendance
Bill Blackburne QC
Stephen Byfield
Peter Cresswell QC
Simon Gordon
John Mottram CB LVO OBE

Apologies were received from
Rt Hon Peter Archer, QC, MP, Menzies Campbell CBE, QC,
Baroness Elles, Lord Lloyd of Kilgerran CBE, QC and
Lord Simon of Glaisdale PC

ITEM	ACTION

Minutes of Last Meeting

The minutes of the meeting held on March 8th 1989 were agreed and signed.

Matters Arising

None

Group Business

Peter Cresswell reported on the Bar's current position. Lord Gifford's speech and the idea of purse sharing was raised - Peter Cresswell explained that the Bar was opposed to purse sharing, as it could not be an alternative to proper pupilage, scholarships and grants from the Inns, the monies for which had all increased markedly over the last twelve months.

The response of the group to the Green Paper was discussed and it was decided to devote the next meeting to discussion on the group's position.

Address by Sir Gordon Borrie, QC, Director General of the Office of Fair Trading

Sir Gordon Borrie outlined his views on the Green Paper. He said that elements of the proposals threatened the existence of the Bar notably because recruitment would suffer. A reliance on market forces was important in many areas of the economy but their application to the legal system should be limited - market forces are of little use to those who cannot afford legal services at all and must be balanced against the administration of justice.

Sir Gordon commented that direct access to the Bar by laymen and mixed practices both contradicted the opening statement in the Green Paper which referred to increasing consumer choice. The number of 'independent consultant practitioners' available in an independent Bar would inevitably fall. He noted that none of the Green Papers dealt with underfunding of legal aid.

Sir Gordon commented that the Government will have least difficulty accommodating criticisms relating to the constitutional position of the advisory committee.

While welcoming some widening of rights of audience, Sir Gordon felt that the Green Papers were going too fast, would damage the independent Bar and thus reduce consumer choice.

Lord Ackner asked Sir Gordon if he had any advice as to how the Government could be persuaded to change its mind. Sir Gordon responded tht he felt it strange the Lord Chancellor had not given any concessions at all during the debate in the House of Lords on April 7th. He explained that, in his view, the Bar has not as yet indicated sufficient willingness to end restrictive practices of its own accord. This should include some compromise on rights of audience.

Ivan Lawrence asked how allowing solicitors rights of audience in the Crown Court could be reconciled with the effect on the Bar.

Sir Gordon explained that limited rights of audience (guilty pleas, perhaps) could be given to solicitors in the Crown Court without resulting in the destruction of the Bar. He noted that the Civil Justice Review will result in devolution from the High Court to the County Court and pressed the Bar Council and the Group to put their minds to some kind of compromise.

Lord Renton asked whether, in view of Sir Gordons opinion on direct access to laymen, he approved of the Bar's move to give direct access to professional bodies. If this is a restrictive practice and the door has been half opened, why close it again to laymen?

Sir Gordon said there is a distinction between the two. Direct access to all laymen will cause chambers to increase back up systems to an extent where they will have the same overheads as solicitors firms. In effect this is fusion and is not desirable.

Patrick Ground asked if Sir Gordon had read Lord Wilberforces speech on competition in professions and asked his opinion on competition policy as it applied to professional bodies.

Sir Gordon made a distinction between different types of professions - for instance he felt it correct that the opticians monopoly had been ended. He said that competition policy has to be applied on an ad hoc basis to satisfy the interests to the consumer. For instance it will be important to examine exemption claims to the Green Paper on Competition.

Ivan Lawrence asked if the OFT would be consulted on the Green Papers.

Sir Gordon explained that the OFT was consulted prior to the publication of the Green Papers.

Lord Bledisloe commented that many of the current difficulties stemmed from differing interpretations of the effects of the Green Paper. He asked if Sir Gordon felt that a properly researched impact study would be of assistance and whether the OFT was a suitable body to carry out such a survey.

Sir Gordon commented that the speed at which the proposals were drawn up and are now being implemented is an indication of the lack of research supporting them. He said that the OFT was not a suitable body to conduct this research but that outside consultants may find it an appropriate area of study.

Ivan Lawrence thanked Sir Gordon for attending.

Any Other Business

None

Date of Next Meeting

5pm April 26th, Committee Room 18.

fst. 02.20.4.89

Treasury Chambers, Parliament Street, SW1P 3AG

The Rt Hon Tom King MP
Secretary of State for Northern Ireland
Northern Ireland Office
Whitehall
London
SW1A 2AZ

28th April 1989

Dear Tom

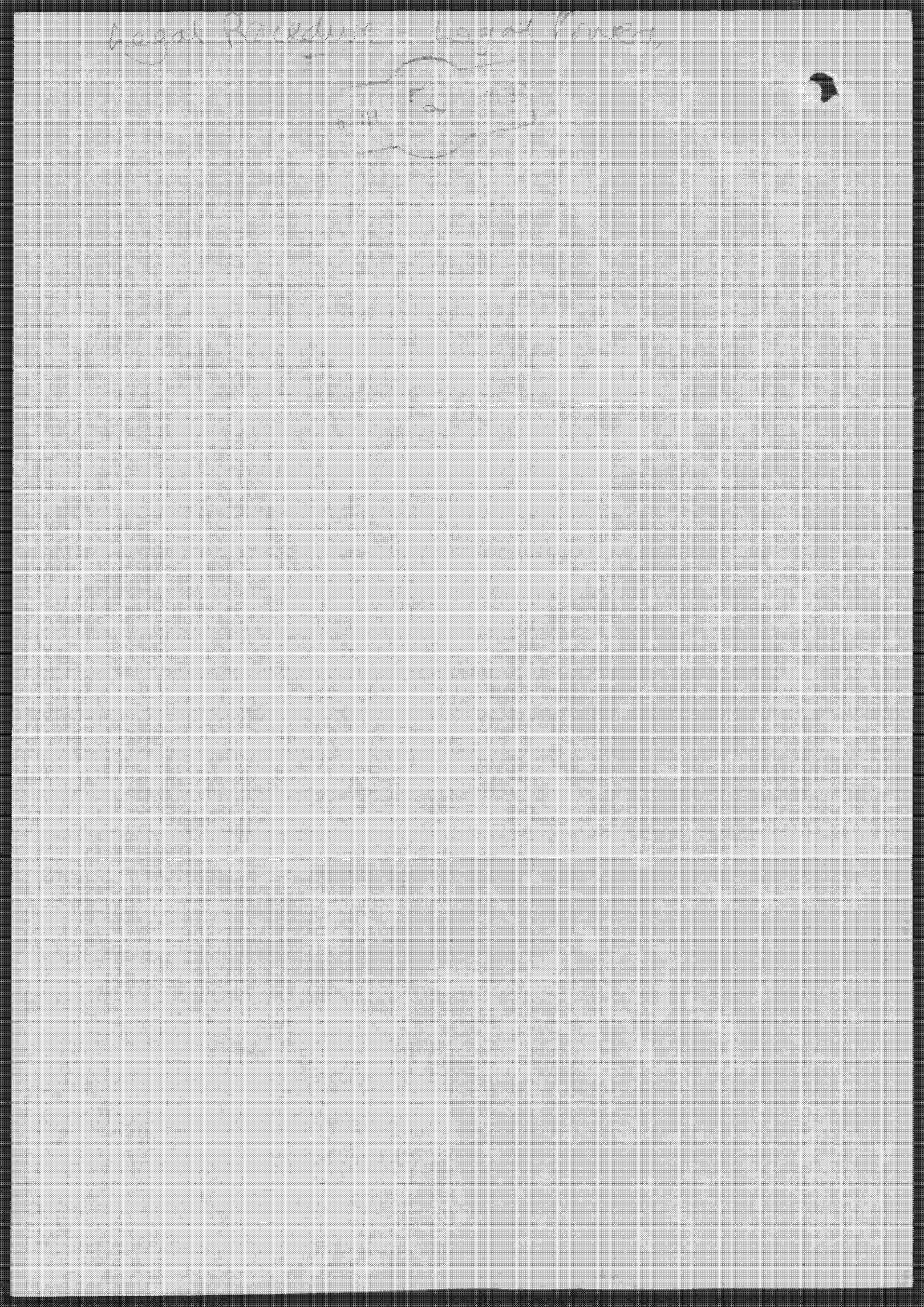
Thank you for sending me a copy of your letter of 4 April to James Mackay seeking agreement to early publication of your Northern Ireland supplement to his Green Papers on the legal profession.

I am fully content with the approach that your paper adopts and hope that you will be able to publish as soon as possible. I have seen Francis Maude's letter of 17 April and agree that it would help to allay possible misunderstanding if you were to include in the introduction a reference to the interests of justice as well as the Government's competition policy.

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

Yours

NORMAN LAMONT


Legal Realism
Legal Formalism

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

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

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

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

LM5ACD

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

PRIME MINISTER

MEETING OF JUDGES

AT AROUND 2.30PM TODAY THE JUDGES COUNCIL ARE ISSUING A STATEMENT TO THE EFFECT THAT AT THEIR REQUEST, THE LORD CHANCELLOR HAS AGREED TO EXTEND THE DEADLINE FOR COMMENTS ON THE GREEN PAPER BY 4 WEEKS. IN VIEW OF THIS WELCOME CONCESSION THE MEETING OF JUDGES PLANNED FOR MONDAY WILL NOW BE MOVED TO SATURDAY 20 MAY.

THE FULL TEXT IS BEING FAXED TO US.

ANDREW TURNBULL

13 APRIL 1989

LORD CHANCELLOR'S DEPARTMENT

PRESS NOTICE

Trevelyan House · 30 Great Peter Street · London · SW1P 2BY
Telephone: Direct lines 01-210 8512 or 8510

13 April 1989

The following statement by the Judges' Council is issued on their behalf by the Lord Chancellor's Department.

STATEMENT: THE JUDGES' COUNCIL

The Green Papers were published by the Lord Chancellor on January 25th this year. Comments on the proposals were invited by 2nd May. The difficult task of obtaining and collating the views of over 100 judges in that time was delegated to a Committee of four. Their draft report has necessarily to be considered and approved, amended or rejected by the body of judges as a whole.

The purpose of the meeting arranged for April 17th was to consider the draft report and to formulate rationally and constructively the collective response of the judges to the proposals on the future shape of the legal profession. It is an important part of the judges' official duties that they should do this, especially in view of the far reaching nature of the proposals. Such meetings are held, exceptionally, in court hours when it is impracticable to do otherwise. The judges are more anxious than anyone to avoid any disruption of court services.

The proposals do not effect the judges personally. Their meeting is not intended to be nor is it a protest of any sort.

The Lord Chancellor has now at the request of the Judges' Council agreed to extend to them the deadline for the Judges' response to the Green Paper for 4 weeks. Because of that welcome and generous concession to the Judges it has been possible to re-arrange the meeting scheduled for April 17th. It will take place on Saturday May 20th.

This will have the added advantage that the Lord Chancellor will be able, as he wishes, to address the meeting. He would have been overseas on April 17th.

EARLY DAY MOTION NUMBER 708

"Industrial Action by Judges"

SPEAKING NOTE

[I do not think I can arrange an early debate on this Motion but] I believe that the public will very much welcome the decision of the Judges' Council to postpone this meeting to a Saturday.

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 0PW

4 April 1989

Dear Jam,

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,

TK

Enc

PM/21366

DAS

DS2 APY

SUBJECT ac
Marks

cc C. Sinclair (PV)

10 DOWNING STREET

LONDON SW1A 2AA

From the Private Secretary

4 April 1989

Dear Paul,

LEGAL REFORM GREEN PAPERS

The Lord Chancellor came to see the Prime Minister yesterday to discuss the latest position on the proposed reforms. He said that the proposals had been issued in the form of Green Papers to make clear that they were the basis for consultation. If there were detailed points on which respondents put forward a strong case for changes, then these could be considered. The Prime Minister supported this approach; it would not be appropriate to retreat on the broad lines of the Lord Chancellor's reform package but details could be modified where a good case had been made.

In discussion of possible detailed changes, the Lord Chancellor raised three possibilities:

- As regards the so-called "state control" aspects, it would be very easy to make some change. Although he recognised there were disadvantages, in the extreme an amendment might take the form of leaving the Law Society alone to decide which of their members would have rights of audience.

- Fears had been expressed about large firms of solicitors becoming overly dominant in the profession. To counter these worries, it might be possible to introduce a requirement that an Advocate should be required to act for anyone seeking his or her services, whether or not the customer also required the services of the firm of solicitors to which the Advocate was linked.

- As regards conveyancing by others than solicitors, there were fears that consumers could be exploited by institutions given, for example, the practices adopted by some building societies in relation to endowment-linked mortgages. Others were concerned about the position of an estate agent being in the position of acting both for the vendor and the buyer. It was therefore worth considering whether some action could be taken in this area, although arguably the most appropriate context for this was via the Financial Services Act machinery. The Prime Minister commented that an important need was for

disclosure of information about the financial interests of intermediaries or recommended to them.

In further discussion, the Prime Minister said that she had been amazed and horrified at the intemperate tone of comments by those opposed to the Green Paper proposal. She believed that the Lord Chancellor had been absolutely right to respond to the debate in a dignified way, by focusing on the real arguments of substance, and this was the means by which he was most likely to continue to succeed in the dialogue.

The Lord Chancellor said the next major stage in the Green Paper process would be the House of Lords debate on Friday 7 April. He anticipated that most if not all of the lawyers speaking would be opposed to the reforms. There would, however, be a fair number of independants who would speak in favour of the proposals, although unfortunately this was unlikely to include any one of real authority. The Prime Minister commented that it was unfortunate that Lord Boyd Carpenter would be away at the time of the debate, and wondered whether he would be prepared for it to be known that, had he been present, he would have spoken strongly in support of the proposals.

Yours,
Paul

PAUL GRAY

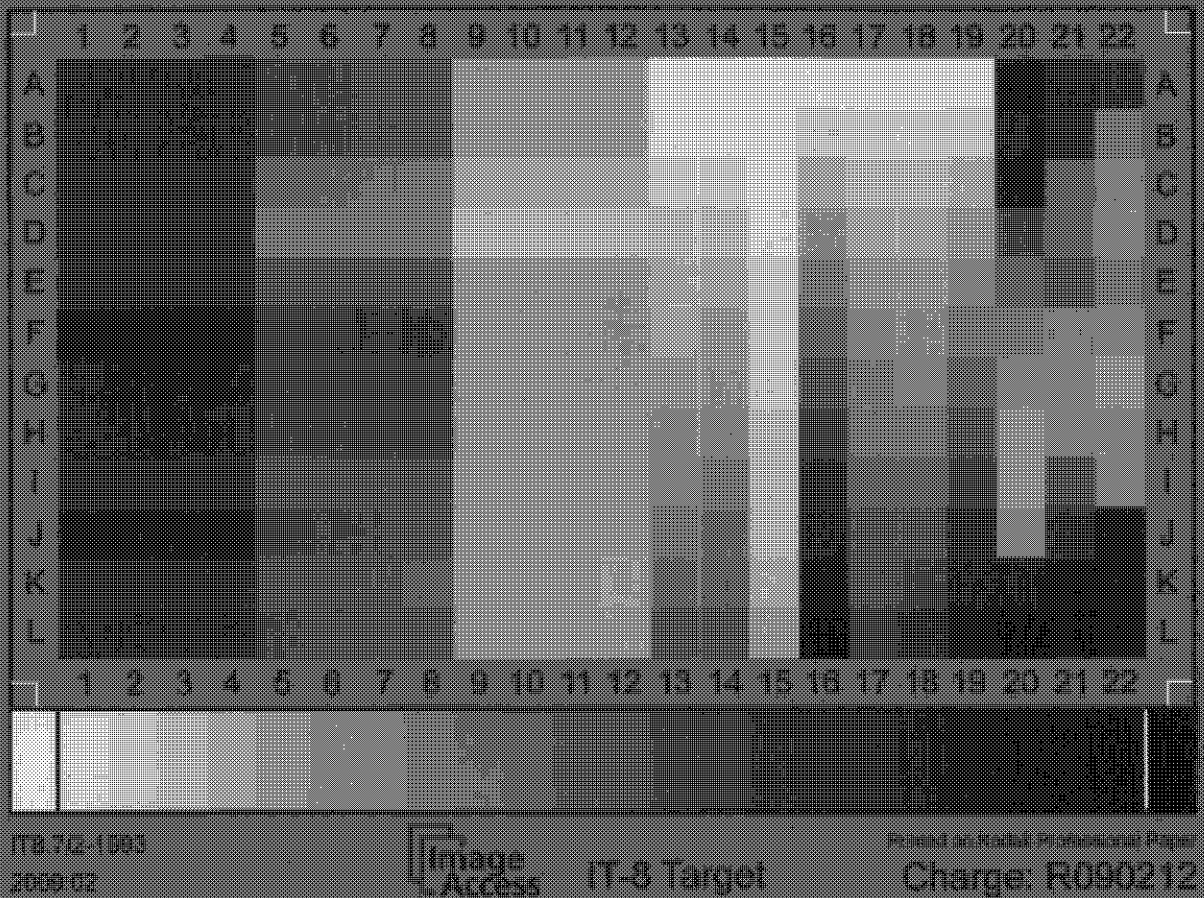
Paul Stockton, Esq.
Lord Chancellor's Office

PART 2 ends:-

Pg to PM 31.3.89

PART 3 begins:-

Pg to Lord Chancellor's office 4.4.89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