PREM 19/3839

CONFIDENTIAL FILING

Legal Powers; Challenges against the DHSS and other Departments

Judicial Review

Restrictive Practices in the Legal Profession.

In attached folder: 'Law under review' reports

LEGAL PROCEDURE

PT1: Dec 1985

PT4: January 1990

PREM 19/3839

Referred to	Date	Referred to	Date	Referred to	Date	Referred to	Date
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15.5.92							
26.5.92							

PART 4 ends:-

SS/SO to Lord Chancellor

PART 5 begins:-

Attorney General to Chancellor of Exchequer 1.6.92 +
Subn on "rights of audience"

Published Papers

The following published paper(s) enclosed on this file have been removed and destroyed. Copies may be found elsewhere in The National Archives.

Law Under Review: A Quarterly Bulletin of Law Reform Projects
No 12, December 1989
Law Commission. Crown Copyright 1989

Law Under Review: A Quarterly Bulletin of Law Reform Projects
No 13, March 1990
Law Commission. Crown Copyright 1990

Law Under Review: A Quarterly Bulletin of Law Reform Projects
No 15, September 1990
Law Commission. Crown Copyright 1990

Law Under Review: A Quarterly Bulletin of Law Reform Projects
No 18, Summer 1991
Law Commission. Crown Copyright 1991

Law Under Review: A Quarterly Bulletin of Law Reform Projects
No 19, Autumn 1991
Law Commission. Crown Copyright 1991

Signed J. Gray Date 2/9/2017

PREM Records Team

SCOTTISH OFFICE
WHITEHALL. LONDON SW1A 2AU

The Rt Hon the Lord Mackay of Clashfern QC
Lord Chancellor
House of Lords
LONDON
SW1P 0PW

26 May 1992

Dear James,

RIGHTS OF AUDIENCE

I have seen Norman Lamont's letter of 5 May to you, and I thought it might be helpful if I were to write briefly about the position in Scotland following the passing of Part II of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, so far as the criminal courts are concerned. I have consulted the Lord Advocate, and this letter reflects his views.

Section 24 of the 1990 Act inserts a new section 25A into the Solicitors (Scotland) Act 1980. The effect of this new section is to enable the Law Society of Scotland to make rules for the acquisition by solicitors of rights of audience in, on the one hand, the Court of Session, the House of Lords and the Judicial Committee of the Privy Council and, on the other hand, in the High Court of Justiciary. Subsection (6) of the new section imposes upon solicitors who acquire such rights of audience a cab rank rule which is the same as that imposed upon members of the Scottish Bar. Subsection (7) exempts employed solicitors from that cab rank rule.

It is clear from these provisions that Parliament intended employed solicitors in Scotland to be as eligible to acquire rights of audience in the courts mentioned above as independent practitioners and you may wish to note that the draft rules on rights of audience presented to the annual general meeting of the Law Society of Scotland at the end of March did not distinguish between the two groups. I consider that any rules which did attempt to exclude employed solicitors from acquiring such rights simply because they were employed would be vulnerable to a successful challenge by way of judicial review.

I have seen the Advisory Commission's advice to you on the subject of employed barristers, and their advice to the Law Society on the subject of employed solicitors, and I note that they consider that no distinction can be drawn between employed barristers and solicitors for the purposes of this question. I also note that their advice - insofar as it amounts to more than a complaint that the legislation is not as they would wish to see it - is that the mere fact of being employed is enough to disqualify an employed barrister or solicitor from acquiring rights of audience in the higher courts.

As Norman Lamont has pointed out, the decision on this matter is for you and the four designated judges. I have drawn the position in Scotland to your attention, since as Parliament has in effect provided that employed solicitors in Scotland are as eligible to acquire extended rights of audience as independent practitioners, it might be difficult to defend the position that the mere fact of such employment made English solicitors and barristers ineligible to acquire such rights.

I am copying this letter to the Prime Minister, other Cabinet Ministers, the Attorney General the Lord Advocate and to Sir Robin Butler.

Yours ever,

Ian

IAN LANG

MAB00614.052

LEGAL PROC: POWERS PTY

HOME SECRETARY

QUEEN ANNE'S GATE LONDON SWIH 9AT

21 May 1992

nbpm

Dear James,

RIGHTS OF AUDIENCE OF EMPLOYED BARRISTERS

I was grateful for the opportunity to see a copy of the advice tendered to you by your Advisory Committee on Legal Education and Conduct which was circulated with your Private Secretary's letter of 23 April to the Prime Minister's Private Secretary. I have also seen copies of the letters sent to you by Norman Lamont on 5 May and Peter Lilley on 11 May.

Although I do not have any responsibilities which bear directly on the "right of audience" issue, I do, as I know you appreciate, have an interest in the effective administration of the criminal justice system as a whole. I have to say that I have never been attracted by the concept of a State prosecution service carrying cases all the way through the trial. I believe that the objectivity of advocates before the Court makes a small contribution to minimising the risk of miscarriages of justice. I agree with the advice tendered to you by your Advisory Committee.

I am sending a copy of this letter to the Prime Minister and to Cabinet colleagues.

Yours ever,

D.

The Rt Hon Lord MacKay of Clashfern
Lord Chancellor
House of Lords
London SW1A 0AA

LEGAL PROC : Legal Powers PTY

KB3031

Chancellor of the Duchy of Lancaster

CABINET OFFICE
70 Whitehall, London SW1A 2AS
Telephone 071-270 0400

Rt Hon Lord MacKay of Clashfern MP
Lord Chancellor
Lord Chancellor's Office
House of Lords
London SW1A OPW

15 May 1992

Dear James,

RIGHTS OF AUDIENCE

I have seen a copy of Norman Lamont's letter to you of 5 May. I, too, have concerns about your Advisory Committee's recommendation that employed solicitors should not be granted rights of audience in the higher courts.

As you know, one of the guiding principles of the Citizen's Charter is to extend the choice available to the consumer of public services. To grant solicitors rights of audience in the higher courts would be very much in line with this principle.

My Civil Service responsibilities also give me an interest in ensuring that we get the best staff to carry out the business of Government. I am concerned that any measure that appears to limit the careers of Government Lawyers - and there is a danger that your Advisory Committee's recommendations will be interpreted in this way - will have a detrimental effect on the recruitment and of staff in the Crown Prosecution Service and the Government Legal Service.

I hope that you will take these points on board in considering the recommendation of your Advisory Committee.

I am copying this letter to the Prime Minister, other Cabinet Ministers, the Attorney General and to Sir Robin Butler.

Yours,

WILLIAM WALDEGRAVE

n5pm
BHP
12/5

cc PO

The Rt Hon Michael Heseltine
President of the Board of Trade

Department of Trade and Industry

Ashdown House
123 Victoria Street
London SW1E 6RB

Direct line
071-215 4417

DTI Enquiries
071-215 5000

Rt Hon Lord MacKay of Clashfern
Lord Chancellor
Lord Chancellor's Office
House of Lords
LONDON SW1A OPW

12 May 1992

Dear James

RIGHTS OF AUDIENCE

I have seen a copy of Norman Lamont's letter to you of 5 May and I endorse the comments he makes. There is clearly a strong case for an extension of the rights of audience for lawyers in the Government Legal Service and the Crown Prosecution Service. The reasons given by the Advisory Committee on Legal Education and Conduct for advising you that CPS and GLS lawyers should not be granted rights of audience in the higher courts are, in my view, not persuasive and do not appear to be justified by the evidence available.

I am sending a copy of this letter to the Prime Minister, other Cabinet Ministers, the Attorney General and Sir Robin Butler.

Yours ever

Michael

SH985

KK/00808.05

DEPARTMENT OF SOCIAL SECURITY
Richmond House, 79 Whitehall, London SW1A 2NS
Telephone 071-210 3000
From the Secretary of State for Social Security

Rt Hon Lord MacKay of Clashfern
Lord Chancellor
Lord Chancellors Office
House of Lords
LONDON
SW1A 0PW

11 May 1992

Dear James

RIGHTS OF AUDIENCE

I have seen Norman Lamont's letter of 5 May concerning Rights of Audience in the higher courts, the views of your Advisory Committee and the report of the Director General of Fair Trading.

The Director criticises the rule which, at present, excludes barristers in the Government Legal Service and the Crown Prosecution Service from appearing as advocates in the Crown Court: he concludes that it restricts competition (for advocacy services) to a significant extent.

The Chancellor's letter supports the Director's conclusions in relation to the advocacy services available to Customs and Excise and Inland Revenue. I would add that the same arguments apply, in my Department, to prosecutions for social security fraud.

The Department of Social Security employs a dozen or so lawyers (barristers and solicitors) who specialise in advocacy, and who are not involved in Departmental policy work. All legal services to the Benefits Agency are provided under a Service Level Agreement between the Chief Executive and the Solicitor to the Department: legal representation in court may be provided either by the specialist advocates in the Solicitor's Office or by practitioners in the private sector. The specialist advocates present most of the magistrates' court cases themselves (about 10,000 a year) and are in court most days of the week. Occasionally barristers or local solicitors are instructed to conduct isolated cases, or cases in distant locations; the decision to use outside services in this way depends on availability, time, travel and comparative cost. Our in-house capacity to prosecute in the magistrates' courts has been helpful not only in managing the caseload economically but also in holding down the charges made to us for advocacy services by private practitioners.

E.R.

In the Crown Court, however, the situation is different. The cases are substantially the same, except as to the amounts involved, but our in-house lawyers cannot appear as advocates and are restricted, by the present rule, to instructing members of the Independent Bar to present cases which they could present themselves just as effectively and, in many cases, more cheaply. There is no competition, except between different sets of barristers' chambers, and the scope for controlling the legal costs is much more limited.

The Heads of the Government Legal Service and the Crown Prosecution Service have contended, for these and other reasons, that you should take the unique opportunity, provided by the Act, to disapprove of the present restrictive rules. Arguments the other way, which seem to have found favour with your Advisory Committee are based on the employed lawyers' apparent lack of impartiality and the infrequency with which enlarged advocacy rights would be used. As regards the advocacy services provided by lawyers in this Department, the arguments are without foundation: their independence and impartiality before the magistrates' courts has never been called in question, they are in court more often than many independent practitioners and they take a pride in high professional standards.

I share the Chancellor's hope that you will withhold approval of the Bar's existing restrictive rule.

Copies of this letter go to the Prime Minister, other Cabinet Ministers, the Attorney General and to Sir Robin Butler.

Yours ever

Peter

PETER LILLEY

chex.kf/jp/77

NJPM
BHP
5/5

Treasury Chambers, Parliament Street, SW1P 3AG
071-270 3000

5 May 1992

Rt Hon Lord MacKay of Clashfern MP
Lord Chancellor
Lord Chancellor's Office
House of Lords
LONDON
SW1A 0PW

Dear James

RIGHTS OF AUDIENCE

will request it required

I have seen a copy of the advice tendered to you by your Advisory Committee on Legal Education and Conduct on 3 April and by the Director General of Fair Trading on 30 April on the question raised by the Director of Public Prosecutions and the Head of the Government Legal Service. I fully realise, of course, that the decision as to whether the Bar's existing rule, restricting the exercise of rights of audience by employed barristers, should be deemed to be approved, is a matter for you and for the four designated Judges following the procedure established under the Courts and Legal Services Act 1990. But I hope that you will feel able to take account of my representations to you which address fundamental issues of Government policy and also take account of the particular interests of the two Revenue Departments for which I am responsible.

Your Green Paper published in January 1989 on "The work and organisation of the legal profession" opened with a statement of the Government's overall objective. That objective was to see that the public has the best possible access to legal services and that those services are of the right quality for the particular needs of the client. The Government believed that this objective would best be achieved by ensuring that:

(a) a market providing legal services operates freely and efficiently so as to give the widest possible choice of cost effective services; and

(b) the public can be certain that those services are supplied by people who have the necessary expertise to provide a service in the area in question.

In the application of this objective to rights of audience, we recognised that it would be necessary to ensure that such rights are available, particularly in the higher courts, only to those who will not only give the right quality of service to the parties involved in a case, but who will also enable the quality of justice and the standards of advocacy to be maintained.

Following the White Paper, the Government's objective to subject legal services to the disciplines of competition in the interests of meeting the needs and demands of the community was of course enshrined in the "statutory objective" and the "general principle" laid down in the Act. Both the "statutory objective" and the "general principle" made reference to the need to maintain "the proper and efficient administration of justice". Our intention, through the procedures laid down for considering the extension of rights of audience was, as the then Solicitor General put it, that "a system which has shown much capability of gentle evolution should find a way of effecting evolutionary change".

The Director General of Fair Trading has found that competition in the supply to the Crown of prosecution advocacy services in the higher courts is being significantly restricted, in that existing Crown employees are not able to offer their services. This finding, it seems to me, clearly demonstrates the urgent need for a way to be found for the wider exercise of rights of audience for lawyers employed by the Crown Prosecution Service (CPS) and Government Legal Service (GLS).

Yet your Advisory Committee have effectively advised you to approve the Bar's existing monopolistic restrictive practice and have also advised that employed solicitors should not be granted rights of audience in the higher courts. The reasons the Advisory Committee give in support of their advice seem to me, both in the case of the CPS and GLS, to be unconvincing and not supported by any evidence. In particular I can see no justification for the implied criticism of the professional integrity of Government lawyers, nor for the view that the CPS is not ready to take on added responsibilities. I know that you will be receiving from the DPP and the Treasury Solicitor a detailed memorandum commenting on the Advisory Committee's findings. But I do want to stress that upholding the Bar's existing rule will deal a savage and, in my view unjustified, blow to the Government's commitment to opening up competition in legal services, the founding principle of the 1990 Act. If that rule is approved, it is very difficult to see what pressures there will be on the Bar to liberalise its restrictive practices. While the Advisory Committee conclude that the possibility of allowing employed advocates to exercise some rights of audience in the higher courts at some time in the future is "not to be precluded", they do not

suggest how this might be achieved. Thus rather than the evolutionary change which we expected to come about in the wake of the Courts and Legal Services Act, we would be faced with inertia in this very important and highly visible area.

It goes without saying that approval of the Bar's Rule would have a most significant effect on the morale of both the CPS and GLS and would be damaging in terms of recruitment and retention. There is a real danger of CPS and GLS lawyers being regarded as second-class lawyers. The effect could well be to reduce the standards of professional expertise available to the CPS and GLS, thereby undermining the future performance of the criminal justice system. I must also be very concerned about the rapid increases in legal costs falling on Government budgets: a decision to extend the rights of audience of CPS and GLS prosecutors would clearly help to contain these. These considerations apply, of course, to all lawyers employed by the Government, but within my own Departments they would particularly affect the lawyers in Customs and Excise and the Inland Revenue, who would continue to be deprived of the opportunity of appearing in any criminal court higher than the Magistrates' Court. This had adverse implications both for the running costs of the two Departments and for the morale of their legal services.

I very much hope, therefore, that you will decide not to approve the Bar's rule and to invite the Bar to come forward with an amendment of its rules which allow for the exercise of rights of audience by the CPS and GLS on a controlled basis and which meet the concerns expressed by the Advisory Committee.

I am copying this letter to the Prime Minister, other Cabinet Ministers, the Attorney General and to Sir Robin Butler.

Yours ever

Norman

NORMAN LAMONT

FROM THE PRIVATE SECRETARY

HOUSE OF LORDS,
SW1A 0PW

23 April 1992

William Chapman Esq
Private Secretary
10 Downing Street
LONDON
SW1A 2AA

Dear William,

I enclose a copy of the advice on rights of audience of employed barristers submitted to the Lord Chancellor by his Advisory Committee on Legal Education and Conduct. The Lord Chancellor thought that the Prime Minister and Cabinet colleagues would wish to see the report. He expects to be able to reach a decision on this very shortly.

I am copying this letter and enclosure to all Cabinet Ministers, to the Attorney General and to Sonia Phippard.

Yours,

Fiona Sandell.

PP Miss J Rowe

THE LORD CHANCELLOR'S ADVISORY COMMITTEE ON
LEGAL EDUCATION AND CONDUCT

RIGHTS OF AUDIENCE OF EMPLOYED BARRISTERS: ADVICE TO THE LORD CHANCELLOR ON THE QUESTION RAISED BY THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE HEAD OF THE GOVERNMENT LEGAL SERVICE

8TH FLOOR
MILLBANK TOWER
MILLBANK
LONDON SW1P 4QU

3 April 1992

CONTENTS

SUMMARY

The Question

The Lord Chancellor has sought the Advisory Committee's advice on a question raised by the Crown Prosecution Service (CPS) and the Government Legal Service (GLS) under section 31 of the Courts and Legal Services Act 1990. The question is whether rule 402.1(c) in the Code of Conduct of the Bar of England and Wales is deemed to have been approved by the framework set up under the Act, as if it were a new rule being submitted for approval.

The Bar's Rule

Rule 402.1(c) effectively limits employed barristers' rights of audience so that they cannot appear as advocates on behalf of their employers in most cases in the higher courts. The CPS and GLS want to be able to use their in-house lawyers as prosecuting advocates in a limited number of the less serious of their Crown Court cases. The Committee has considered the question in relation to all employed barristers, who are affected equally by the rule.

The Committee's Approach

The Committee agrees with the policy of the CPS, the GLS and other employers that barristers and solicitors on their staff should be treated equally in relation to rights of audience. The position of employed solicitors is considered separately in the Committee's advice to the Law Society on its application to be authorised to grant rights of audience in the higher courts to suitably qualified solicitors.

In relation to both, the Committee wishes to stress that advocacy in the higher courts is one of a range of lawyers' specialisations. The skills it requires are not inherently superior to other legal skills, and should not be seen as conferring a higher professional status.

The statutory objective of the Act requires the Committee to consider whether the proper and efficient administration of justice would be maintained if employed barristers had rights of audience in the higher courts. The Committee believes that the two most important questions in this context are:

(i) whether barristers appearing in court on behalf of their employers could demonstrably achieve the degree of objectivity and impartiality needed by advocates presenting cases in the higher courts; and

(ii) whether employed barristers would have the opportunity to appear in the higher courts sufficiently frequently to ensure that their advocacy skills were maintained at the standard required by the longer and more complex cases which are dealt with at that level.

Potential for conflict

In the Committee's view, the circumstances in which many employed barristers work, and the variety of their functions, make it difficult for them to demonstrate the necessary objectivity and impartiality.

Lawyers in commerce and industry may hold senior positions in their firms, and share responsibility for the company's actions and policies. Those in local government are often involved in policy formulation and implementation, and may be subject to pressure to conform to a local authority's political objectives. Government lawyers prosecuting on behalf of, for example, the Inland Revenue or the Department of Social Security will almost inevitably be identified in the public perception with the purposes and policies of their departments.

The Committee would not wish to extend rights of audience for barristers in any of these categories of employment unless there were limitations on the other functions within an organisation that could be carried out by an employed barrister who wished to appear in court.

Lawyers in the CPS and the Serious Fraud Office (SFO) are in a different position, since their organisations have been established to act only as independent prosecuting authorities and have no conflicting objectives.

Frequency of appearance

The Committee believes that the proper and efficient administration of justice would not be maintained if rights of audience in the higher courts were given to groups of people, all or most of whom were likely to use those rights only rarely. A number of private sector employers have told the Committee that they would not make much use of in-house advocates in the higher courts. Similarly, the evidence put to the Committee suggests that most lawyers in local government and in the GLS would have little opportunity to appear in the higher courts. Those employed by the CPS and SFO are in a different position, because the prosecution of offences is the central focus of their work.

The CPS

No-one has argued that the CPS should have a monopoly of prosecution advocacy in the Crown Court. The Committee would oppose such a monopoly because that would polarise the experience of prosecution and defence advocates (and judges), and could lead to greater confrontation. A mix of prosecution and defence work helps the development of criminal advocates' skills and encourages a balanced approach to the presentation of evidence.

The Committee sees some attraction in a mixed system, with most Crown Court cases prosecuted by independent advocates, but with the option for the CPS of prosecuting a limited number of less serious cases in-house. The Committee appreciates the CPS's arguments that this would enable the Service to improve its standards of case preparation and decision making, enhance morale, and ease recruitment problems.

The Committee believes that the CPS must demonstrate a high standard of achievement in its present functions before an extension of rights of audience can be justified. The Committee has heard evidence that, despite great progress, the CPS has not yet fully overcome initial difficulties in terms of resources, manpower and organisation, and may not yet be in a position to take on the additional responsibilities of providing advocacy services in the higher courts.

The Committee has also noted that a number of submissions to the Royal Commission on Criminal Justice recommend radical changes which would alter the role of the advocate in the Crown Court. If accepted, these would affect the way in which the CPS might exercise rights of audience.

A further point which has been put to the Committee is that a limited extension of the CPS's rights of audience would inevitably be the thin end of the wedge, leading eventually to a monopoly. The Committee notes that any Crown Court advocacy rights granted to the CPS would be exercised in accordance with guidelines laid down by the Attorney General, which would not be binding on his successors. The Committee believes it would be more appropriate for the exercise of Crown Court advocacy rights by the CPS to be controlled by the framework set up under Part II of the Act (which includes the Lord Chancellor and the four designated judges as well as the Committee itself). There is, at present, no certain way in which that could be achieved.

Conclusion

Having taken all these matters into consideration the Committee has concluded that it would not be right at present to give extended rights of audience in the higher courts to barristers employed in the CPS, the SFO, the GLS, in local government or in commerce and industry. The Committee's advice to the Lord Chancellor is therefore that the Bar's rule 402.1(c) should be deemed to have been approved.

SECTION I : FORM AND SCOPE OF THE QUESTION

1. The issue of rights of audience for employed lawyers has come before the Advisory Committee in the form of a question raised by the Crown Prosecution Service (CPS) and the Government Legal Service (GLS) under section 31 of the Courts and Legal Services Act 1990. The question, which has been referred to the Committee by the Lord Chancellor, is whether rule 402.1(c) of the Bar's Code of Conduct is deemed to have been approved by the framework set up under the Act, as if it was a new rule being submitted for approval under the procedure set out in the Act. Annex A to this advice gives details of the Committee's work on the question.

2. Rule 402.1(c) provides that, subject to certain conditions about the completion of pupillage, an employed barrister may 'appear as counsel in any court in circumstances where immediately before 7 December 1989 barristers in independent practice did not have an exclusive right of audience on behalf of ... his employer or another employee of his employer or (if the barrister is employed by a trade association) an individual member of the association'.

3. In the submission of the CPS and GLS, revocation of rule 402.1(c) would remove the restrictions on employed barristers' rights of audience, enabling them to appear in all courts on behalf of their employers. The Bar Council, in its evidence to the Advisory Committee, has taken a different view, suggesting that, on the true construction of the Act, this rule in fact gives employed barristers their rights of audience and that revoking it would deprive them of the limited rights of audience they currently enjoy. The Bar Council has also suggested that it is inappropriate for a substantive question of rights of audience to be decided through the procedure set up under section 31 of the Act. The Bar points out that the general scheme of the Act requires changes in rights to have the approval of the Lord Chancellor and each of the four designated judges, while under section 31 rules can be found not to have deemed approval by either the Lord Chancellor or a single judge not being satisfied. Such a question, in the Bar's view, could properly be dealt with only by means of an application from the Bar Council itself, under section 29 of the Act, to amend its rules of conduct.

4. The Advisory Committee has noted the Bar's objections to the use of the section 31 procedure, and concluded that questions of statutory construction and procedure should be decided by the Lord Chancellor and the designated judges. The Committee's advice therefore deals with the question of rights of audience for employed barristers on its merits.

5. The question before the Committee is concerned with the rights of audience of barristers employed in the CPS and GLS. The Bar's rule, however, makes no distinction between different categories of employment. The Committee has therefore decided that the question must be considered in relation to all employed barristers.

6. The CPS, the GLS and other employers have told the Committee that they treat their legal staff on an equal footing, regardless of whether they are barristers or solicitors, in relation to advocacy and other functions. They would want to continue on this

basis in relation to advocacy in the higher courts, and the Committee agrees that is the right approach.

7. The question raised by the CPS and GLS, however, relates to a rule of conduct of the Bar, and so this advice deals only with employed barristers. The question of extended rights of audience for employed solicitors has arisen at the same time, since the Law Society's application to be authorised to grant rights of audience in the higher courts deals equally with all suitably qualified solicitors, whether employed or in private practice. The central issues arising from the two submissions are, inevitably, similar, and much of what is said in this advice could be taken as applying to employed lawyers generally. Some further points which relate specifically to employed solicitors are set out in Part 4 of the Committee's advice to the Law Society on its application dated 3 April 1992.

Rights sought

8. The submission from the Head of the Government Legal Service and the Director of Public Prosecutions seeks unrestricted rights of audience in the higher courts for barristers employed in the CPS, the Serious Fraud Office and the Government Legal Service. The submission makes it clear, however, that these rights would be exercised only to the limited extent outlined below.

Crown Prosecution Service

9. The submission from the Head of the GLS and the Director of Public Prosecutions (DPP) seeks full rights of audience in the Crown Court for barristers in the CPS. In practice, however, it envisages that only experienced advocates would appear, in a limited number of cases not exceeding three days in length. The CPS argues that it does not wish, and would not be able, to match the range of experience and expertise available in the independent Bar, from which it has a free choice. It therefore needs to continue to draw most of its advocacy services from the Bar.

Serious Fraud Office

10. The Serious Fraud Office (SFO) is seeking to exercise rights of audience only in very substantial cases, where there would be two or more independent counsel in addition to an in-house junior. The in-house advocate would be the team member known as the case controller, who has principal responsibility for the overall management of a case but is not involved in the investigation.

Government Legal Service

11. The GLS, which employs some 1000 lawyers in total, covers the entire range of legal work, from the drafting of statutory instruments to conveyancing, from criminal prosecutions to judicial review of ministerial decisions. Many barristers will move between different types of legal work during their careers.

12. The GLS makes it clear, however, that any increased rights of audience would only be exercised in relation to prosecutions in the higher courts. The Committee has received evidence that the CPS and GLS are broadly satisfied with the arrangements for providing representation in the higher civil courts, and their submission says that neither 'has any present intention to exercise rights additional to those exercised currently in civil proceedings.'

13. The GLS was asked to estimate the amount of prosecution work it might undertake. It suggests that the likely caseload would not exceed some: 100 appeals from the magistrates' courts; 1000 guilty pleas; and 100 contested cases (mainly cases involving the importation of drugs). There would be a small number of pre-trial reviews and other interlocutory hearings. No department would use its own advocates for contested cases expected to last more than three days.

Local government and the private sector

14. Barristers employed in local government and in the private sector are represented, respectively, by the Bar Association for Local Government and the Public Service (BALGPS) and the Bar Association for Commerce, Finance and Industry (BACFI). Neither of these bodies has itself raised a question about the Bar's rule on rights of audience for employed barristers, but both have submitted written and oral evidence to the Advisory Committee in support of the arguments advanced by the CPS and GLS.

15. BACFI and BALGPS seek unrestricted rights of audience for their members, but the latter believes that they are more likely to be used in prosecution work than in cases in the higher civil courts. BALGPS points out that the current rule setting out employed barristers' rights of audience is comparatively recent, and that before it was introduced in February 1989, local authorities were very reluctant to employ barristers because they would not have the same rights of audience as solicitors.

Europe

16. Section 20 of the Act requires the Committee, where it considers it appropriate, to 'have regard to the practices and procedures of other member States in relation to the provision of legal services'. It has been brought to the Committee's attention that among member states of the European Community legally qualified persons employed to provide legal services for public and private sector employers are distinguished from legally qualified persons engaged in the private practice of law. In states with a 'Latin' civil law tradition (such as Belgium, France, Italy, Luxembourg, and Portugal), employed lawyers are not treated as members of the legal profession at all. The Committee does not regard that as a precedent which could helpfully be followed in the wholly different tradition in England and Wales.

17. In the other main group of states (Denmark, Germany, Ireland, the Netherlands, and the UK), employed lawyers are seen as members of the legal profession, but may be differentiated from lawyers in private practice. Denmark and Ireland, for example, accept the possibility of employed lawyers exercising rights of audience on behalf of

their employers. Germany and the Netherlands, on the other hand, prohibit employed lawyers from representing their employers in courts when legal representation is required.

18. Most Continental countries, whether or not they treat privately employed lawyers as full members of the legal profession, do have state prosecution services with wide rights of audience. Unlike the legal system in England and Wales, however, the systems in those countries are essentially inquisitorial. The different role of the prosecution advocate in an adversarial system has been central to the Committee's consideration of rights of audience for the CPS.

SECTION II : THE COMMITTEE'S RESPONSE: GENERAL ISSUES

The general principle and its requirements

19. Section 17 of the Act establishes the criteria which, as a general principle, are to determine whether or not a person should be granted rights of audience. The requirements of the general principle relate first to education and training, and secondly to professional conduct.

Education and training requirements

20. The general principle requires that anyone who is to be granted a right of audience must be 'qualified in accordance with the educational and training requirements appropriate to the court or proceedings'.

21. Employed barristers have all been called to the Bar, having complied with the training regulations valid at the time of their call. In order to exercise rights of audience in the lower courts, an employed barrister must have completed 6 months pupillage with a barrister in independent practice, and:

    (i) have completed a second 6 months of pupillage, either with a barrister in independent practice or through an employer's in-house scheme which is approved by the General Council of the Bar (one such scheme is run by the Crown Prosecution Service); or

    (ii) be engaged in a second 6 months of pupillage under the supervision of a recognised pupil-master (as in (i)); or

    (iii) have been an employed barrister for a period or periods amounting to not less than 5 years. (This applies only to those who became employed barristers before 1 January 1989.)

22. These provisions, which are set out in rule 402.2 of the Bar's Code of Conduct, are deemed by the Act to have been approved under it in relation to employed barristers' current, restricted rights of audience, as described in paragraph 2 above. The Committee takes the view that employed barristers should not be allowed to appear as advocates in the higher courts unless they have, as a minimum, completed a full year's pupillage, either wholly in independent practice or partly through an employer's in-house scheme. The Committee considers that a newly qualified barrister should not progress to appear as an advocate in the higher courts without experience of advocacy in the lower courts, and preferably further training. The Committee does not consider that 5 years experience as an employed barrister is of itself a satisfactory qualification for rights of audience in the higher courts, since it may not involve much, or any, practical experience of advocacy.

23. The Committee notes that further in-house training of advocates is provided by both the CPS and the GLS. There is no requirement for further training of barristers

employed in local government or the private sector, and provision will vary according to the arrangements made by individual employers, over which there is no central control.

Rules of conduct required by the general principle

24. The general principle requires a person who is granted a right of audience under the Act to be a member of a professional body with rules of conduct which are, in relation to the court or proceedings, 'appropriate in the interests of the proper and efficient administration of justice', and which include a non–discrimination rule. The professional or other body must have an appropriate mechanism for the enforcement of its rules of conduct, and be likely to enforce them.

25. The Committee sees the advocate's role in our adversarial system as being a public one, which depends on the skill, judgment and integrity of an individual. Advocates owe duties to the courts, and thus in effect to the public, as well as to their own clients. In civil cases these responsibilities include disclosure to the other parties of material including documents damaging to the case of the advocate's own client, deciding the contents of written pleadings, and making submissions to the court. Advocates must not knowingly mislead the court about the facts and must draw the court's attention to any relevant precedent or statute, even if it is damaging to the case they are presenting. In criminal cases, an advocate's responsibilities, which are conditioned by the principle that it is for the prosecution to prove its case, vary according to whether the advocate is appearing for the prosecution or the defence. This is discussed in greater detail elsewhere, but for present purposes it is sufficient to say that the proper discharge of a criminal advocate's responsibilities, whether prosecuting or defending, is of high importance for the proper and efficient administration of justice. Because of their direct experience of putting arguments before the courts, advocates' assessment of the strengths or weaknesses of arguments or evidence has a special authority, and the court and the public should be entitled to rely on advocates not wasting time with unsustainable arguments or proceeding for vexatious or oppressive reasons with cases that have no chance of success. The judge will seek to take a more active part in any case where it appears that the quality of representation offered by one side is out of balance with that on the other, or that elements are missing, but that in no way diminishes the responsibility of the advocates. If judicial intervention is necessary, it is likely to prolong significantly the time needed for the trial and interfere with the proper and efficient administration of justice.

26. The court and the public therefore need to be sure that the advocate's decisions are based on an impartial assessment of the merits of the case, not on the advocate's own interests; and that the advocate has been free of pressure from the client or a third party which might interfere with accepting full responsibility for the way in which the case is presented in court.

27. Employed barristers are members of the Bar, and are bound by the sections of the Bar's Code of Conduct which apply to them. Rule 202 of the Code, which applies to

all practising barristers whether employed or in independent practice, embodies the advocate's overriding duty to the court:

> 'A practising barrister has an overriding duty to the Court to ensure in the public interest that the proper and efficient administration of justice is achieved: he must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court.'

28. Other provisions in the Code of Conduct forbid a practising barrister to 'permit his absolute independence and integrity and freedom from external pressures to be compromised' (Rule 205 (a)), or 'compromise his professional standards in order to please his client the Court or a third party' (Rule 205(c)); and require him to consider whether it is consistent with the proper and efficient administration of justice, and in the best interests of the client, for the advocate to be instructed or continue to be instructed in a particular matter. The factors to be taken into account in reaching that decision include the advocate's relationship with the client.

29. Annex H to the Bar's Code of Conduct sets out written standards for the conduct of professional work which apply in addition to the basic rules in the main text of the Code. Except where this would be inappropriate, it relates equally to employed barristers and those in independent practice. It includes a section on the particular responsibilities of prosecuting counsel, which requires all barristers conducting prosecutions to have regard to the guidelines set out in the report of Mr Justice Farquharson's Committee on the Role of Prosecuting Counsel.

30. Prosecutors employed by the CPS are bound by the DPP's Code for Crown Prosecutors, which is also followed by other Government and local authority prosecutors. The DPP's code sets out the principles to be applied in determining whether proceedings should be instituted, whether they should be discontinued, and what charges should be preferred, and in representations about mode of trial. It imposes a duty on prosecutors to ensure that:

(i) a case is being conducted fairly and impartially in the best interests of the administration of justice;

(ii) there is a realistic prospect of a conviction; and

(iii) it is in the public interest to continue the case.

31. In so far as they apply to employed barristers, the Bar's rules are deemed to have been approved under the Act only in relation to advocacy in the lower courts. The Committee has therefore had to consider whether they would also be appropriate in relation to the higher courts, having regard, on the one hand, to the special position of employed barristers appearing for a single client (their employer), and, on the other hand, to the additional substance and complexity of higher court cases.

32. In the Committee's view, there is a particular need for the court to rely on the impartiality of an advocate's decisions in proceedings in the higher courts. The

consequences for a defendant in the Crown Court are potentially far greater if the prosecutor fails to comply with the special standards required of prosecution counsel. As the High Court becomes an increasingly specialist jurisdiction, the complexities of fact and law increase, and it therefore becomes even more important for the court to be able to rely on the fullness and accuracy of what counsel says. Finally, the consequences and cost of failure in a case in the higher courts are so much more serious that it becomes far more important to have in place independent safeguards against cases being proceeded with vexatiously or oppressively.

Independence

33. There are two respects in which it has been argued that it is more difficult for employed lawyers to establish beyond doubt that they have the necessary independence to carry out the advocate's duties. First, it is said that employed barristers might be subject to personal or institutional pressure which would influence the way in which they exercise their professional judgment. That might take the form of direct influence or pressure from the employer to take a particular course of action, or face dismissal or reduced prospects of interesting work, promotion or pay. Employees may also be subject to indirect pressure to react in certain ways from what they know of the views and expectations of colleagues.

34. On the other hand, the Committee accepts the evidence from employed lawyers that they value and protect their professional independence, which is much strengthened by the fact that they are subject to a professional code of conduct enforced by an independent professional body. Moreover, the Committee has seen evidence that employers are aware of the importance of allowing employed lawyers to exercise objective professional judgment if they are to do their job properly. Some employers are able to strengthen that by giving the legal departments in their organisations some measure of autonomy or functional separation, and enhanced status.

35. The Committee acknowledges, however, that pressures can also be brought to bear on lawyers in independent practice by the threat of withdrawing business, whereas those in employment benefit from the protection of the employment protection legislation, with its ability to challenge unfair dismissal in a public tribunal (although that is of little use, at least in the short term, if the employer's reaction takes the form of giving the employee less interesting work, or no promotion).

36. The Committee's own assessment is that the professional regulation that applies to employed lawyers, taken with the employed lawyers' professional integrity and employers' awareness of the need for objectivity, provides a very substantial defence against specific and identified individual pressures. While accepting that, and the general personal integrity of employed lawyers, the Committee considers that there remains a risk of diffused pressure from the expectations and ethos of a lawyer's employer and colleagues.

Potential for conflict

37. In the Committee's view, the potential threat in the employed environment from such diffused pressure is likely to be greater if advocates have to exercise their judgment as to the proper course of action in a situation where they have a range of possibly conflicting aims and objectives to achieve. These conflicting objectives are more likely in bodies which exist for other purposes than the proper conduct of legal proceedings, since there will be, for example, commercial or political imperatives to consider. The greater the degree of separation which the legal department is given within an organisation, of course, the less the risk from such institutional conflicts.

38. The conflicts may also be personal, since many employed lawyers have a range of functions in which specifically legal duties may well not be the major part. They are often senior members of their organisation, and have their part in its collective leadership. The Committee recognises that the legal skills they can bring to their work will often have a central part to play in the formulation of organisational strategy. But where an individual has to carry out a range of functions, there is a real possibility that appearance as an advocate might raise questions in the mind of the court or the public as to whether the proper detachment could be exercised when putting before the court issues, arguments and decisions which the advocate personally has initiated or participated in.

Non-discrimination rules

39. Different non-discrimination rules apply to employed barristers and those in independent practice. All practising barristers, whether employed or not, are subject to the general non-discrimination provision in Rule 204 of the Bar's Code:

> 'A practising barrister must not in relation to any other person (including a lay client or a professional client or another barrister or a pupil or a student member of an Inn of Court) on grounds of race ethnic origin sex religion or political persuasion treat that person for any purpose less favourably than he would treat other such persons.'

40. Only barristers in independent practice are, in addition, governed by the 'cab-rank' form of the non-discrimination rule expressed in Rule 209 of the Code:

> 'A barrister in independent practice must comply with the 'cab-rank rule' and accordingly . . . he must in any field in which he professes to practise in relation to work appropriate to his experience and seniority and irrespective of whether his client is paying privately or is legally aided or otherwise publicly funded:
>
> (a) accept any brief to appear before a court in which he professes to practise;
>
> (b) accept any instructions;

(c) act for any person on whose behalf he is briefed or instructed;

and do so irrespective of (i) the party on whose behalf he is briefed or instructed (ii) the nature of the case and (iii) any belief or opinion which he may have formed as to the character reputation cause or conduct guilt or innocence of that person.'

41. The Bar Council, in its submissions to the Advisory Committee on employed barristers' rights of audience, has suggested that no advocates should have rights of audience in the higher courts unless they are subject to the 'cab-rank' rule as it applies to barristers in independent practice. The Committee does not accept this.

42. A cab-rank rule only makes sense in relation to the mode of business of barristers in independent practice, as the Bar's own Code of Conduct recognises by confining the rule's application to such barristers. Employed barristers who have only one client, or who appear for fellow employees or their employer's members, are simply not available to act for the general public. That applies in both lower and higher courts. The Committee does not, therefore, think that the absence of a cab-rank rule is any reason to refuse to widen the rights of audience of employed barristers.

The statutory objective and its requirements

43. The statutory objective, set out in section 17 of the Act, is 'the development of legal services in England and Wales (and in particular the development of advocacy, litigation, conveyancing and probate services) by making provision for new or better ways of providing such services and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice'.

44. The Committee accepts that extending employed barristers' rights of audience would create a new way of providing advocacy services in the higher courts. This has, however, to be balanced against the need to maintain the proper and efficient administration of justice. In striking that balance, the Committee believes that one major factor is the doubts it has discussed in paragraphs 33-38 as to whether employed lawyers could maintain, and be seen to maintain, the level of objectivity and impartiality required by an advocate presenting cases in the higher courts.

Frequency

45. The Committee's second major concern is that the proper and efficient administration of justice would not be maintained if rights of audience in the higher courts were given to groups of people, all or most of whom were likely to exercise those skills only rarely. This is because the Committee regards advocacy in court, especially in longer and more complex cases, as a skill which is only effectively developed by practice. Moreover, courtroom advocacy skills are fugitive unless regularly used. Failing to develop them to the right level, or allowing them to become rusty, would be particularly serious in the higher courts. The Committee is obliged to deal with this issue on a 'worst case' basis, because the procedures for dealing with a question raised under section 31 of the Act require it to advise that the Bar's rule should be

either revoked or approved as it stands. Revocation of the rule would give the same rights of audience to employed barristers with extensive advocacy experience as to those whose work involved no advocacy at all.

46. The Committee has consulted some private sector employers of barristers on the CPS's and GLS's submission. None of those who responded expected to make much use of in-house advocates if they obtained rights of audience in the higher courts, but some thought it might be helpful to use them for emergency interlocutory proceedings in the Chancery Division. Employed barristers, having the same rights of audience as solicitors, can already appear in most High Court interlocutory work.

Professional status

47. Several of the submissions received by the Committee indicate that employed barristers see acquiring rights of audience in the higher courts as a badge of progress within their profession, and therefore as a means of enhancing their status, even if they would be unlikely to exercise the extended rights frequently. They argue that it is illogical and demeaning for barristers with experience of independent practice to lose their higher court advocacy rights if they take up employment, and that this disparity between the two sectors of the Bar makes those in employment appear to be second-class barristers in the eyes of the public and (at least in some cases) their employers.

48. The Committee appreciates this point of view, but does not see it as sufficient reason for extending employed barristers' rights of audience. The Committee gives priority to the arguments about possible conflicts of role and about frequency of appearance. The Committee does not believe, however, that acquiring and maintaining advocacy skills in the higher courts should command any particular status, or that the ability to exercise them gives any branch of the profession some kind of competitive edge. In the Committee's view, advocacy requires a discrete set of skills, which are primarily acquired through experience and which are blunted by disuse. There is, moreover, a practical limit to the number of skills which individuals can acquire, and in which they can expect to maintain simultaneous proficiency. Advocacy in the higher courts is one of a range of lawyers' specialisations. The skills it requires are not inherently superior in quality to others which are exercised by employed barristers, although like all skills they need constant practice if they are to remain at the level of proficiency required by the higher courts.

49. The Committee has considered the groups of employed barristers who might be affected by the CPS's and GLS's question in the order:

- the private sector
- local government
- the Government Legal Service
- the Crown Prosecution Service
- the Serious Fraud Office.

SECTION III : THE PRIVATE SECTOR

Standards of professional conduct

50. The range of duties carried out by employed barristers in the private sector varies very widely. For a substantial proportion, providing legal services is not their principal function. Many hold posts, such as company secretary, which combine a range of functions, legal and non-legal. Many hold senior positions, including directorships, in their firms, and therefore share responsibility for their firm's actions and policies. Indeed, lawyers who act as directors have an identical position under the Companies Act to all other directors.

51. As explained in paragraphs 33-38 above, the Advisory Committee considers that there must be obvious doubts that an employed lawyer with a range of different functions can be, and can be seen to be, sufficiently objective, impartial and free from conflicts of interest to carry out the advocate's duties in the higher courts. It might be thought that decisions on how the case should be handled had been influenced, for example, by the barrister having participated in the commercial or policy decisions being questioned, or in their implementation. It is possible that doubts of this nature could be reduced or removed by restricting the functions to be carried out by barristers who wished to appear in court. If this approach were to be adopted, rights of audience could only be granted to barristers who could show that their organisation was structured so as to prevent advocates being subject to direct or indirect pressure from their employer or colleagues, particularly by potential advocates' direct involvement in policy making or implementation, and that they had not been influenced in handling the case by their own perception of their organisation's other objectives. That would demand a radical restructuring of many, and perhaps all, legal departments in this area. It would probably also radically reduce the use that could be made of employed barristers in their organisations. There must be considerable doubt that employers, and indeed barristers themselves, would regard the cost of that as worthwhile.

Frequency of appearance

52. The evidence which the Committee has received indicates that a very small proportion of private sector employed barristers are using their existing rights of audience and might make occasional use of extended rights, whereas the majority do not appear in court, and would be unlikely to do so if their rights were extended. The Advisory Committee recognises that this situation might change, for example if private sector employers decided to make more use of advocacy services from their in-house lawyers for reasons of cost-effectiveness. Even if that happened, the Advisory Committee would not consider it appropriate for them to appear in the higher courts unless the organisations in which they worked were appropriately structured.

SECTION IV : LOCAL GOVERNMENT

Standards of professional conduct

53. In considering whether it would be appropriate for barristers employed in local government to exercise rights of audience in the higher courts, the Advisory Committee has first addressed the question whether, given the range of duties which a modern local authority is required to carry out, and the barrister's place within such authorities, it is possible for the employer to provide the safeguards necessary to enable in-house barristers to achieve and maintain the appropriate standards of professional conduct.

54. At one time, the functions of a local authority's chief official and senior legal adviser were usually combined in the post of County Clerk or Town Clerk. Increasingly, those functions are separated, so that many councils have separate Chief Executives and Directors of Law. Nevertheless, even in those cases where local authorities have separated these functions, councils' senior lawyers, like all other senior local authority officials, are commonly closely involved in a broad capacity in the political process of policy formulation and implementation, as well as recommending policies on enforcement. In particular, many of the civil cases with which local authorities have to deal are centrally concerned with the legality of the authority's regulations and decisions. Often, these have been made on the policy recommendations of the authority's own lawyers.

Public and administrative law

55. One area is likely to create particular problems. Applications for the judicial review of local authorities' policies and decisions are an important aspect of public and administrative law, although the number of cases involved overall is small (and is concentrated amongst the larger metropolitan authorities). This area of the law is increasingly complex and specialised but also one in which individual decisions may have national implications or involve very large sums of money, and so be intensely controversial. Success in a particular judicial review can therefore become a major political objective of the authority concerned.

56. It is difficult to see how proper impartiality and objectivity could be demonstrated to the public satisfaction when advocates who had been involved in policy formulation, or in deciding how that policy should be implemented, were appearing in court effectively to defend their own propositions and actions. To achieve that, it would be necessary to demonstrate at the very least an effective separation of policy-making, executive and court-related duties within authorities, and the establishment of mechanisms which would guarantee that improper 'political' pressure was ineffective.

57. This might not be an insuperable problem, for some authorities at least. The volume of litigation which some authorities need to conduct is such that they may have a number of effectively full-time advocates dealing with particular aspects of their

work, who may form virtually separate advocacy departments. In other areas of work, or other authorities, greater mixtures of advocacy and other work may be found.

58. The Committee has heard of a number of developments which may encourage further separation of functions, such as the appointment of monitoring officers. The Audit Commission's report on the provision of legal services within local authorities, and the Government's proposals for extension of compulsory competitive tendering (CCT) procedures into this area, are likely at the least to lead to clearer identification of the legal and non-legal services provided by employees. The Committee thinks it likely that developments in this area in the next years will have a significant influence on whether it would be appropriate for some groups of lawyers employed by local authorities to have extended rights of audience.

Frequency of appearance

59. The Advisory Committee has heard evidence that few of the barristers employed by local authorities would exercise rights of audience in the higher courts sufficiently often for them to maintain the skills necessary for advocacy at that level, although some local authority lawyers appear quite frequently in the lower courts and tribunals. As in the case of the private sector, the Committee accepts that this might change, particularly in response to the Audit Commission's work and CCT.

Conclusion

60. The Advisory Committee has nevertheless concluded that it is not at present in the interests of the proper and efficient administration of justice for barristers employed in local government to have rights of audience in the higher courts.

SECTION V : THE GOVERNMENT LEGAL SERVICE

Standards of professional conduct

61. All Government departments are required to observe the Philips principle of the separation of investigation from the decision to prosecute. Indeed, the Committee notes that Lord Keith commented that the Revenue departments 'go one better, with general separation of investigation, advice on sufficiency of evidence and conduct, and the decision to order proceedings'. The Attorney General made it clear when introducing the Code for Crown Prosecutors in Parliament that all GLS lawyers, and others conducting prosecutions, would follow the Code.[1]

62. The Committee is not, however, convinced that these safeguards are sufficient to establish that the advocates the GLS employs could be seen as having the detachment required to carry out the public duties of an advocate in the higher courts.

63. The Advisory Committee has received evidence that barristers employed in the GLS value their professional independence, and will resist any attempts to encroach upon it. The Committee entirely accepts that. Nevertheless, the Committee sees an inevitable tendency for an in-house advocate appearing for a Government department such as the Inland Revenue or the Department of Social Security to be identified with the purposes and policies of the department. That, at least, is likely to be the perception of the general public.

64. Moreover, Government departments have a range of policy aims and objectives, of which the fair and effective conduct of prosecutions will be only one (if always an important one). Such variations in aims and objectives make it more difficult for any institution to demonstrate that the prosecutor's prime aim is always and only a fair and effective prosecution, and that prosecutors are supported by the institutional and peer support for robustly independent decisions which would follow from that ethos. Such difficulties increase very considerably when lawyers are not engaged as prosecutors full-time, but have other duties as well.

Frequency of appearance

65. The Committee also notes that the number of advocates who it is proposed should actually exercise increased rights in each department is very small. There is a comparatively restricted number of cases which it is thought they would wish to undertake. The Advisory Committee has made clear its reservations about granting wider rights of audience to a wide class of advocates when it expects only a small number of them to exercise those rights, and even then infrequently.

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[1] Hansard, 25 June 1986, coll. 159-160 (Written Answers).

Conclusion

66. For the foregoing reasons, the Advisory Committee does not think it appropriate for barristers employed in the Government Legal Service to have extended rights of audience.

SECTION VI : THE CROWN PROSECUTION SERVICE

A state monopoly

67. The starting point for the Advisory Committee's consideration of rights of audience for the CPS has been a consensus in the evidence which it has received that there are considerable advantages in the present arrangements which would be lost if the CPS exercised a complete monopoly of advocacy in the Crown Court. The principal arguments are these:

- It is desirable that advocates should have a balanced mixture of defence and prosecution experience in order to develop a balanced approach and advocacy skills.

- It is better if judges are appointed from those who have had such a balanced mixture of defence and prosecution experience.

- The future of the Bar, and the proper and efficient administration of justice, would be imperilled if the CPS had a monopoly of prosecution advocacy work.

68. The Advisory Committee accepts these arguments. In particular, the Committee sees force in the arguments that appearing in both defence and prosecution work is of considerable assistance in the development of a criminal advocate's skills. This factor must inevitably be most important when dealing with the more serious cases.

69. Secondly, the Committee believes that a mix of prosecution and defence work helps the advocate to appreciate the concerns of the other side, and develop a balanced approach to the presentation of evidence. This, too, must be a more important factor when more serious cases are involved.

70. Thirdly, the Committee accepts that any move towards a polarised profession in which there are exclusively defence and exclusively prosecution advocates is likely to have more diffused adverse effects on the proper and efficient administration of justice. The way in which cases are presented to the court is likely to become more polarised. Much more importantly, it would no longer be possible to appoint judges with wide, concurrent experience of appearing for both sides in criminal cases.

71. On the basis of these arguments, the Committee advises that the proper and efficient administration of justice would not be maintained if the prosecution of criminal cases in the higher courts were to be exclusively conducted by the CPS.

A mixed system

72. The CPS itself does not, however, look for such a monopoly. The Advisory Committee notes that the CPS's application envisages the Service doing only a comparatively small proportion of their advocacy work. This is because the CPS

believes that it will always need full-time, consultant advocates to deal with the most difficult cases, because the advocacy skills needed at the highest levels are developed and maintained only by constant practice at that level. The application therefore acknowledges the need to preserve a wide pool of advocates of varied expertise from whom the most senior specialists can develop. The CPS proposes that its barristers should formally have full rights of audience in the Crown Court, but that those rights would be exercised only in a limited number of cases, none of which would exceed three days in length.

73. The Committee has therefore given careful thought to the desirability and feasibility of creating a 'mixed' system, where most prosecution advocacy in the Crown Court would continue to be undertaken by independent advocates, but the CPS would have the option of presenting a limited number of the less serious cases in-house. Such a limitation might, for example, be expressed in terms of a percentage of the Service's overall workload in the Crown Court.

74. In the Committee's view, it is important that, before any such extension were granted, the Service as a whole should have achieved and be maintaining a high standard in its present functions of preparing and presenting cases in the magistrates' courts and preparing Crown Court cases. The Committee notes that the CPS is a new element in the administration of justice. It has carefully considered accounts of the difficulties which the Service experienced in its first years, in terms of resources, manpower and organisation, and in establishing itself in relation to the police and the courts. The CPS has made great progress in overcoming those difficulties. The Service, however, remains below its complement in a number of areas, and evidence received by the Committee has raised doubts as to whether the CPS could now take on the additional responsibilities of providing advocacy services in the higher courts whilst maintaining the proper and efficient administration of justice.

The arguments for a mixed system

75. It is against this background that the Committee has considered the arguments put forward by the CPS itself in favour of a limited extension of its rights of audience.

76. The principal arguments are these:

- The lawyers employed by the CPS are full members of their professional bodies, well trained and effectively regulated. They are as independent as any other members of their profession.

- It is illogical, and incompatible with the general principle, for them to lose rights of audience the day they join the Service, and regain them the day they leave.

- The CPS could give a better standard of service in the courts, particularly by avoiding returned briefs being given to substitute counsel of a lower level of experience than the one originally chosen for a case.

- The CPS's decision-making would improve if those who did the work, or supervised it, had first-hand experience of presenting cases in court.

- The morale of existing staff, and the quality of recruits, could be improved if the CPS could offer the prospect of progressing to appear in the higher courts.

- It would cost the tax-payer less if the CPS was able to use its own advocates in at least some cases.

The arguments against a mixed system

77. As against this, it has been put to the Committee that even a limited extension of the CPS's rights of audience would not maintain the proper and efficient administration of justice. The principal arguments advanced against any extension are these:

- There is a fundamental constitutional principle that the advocates who prosecute in serious criminal charges should not be employees of the Government department which has taken the decision that the prosecution should proceed.

- CPS advocates could not be sufficiently independent to carry out their duties as prosecutors.

- A mixed system would be against the public interest, because some defendants would be prosecuted by independent advocates and some by CPS staff.

- Any extension would be the thin end of the wedge leading inevitably either to a total CPS monopoly, or to a drop in recruitment to the private Bar and loss of existing barristers which would in the long run amount to the same thing.

The Advisory Committee's views

78. The Advisory Committee has examined carefully the arguments put forward on both sides. It considers that the most fundamental are those which relate to the claimed constitutional principle and to the advocate's independence.

A constitutional principle?

79. First, despite its opposition to a CPS monopoly of prosecution advocacy, the Committee does not agree that the question whether CPS employees should have rights of audience in the higher courts is a matter of constitutional principle. Parliament has given Crown Prosecutors the rights of audience now enjoyed by solicitors to enable them to present prosecution cases in the magistrates' courts, and has left the question whether they should do so in the Crown Court open to change

by the arrangements for determining rights of audience, now the framework set up under the 1990 Act.

80. Apart from matters of constitutional principle, it has, nevertheless, been a tradition in England and Wales that state prosecutors do not present cases in the higher courts.[2] In contrast, in a number of Commonwealth countries with legal systems very like that in England and Wales, advocates employed by the state are permitted to appear in all courts.

Independence

81. As explained in paragraphs 33–38 above, the Committee has heard evidence that there is a real risk that any employed advocate will be subject to a range of pressures. This has been a major factor in the Committee's view that employed barristers should not generally have rights of audience in the more serious and complex cases. The CPS's position is, however, clearly more complicated than that of other organisations where employed barristers work. Most importantly, the CPS has been established to achieve a single set of objectives, providing a fair but effective prosecution system. The direct and indirect pressures which might apply to employees will, at least, not come from conflicting objectives.

82. Moreover, as the only substantial source of prosecution briefs, the CPS is a major factor in the market for advocacy services in the criminal courts. Independent barristers who derived a significant proportion of their practice from prosecution work might well feel, not having the protection of the employment legislation, that they could be put under pressure by the CPS to work in certain ways.

83. The Advisory Committee does not believe that it is inherently impossible for employed prosecutors to maintain sufficient independence to carry out their duties fairly. In both common and civil law jurisdictions, employees of prosecution services very often appear in serious cases. In particular, the Advisory Committee has had evidence from the Crown Agent in Scotland on the Procurator Fiscal system there. On the basis of that evidence, the Committee accepts that it is possible to manage a prosecution system, whose advocates appear in all but a very small proportion of the cases that would here be heard by the Crown Court, on the basis of an ethic of fairness to all the parties involved in a prosecution, successfully avoiding unhealthy prosecution–mindedness. The Committee notes, however, that the office of Procurator Fiscal has had many years in which to develop that ethic. Historically the office is senior in age and status to the police, and there is active involvement and supervision of the more difficult cases by senior members of the Bar seconded to the service in a way which it would be difficult to replicate in the larger jurisdiction of England and Wales.

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[2] The Law Officers of the Crown, including the Attorney General, do sometimes appear in court in cases of exceptional public interest.

CPS organisation

84. The Committee considers there are three factors in the way the CPS is organised which considerably assist it in developing as a fair and independent prosecution system. First is the fact that it exists only to be an independent prosecuting service. Secondly, the independence of the Attorney General, to whom it answers, from direct political pressure in relation to prosecutions has long been recognised. Thirdly, the Prosecution of Offences Act 1985 gives the Director of Public Prosecutions and individual Crown Prosecutors individual statutory responsibilities for the cases which they conduct. This puts them in a different position from the Civil Service in general, which 'as such has no constitutional personality or responsibility separate from the duly constituted Government of the day ... The duty of the individual Civil Servant is first and foremost to the Minister of the Crown who is in charge of the Department in which he or she is serving'.[3]

The assessment of Crown Prosecutors

85. The Committee has considered with particular care the argument that the rate of successful prosecutions will be used by the Service and by prosecutors as a central, or sole, indicator of performance, with the result that prosecutors will strive too hard for conviction and be tempted not to reveal evidence favourable to the defence. The Committee has considered the range of factors which are used to assess Crown Prosecutors' performance and suitability for promotion. These include intellectual penetration, good judgment, capacity for management and effective team relations, as well as competence. The outcome of the cases undertaken by an individual is inevitably to be taken into account in assessing the last of these factors, in particular, but the Committee accepts that the CPS does not believe that conviction rates, as opposed to the efficient management of cases, can be used even as a crude yardstick of success for its employees.

86. For all these reasons, the Committee does not accept the arguments that CPS employees could not be, and be seen to be, sufficiently independent to carry out the duties of advocates in the higher courts.

87. The CPS was, however, established on the basis that appearing in the higher courts would not be part of its functions. The Committee is seriously concerned by some of the evidence it has received on the present performance of the CPS, which suggests that the Service as a whole is not yet at a stage where it could demonstrate to the satisfaction of the public, the courts and others involved in the criminal justice system that it was ready to take on new responsibilities in the higher courts.

88. The Committee has considerable sympathy with the CPS's arguments that rights of audience in the Crown Court would improve decision-making, enhance morale and raise the standard of recruitment to the Service. The Committee does not, however,

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[3] The Duties and Responsibilities of Civil Servants in relation to Ministers: Note by the Head of the Home Civil Service; Hansard, 2 December 1987, coll. 572–5.

consider that these reasons alone would at the present time be sufficient to justify an extension of rights.

89. The Committee also sees force in the CPS's contention that it would be able more effectively to deal with the problem of returned briefs if it had the option of presenting some cases in-house. It is unlikely, however, that the use of in-house advocates on the limited scale envisaged by the CPS would have a significant impact on this problem, to which, in the Committee's view, a more radical solution needs to be found.

Fairness to defendants

90. The Committee finds it difficult to see the force of the argument that it would be unfair for some defendants to be prosecuted by independent advocates and others by the CPS, given that barristers appearing in the Crown Court as Crown Prosecutors would be governed by appropriate professional standards and codes of conduct. The Committee has, moreover, seen no evidence of problems in this respect in the magistrates' courts, where prosecution work is shared between CPS advocates and private barristers or solicitors working as agents for the CPS.

The future of the Bar

91. The Committee does not accept that a limited extension to the CPS's rights of audience would necessarily have a seriously damaging effect on the Bar. That could only happen if there was a collapse of confidence in practice at the criminal Bar as a worthwhile career on the part of present or potential members. It is clear that considerable caution is needed in determining what kind of extension should be permitted, and how it should be controlled, without causing an unduly adverse effect on the structure of the Bar, on its future, and therefore on the availability of advocacy services, at least in the short term.

The 'thin end of the wedge'

92. The Committee accepts that it is not the CPS's present intention to use its in-house advocates for more than a small number of the less serious Crown Court cases. Both the Bar and senior members of the judiciary have, however, expressed great anxiety that this would be the 'thin end of the wedge', leading inexorably to a virtual monopoly by the CPS of all Crown Court prosecution advocacy.

93. The major problem, in the Committee's view, is the absence of any really effective mechanism to ensure that the CPS could not, either immediately or in the future, exceed whatever limit had been set on the number of cases in which it could appear in the Crown Court. The CPS itself proposes that its in-house barristers' rights of audience would be exercised in accordance with guidelines to be laid down by the Attorney General. The approach adopted by a particular Attorney General would not, however, be binding on his successors. Indeed, the Committee notes that when the CPS was set up, it was on the basis of a statement from the then Solicitor General that

rights of audience in the Crown Court would continue to be confined to an independent Bar which prosecutes and defends. [4]

94. In the Committee's view, it would be more appropriate, and in keeping with the spirit of the new legislation on legal services, if the exercise of any extended rights of audience granted to the CPS could be controlled by the framework set up under Part II of the Courts and Legal Services Act. This would, in particular, provide the important reassurance that any rights of audience granted to CPS advocates could only be exercised within limits approved by the senior judiciary, as well as the Lord Chancellor and the Advisory Committee itself.

95. There is, however, no certain way in which that can be achieved within the procedures which the Act now lays down. The Committee believes that it would be inappropriate to extend the rights of audience of CPS barristers in the absence of machinery by which the limits to be imposed on the amount of work done by the CPS can be brought under the control of the statutory framework, with its careful balance of Government, the judiciary, and independent advice.

The Royal Commission on Criminal Justice and the future of the CPS

96. There is another important factor. Any question relating to rights of audience is to be determined by the framework established under the Courts and Legal Services Act. Shortly after the Committee started work, however, the Government announced the appointment of the Royal Commission on Criminal Justice, whose terms of reference clearly raise fundamental issues for the future system of prosecutions in this country. For example, the particular nature of the advocate's duties to the court is shaped by the adversarial nature of the proceedings. If the courts were given enhanced inquisitorial duties of some kind, that might radically change the role of the advocate.

97. The Royal Commission is also specifically directed to consider the role of the prosecutor. The Advisory Committee has noted reports that a number of the more substantial submissions to the Royal Commission have argued for the CPS's powers and authority in relation to the police to be augmented, and for the Service to be involved in cases at an earlier stage than happens at present. If such changes were to find favour, the issues over rights of audience would become significantly different and perhaps more complex.

Conclusion

98. On all these grounds the Committee has concluded that at the present time it would not be right to extend the CPS's rights of audience into the higher courts.

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[4] Hansard, 16 April 1985, coll. 215–216.

SECTION VII : THE SERIOUS FRAUD OFFICE

99. The SFO is not a statutory body, and its employees do not enjoy the special status of those civil servants who have specific statutory duties. The SFO deals, however, with a comparatively small number of cases, representing some of the most serious and complex criminal work. That work is closely supervised by its Director, who has independence equivalent to that of the DPP. The Committee accepts also that the special nature of the SFO's work means that the experienced lawyers who work within it have had to develop new ways of working to deal with the ever-increasing size and complexity of the cases.

Independence

100. For the same reasons as in the case of the CPS, the Advisory Committee sees no overriding objection of principle to allowing barristers employed by the SFO to present cases in the Crown Court, and is satisfied that individual SFO lawyers can act with the appropriate independence and objectivity. The SFO is, however, directly involved in the investigation of cases as well as with the later stages of preparation and presentation in court, although internal organisation of the office ensures that, within the team working on a particular case, an investigating lawyer does not make the decision to prosecute or become involved in the detailed preparation of the case for trial.

Quality of service

101. In the SFO's submission, the quality of service would be improved if they could use in-house junior counsel in the way proposed, because in-house advocates would be able to appear in pre-trial reviews and preparatory hearings, which often cause practical problems for independent counsel. It is also pointed out that the use of in-house advocates would improve the quality of case presentation, since they have more detailed knowledge of particular cases, and are more familiar with the evidence.

Conclusion

102. The minor change proposed by the SFO would in practice make very little difference to the present arrangements, where an SFO case controller usually sits in court behind counsel as 'instructing solicitor'. The Committee does not, in any event, think it right to deal with this by giving SFO lawyers wider rights of audience than those enjoyed by the CPS.

SECTION VIII : SUMMARY AND CONCLUSION

103. The Advisory Committee believes that the maintenance of the proper and efficient administration of justice requires cases in the higher courts to be presented by advocates who are fully and demonstrably capable of handling a case objectively and fairly, and are not unduly influenced by pressure to please their clients. In the case of advocates who are representing their employers, the Committee is not persuaded that the appropriate degree of impartiality and detachment can be established and demonstrated unless there are substantial safeguards in addition to those provided by the advocates' code of professional conduct. These would probably need to take the form of considerable restrictions on the other functions within an organisation that could be carried out by an employed barrister who wished to appear in court. On the evidence presented to it, the Committee has concluded that there are not sufficient safeguards in relation to barristers employed in local government or the private sector.

104. The Government Legal Service does have the additional safeguards provided by the Code for Crown Prosecutors and a special relationship with the Attorney General, but there is still a substantial risk that barristers employed in Government departments will be, or be seen to be, identified with the policies of their departmental Minister.

105. Both the CPS and the SFO are in a different position. These organisations are dedicated to the prosecution of offences, with no conflicting policy aims and with appropriate safeguards to protect the independence of individual prosecutors.

106. In considering what is needed to maintain the proper and efficient administration of justice, the Committee's other main concern has been to ensure that advocates granted rights of audience in the higher courts would appear there sufficiently frequently to maintain their skills at an appropriate level. The evidence received by the Committee suggests that not all barristers in local government, the private sector or the Government Legal Service have the opportunity to appear in court regularly. Those in the CPS and SFO are, again, in a different position.

107. For these reasons, the Committee does not believe that barristers employed in the private sector, in local government or the Government Legal Service should at present be allowed to appear as advocates in the higher courts. For the reasons explained in paragraphs 67–98 above, the Committee also thinks it inappropriate at present to give rights of audience in the Crown Court to barristers in the CPS and SFO.

108. It therefore follows that, had the Advisory Committee been considering rule 402.1(c) of the Bar's Code of Conduct as a new rule, it would now have concluded that the rule was appropriate in accordance with the general principle and statutory objective. The Committee's advice is therefore that the rule should be deemed to have been approved.

Procedure

109. It follows from the Committee's conclusions on employed advocates that the possibility of allowing them to exercise some rights of audience in the higher courts at some time in the future is not to be precluded. Although it appears to the

Committee that section 31 of the Act will not permit a further question to be raised about the Bar's rule 402.1(c) once it is deemed to have been approved, there are several ways in which the question of rights of audience for employed lawyers could effectively be reopened.

ANNEX A

THE ADVISORY COMMITTEE'S WORK ON THE QUESTION

Meetings

1. Since 26 April 1991, when the Lord Chancellor referred the question raised by the CPS and GLS to the Advisory Committee, the Committee has discussed the question at 10 of its full-day meetings, and at a two-day residential conference.

Visits

2. All Committee members have visited a CPS Branch Office, and have observed proceedings at a magistrates' court in which CPS lawyers were conducting the prosecution. The courts and offices visited were: Brighton, Luton, Manchester, Nottingham magistrates' court, West London magistrates' court and Inner London CPS. As detailed in the advice on the Law Society's application, members also visited Crown Court centres on a number of occasions.

Consultation

3. The Committee issued a press notice on 30 May 1991 inviting comments on the submission from the CPS and GLS. Over 60 consultation papers were sent out, and replies were received from the following individuals and organisations:

a)	Judiciary	1. Council of HM Circuit Judges 2. A group of judges sitting regularly at the Central Criminal Court 3. A Metropolitan Stipendiary Magistrate
b)	Legal Profession and Representative bodies	4. The General Council of the Bar 5. The Law Society 6. The Bar Association for Commerce, Finance and Industry 7. The Bar Association for Local Government and the Public Service 8. Fleet Street Lawyers' Society

		9.	Gianni Manca (immediate past President of the Consultative Committee of the Bars and Law Societies of the European Community - CCBE)
		10.	Association of First Division Civil Servants
		11.	Trades Union Congress
c)	Employers of Lawyers	12.	British Gas
		13.	ICI Group
		14.	British Broadcasting Corporation
		15.	British Railways Board
		16.	Lloyds of London
		17.	Association of District Councils
		18.	Association of British Insurers
		19.	Legal Aid Board
d)	Law Teachers	20.	Committee of Heads of Polytechnic Law Schools
		21.	Professor Bailey (University of Nottingham)
		22.	Professor Michael Zander (London School of Economics)
e)	Consumers	23.	Legal Action Group

4. There was a clear split between respondents who favoured extending employed lawyers' rights of audience in the higher courts, and those who were fundamentally opposed to any extension. Among the latter there was particularly strong opposition to CPS advocates in the Crown Court. The main issues of principle raised in responses were:

- independence and conflicts of interest;

- the danger of 'prosecution mindedness' and the need for a balanced mix of defence and prosecution work; and

- the effect on the independent Bar of CPS lawyers acquiring a virtual monopoly of Crown Court prosecution work, and of in-house lawyers generally taking on more advocacy.

5. The Committee also sought and received written evidence on prosecution rights of audience in a number of Commonwealth jurisdictions, and Scotland. In the case of the latter, the Chairman and Secretary visited offices of the Procurator Fiscal Service in Edinburgh.

Oral evidence

6. The Committee received oral evidence on the question raised by the CPS and GLS from the following bodies:

The CPS and GLS

The Bar Association for Commerce, Finance and Industry

The Bar Association for Local Government and the Public Service

The General Council of the Bar

CCPU

ATTORNEY GENERAL

071-828 1884

9 BUCKINGHAM GATE
LONDON SW1E 6JP

nSPM
BSD
2012

18 February 1992

The Rt Hon Michael Heseltine MP
Secretary of State for the Environment
2 Marsham Street
LONDON S W 1

Dear Michael:

USE OF THE PRIVATE SECTOR FOR GOVERNMENT LEGAL WORK

Thank you for your letter of 31 January. I entirely agree with you that the mere process of competitive tendering can lead to non-financial benefits and the better use of resources, whether the work is allocated to the private sector or an in-house team. I also agree that non-financial benefits should be considered by departments when they are taking decisions about market-testing and contracting out. These points are already being made when the Lawyers' Management Unit meet departments about their plans.

My guidelines build on the White Paper "Competing for Quality", which of course explains the advantages, financial and non-financial, of competition. In the guidelines I stress the importance of considering value for money, which I certainly see as including non-financial benefits. In the circumstances, I do not see the need for an immediate amendment of the guidelines, but I will bear your point in mind when they come to be revised. In the meantime my officials will continue to stress the points you make when they are discussing plans with departments.

I am copying this to the Prime Minister, to all members of the Cabinet, to Ministers in charge of Departments and to Sir Robin Butler.

Yours ever
Patty

LEGAL PROC: POWER
PAC

MRM

10 DOWNING STREET
LONDON SW1A 2AA

From the Private Secretary

5 February 1992

Dear Jennie,

CONVEYANCING

The Prime Minister was grateful for the Lord Chancellor's views set out in your letter to me of 31 January.

The Prime Minister is aware that a good deal of expert work has been done on the English conveyancing system in recent years. He feels that, in these circumstances, it would be sensible to focus on specific measures which the Government can take to speed up the administrative processes involved.

Two promising areas to explore are:

- statutory time limits for replies to local authority enquiries (which, as the Lord Chancellor points out, were recommended by the Law Commission's Conveyancing Standing Committee);

- examining the case for setting up a central computerised data bank which would bring together the property-related information currently held by the Land Registry, local authorities and other public bodies.

The Prime Minister is inclined to think that it might be better to concentrate on these specific measures rather than undertake a wide-ranging inquiry into conveyancing since this is, as the Lord Chancellor says, well-trodden ground. The time-scale of the two proposals is, of course, rather different. It is likely that the Government would wish to look at experience abroad with central data banks, before any commitment to set up such a system here. The Prime Minister would welcome colleagues' views.

I am copying this letter to Phillip Ward (Department of the Environment), Jeremy Heywood (HM Treasury) and Sir Robin Butler.

Yours,
Barry

BARRY H. POTTER

Miss Jennie Rowe,
Lord Chancellor's Office

GR
Vas amended

20

BHP
5/2

Content

PRIME MINISTER

CONVEYANCING

I understand that the gist of the attached letter from the Lord Chancellor was conveyed during this morning's manifesto discussions. You will see that Carolyn Sinclair has prepared a draft reply for me to send.

This seems fine: but not having attended the discussion, I thought it best to check you were content for me to send the letter as drafted by Carolyn.

BHP

BARRY H POTTER
4 February 1992

DRAFT LETTER FROM BARRY POTTER TO PS/LORD CHANCELLOR

CONVEYANCING

The Prime Minister was grateful for the Lord Chancellor's views set out in your letter of 31 January to me.

The Prime Minister is aware that a good deal of expert work has been done on the English conveyancing system in recent years. He feels that in these circumstances it would be sensible to focus on specific measures which the Government can take to speed up the administrative processes involved. Two promising areas to explore would be:

- statutory time limits for replies to local authority enquiries (which, as the Lord Chancellor points out, were recommended by the Law Commission's Conveyancing Standing Committee);

- examination of the case for setting up a central computerised data bank which would bring together the property-related information currently held by the Land Registry, local authorities and other public bodies.

The P.M.

He is inclined to think that it might be better to concentrate on these specific measures rather than undertake a wide-ranging inquiry into conveyancing since this is, as

the Lord Chancellor says, very well-trodden ground. The time-scale of the two proposals is, of course, rather different. It is likely that we would want to look at experience abroad with central data banks before committing ourselves to set up such a system here.

The Prime Minister would welcome colleagues' views.

Copies of the letter go to Phillip Ward (DoE), Jeremy Heywood (HMT) and Sir Robin Butler.

259.CS

EL PL

LORD CHANCELLOR

HOUSE OF LORDS,
SW1A 0PW

31 January 1992

Dear Barry,

The Lord Chancellor has asked me to write to you with reference to your letter of 30 December in which you state the Prime Minister's wish to see comparisons between the English system of buying and selling domestic property and that which applies in certain other countries. As you will know, Carolyn Sinclair has subsequently discussed this subject with the Lord Chancellor and officials of this Department and of the Department of the Environment, and is aware of much of the background. Officials have also had discussions with one of the Law Commissioners and with the Law Society. As a result, the Lord Chancellor recommends a slightly different approach to this problem.

The conveyancing system in England is largely unregulated by law, except that only those with prescribed qualifications may offer conveyancing services for reward, ie solicitors and (since 1985) licensed conveyancers. The methods of conveyancing used have evolved to meet the needs of buyers and sellers, influenced by the advice of their professional advisers and by the underlying law of property, which in this country is very different from continental systems; and although other methods of sale exist, eg auction and tender, the usual method chosen for the sale of domestic property is "private treaty".

A National Consumer Council Report in September 1990 ("Home Truths") concluded that despite the changes in conveyancing practice which have taken place, people are still dissatisfied with a number of aspects of buying and selling their homes. They said that consumers mainly wanted to remove the uncertainty and reduce the total costs involved. Our experience of complaints, and that of the Law Society, is that cost is now less of a problem, no doubt because conveyancing has become more competitive, especially in the present state of the property market. But uncertainty and delay are still grounds for complaint.

The complaints about uncertainty are commonly from victims of actual or threatened gazumping (and its reverse) and/or the collapse of conveyancing chains. Delay has various causes. Much of it stems from the length of time a purchaser has to spend in obtaining the information he needs, eg from local authorities (which seem to vary enormously in the speed with which they reply to enquiries), and from other sources. Recent trends, eg the establishment of Sites of Special Scientific Interest and the forthcoming register of contaminated land, have

increased the variety of information to be collected and the number of places from which it has to be obtained.

Conveyancing chains are regarded as the largest single cause of problems. They arise because of the desire of people who are moving house, and are both buying and selling, to synchronise the two dates so that they can move directly from one property into the next one. The resulting conveyancing chains can mean that a dozen or more sales of property are linked, and it needs only one of them to go wrong for the entire chain to collapse, or at least be delayed. In Scotland people apparently do not feel the need to synchronise transactions and bridging finance, arranged by solicitors, is more easily available, and on easier terms, than in England. The lack of short-term private accommodation for rent, to cater for those who sell one property before they buy another, does not help. Synchronising dates of sale and purchase also saves the cost of bridging or renting which is important in England where domestic property prices are quite high in many places; with the rise in home ownership over the last 20 years, many buyers are operating at the limits of their resources.

A good deal of work has been done in recent years to improve the English conveyancing system within the broad framework of property law, title registration and the way in which information about property is held. Most recently the Law Commission's Conveyancing Standing Committee has produced a series of reports of studies of suggestions for change, one of which is for a time limit to be placed on the length of time that local authorities take to answer enquiries about whether they have plans which affect property, and others recommend changes in practice, some of which were adopted by the Law Society in their new National Protocol in 1990, which is steadily gaining greater acceptance.

In view of this background, and in particular the amount of expert attention which has been given to improving the conveyancing system in recent years, the Lord Chancellor considers that, apart from one or two relatively minor matters (such as the proposal about time limits on local authority enquiries), there is little that can be done to improve the system within the present framework. International comparisons, though they may yield interesting ideas, are unlikely to provide solutions to English problems, since other systems will be shaped by their own different legal systems and traditions, eg the compulsory involvement of notaries in property transactions, and different social conditions, levels of home ownership, property values etc. The Law Society have, however, kindly agreed to ask their opposite numbers in Germany, Sweden, the USA and New Zealand for descriptions and appraisals of the conveyancing systems in their countries, and to ask for replies for us within a month.

Improvement will therefore depend on some more radical initiative, probably on the part of the Government, but it is at present far from obvious what form that initiative should take: a radical review of property law, a centralised information system, easier bridging loans, and a revived private rented

housing sector are all possibilities. The Lord Chancellor considers that it would be a mistake to decide what the best solution might be without a proper inquiry; but he considers that there is a good case for a wide-ranging inquiry into the conveyancing system, and that an examination of ideas abroad could form a useful part of that inquiry.

Copies of this letter to go to Phillip Ward (Department of the Environment), Jeremy Heywood (H M Treasury) and Sir Robin Butler.

Yours sincerely
Jerry Howe

Barry H Potter
Private Secretary
10 Downing Street

Private Secretary

LEGAL PROCEDURE : Judicial Review PE4

CCPU

2 MARSHAM STREET
LONDON SW1P 3EB
071-276 3000

My ref:

Your ref:

The Rt Hon Sir Patrick Mayhew QC MP
The Attorney General
9 Buckingham Gate
LONDON
SW1E 6JP

31 January 1992

USE OF THE PRIVATE SECTOR FOR GOVERNMENT LEGAL WORK

FILE WITH BP.

Thank you for copying to me your minute of ~~31~~ December to the Prime Minister about using the private sector for Government legal work. I am sure that my Department will find your guidance helpful in considering these matters.

I have only one concern. As you know, we are proposing to extend compulsory competitive tendering to local authority legal services and I shall be specifying a target percentage of the workload - 30% - which must be contracted out. We have made clear that we believe that competitive tendering means more than financial savings. Benefits can accrue from the setting of clear specifications, the setting of targets for performance standards and productivity, and, more generally, better use of legal resources whether in-house or from private firms. I am anxious that central Government's approach to these matters should not be inappropriately different. I should be grateful if you could consider extending your guidance to cover the need to take account of non-financial benefits.

I am copying this to the Prime Minister, to all members of the Cabinet, to Ministers in charge of Departments and to Sir Robin Butler.

Yours ever

MICHAEL HESELTINE

LEGAL PROC : Powers Pt4

PRIME MINISTER

USE OF THE PRIVATE SECTOR FOR GOVERNMENT LEGAL WORK

The White Paper on Competing for Quality lists a number of promising areas, including professional services such as legal work, for market testing/contracting out by Government departments. As legal adviser to the Government, I have prepared the **enclosed** guidance to help departments and Agencies when they consider the scope for using the private sector for their legal work.

I am copying this minute to all members of the Cabinet, to Ministers in charge of departments and to Sir Robin Butler.

31 December 1991


31.12
1991

USE OF THE PRIVATE SECTOR FOR GOVERNMENT LEGAL WORK
GUIDANCE BY THE ATTORNEY GENERAL

1. The White Paper on Competing for Quality emphasises the need to examine the scope for introducing more competition across all Government activities. As legal adviser to the Government as a whole, I have prepared this guidance to help departments and Agencies with this task in relation to their legal work.

2. The guidance starts by giving the context for the extension of competition, and then sets out the criteria for individual decisions. The following sections deal in turn with the approach to be used when going to tender, the role of the departmental or Agency Legal Advisers, and the role of the Lawyers' Management Unit, who will co-ordinate the exchange of information between departments and Agencies about their experience of using the private sector for legal work.

THE CONTEXT

3. The contracting out of some legal work is not new. Its consideration derives necessarily from the Government's financial management initiative. This, by introducing decentralised management and budgetary control, has imposed on departmental Legal Advisers (like other Civil Service managers) the obligation to seek value for money, and to make the most effective, efficient and economical use of the resources allocated to them. Sir Robert Andrew's review of Government Legal Services in 1988 recommended that departments should be ready to contract out legal work if

   (a) the necessary expertise does not exist in Government;

   (b) Government does not have the resources to do the work without undue delay;

   (c) it is more cost-effective for the work to be done in the private sector.

4. My experience as a Law Officer has satisfied me that the Government needs to retain an effective in-house legal capacity. But I firmly

believe that departments and Agencies should be encouraged to examine the scope for using the private sector in accordance with the principles set out in the White Paper. The extent to which legal work is done in-house must be kept under review in the light of experience.

5. No legal considerations require the services currently provided by Government lawyers to be viewed differently from other services provided by the Government. A large volume of Government legal work - particularly in relation to executive functions for which Agencies are responsible - should be considered for possible contracting out to the private sector, where the criteria set out in the Andrew Report are met and where the potential benefits from contracting out - e.g. cost savings, coping with fluctuating demand, special expertise - can be realised.

THE CRITERIA

6. The following factors will be relevant when departments and Agencies are considering the possible use of the private sector:-

(i) **Value for money, which must be the prime consideration.** Departments and Agencies should satisfy themselves that they would receive a service which is cost-effective and of the right professional quality.

(ii) **The particular experience and expertise required for a job.** There are certain fields of law, for example public law and many areas of EC law, where experience suggests that legal advice provided in-house is unlikely to be matched outside. Equally, there are other areas, such as the flotation aspects of privatisation, where the relevant expertise lies in the private sector.

(iii) **The risk that the nature of the work contracted out will tie the department or Agency to one supplier.** The work may require a substantial commitment of official time instructing an outside firm before any useful service can be received. Continuity of advice over a considerable period may, moreover, in certain circumstances be

especially desirable. A firm in which time has been invested will enjoy a significant advantage over its competitors, and the resulting barrier to entry will enable that firm to charge higher fees than would otherwise have been possible.

(iv) **The risk of a conflict of interest between a department or Agency and another client of a private sector firm.** A conflict of interest must be avoided by a private firm, as a matter of professional duty, but a firm's involvement in work for the department or Agency may lead it to advise other clients in a manner prejudicial to the proper interests of the department or Agency. A potentially significant detriment of this nature should be taken into consideration.

7. When considering whether to use the private sector for particular types of legal work, departments and Agencies should also ask themselves whether it falls within the area, which might be described as **core governmental work**, where contracting out will not be appropriate. In this area, there will be a continuing relationship of close confidence between Ministers and their legal advisers who need to understand the implications of policy options and the public interest factor in the consideration of particular aspects of the work of the department or Agency. Ministers have collectively recognised that their legal advisers must be involved in the development of policy in order to minimise the risk of adverse judicial review of administrative action. With this type of work the private sector will in my view be at a decisive disadvantage in relation to the in-house lawyer in the Government Legal Service.

8. **Core governmental work** will include, but not exclusively comprise, the following categories:-

(a) Work with national security or other especially sensitive implications;

(b) Work relating to major policy or constitutional issues;

(c) Government to government and other international non-commercial work;

(d) Work affecting the long term interests of more than one department, e.g. claims of public interest immunity;

(e) Work where Cabinet Office co-ordination is necessary.

PROCEDURES

9. Departments and Agencies must take decisions that are well informed about the comparative value for money offered by the private sector and the in-house service. They should generally test the market before committing themselves, drawing upon the Public Competition and Purchasing Unit's guidance on competitive tendering and contracting out. Their "Statement of good professional practice" is intended to apply, in general, to any type of activity in any department or Agency. Among the points stressed are the need to assess thoroughly the private firm; to draw up a suitable contract; and to monitor effectively, comparing the cost and performance of the private firm and the in-house operation. Additionally they should in particular take note of any risk of "loss leading" in tendering, which may prove, if successful, to be only of short term duration.

10. Departments and Agencies should probably focus first on market-testing in fields where private firms already carry out comparable work for private sector clients, since existing experience could be employed immediately.

DEPARTMENTAL LEGAL ADVISERS AND CONTRACTING OUT

11. Sufficient in house capacity must remain available within the Government Legal Service at least to service the needs of core governmental work, and also to provide me with the legal assistance of the high quality I need to fulfil my personal responsibility as the Government's legal adviser. As a matter of law the Crown is indivisible, and it is important to ensure that different emanations of the Crown do not take inconsistent lines on significant legal questions. The departmental Legal Adviser, who consults me in

accordance with well established procedures, needs to be aware of the legal issues arising from the work of the department so as to identify the questions where I should be consulted.

12. Departmental or Agency Legal Advisers should accordingly always be involved in any plans to market-test or contract out work to the private sector, and it will generally be appropriate for them to consult me. The Legal Adviser should agree to the specification for the work and the tendering arrangements, participate in the selection of the firm, and agree on the procedures for consultation. In certain cases, departments or Agencies may think it right for the selected firm to act on an agency basis for, and report to, the departmental or Agency Legal Adviser.

ROLE OF THE LAWYERS' MANAGEMENT UNIT

13. It will be helpful for departments and Agencies to exchange information on the use of the private sector for legal work. This exercise will be co-ordinated by the Lawyers' Management Unit, who are considering the establishment of a database of the name and location of legal firms used by departments and Agencies, the nature of the work and the name of the organisations which use them, so as to help with the identification of suitable local firms.

14. The Unit will make periodical reports to the head of the Government Legal Service, and to me, on the cost of the private sector and in-house legal work, in order to assess the relative value for money provided by the Government Legal Service. The Unit will shortly be visiting departments and Agencies to survey what systems they have in place, and where necessary to advise how such systems might be established, and to discuss what information from other departments would be helpful to departments and Agencies when they are considering the use of the private sector for legal work.

15. Any questions about this guidance should be addressed in the first instance to Mrs M Harrop at the Lawyers' Management Unit, Queen Anne's Chambers, 28 Broadway, London SW1H 9JS (071-210-3290).

CONFIDENTIAL

economic
law CCL

10 DOWNING STREET
LONDON SW1A 2AA

From the Private Secretary

30 December 1991

Dear Jennie,

CONVEYANCING

The Prime Minister has been giving some consideration to the present system for the buying and selling of domestic property in England. The Prime Minister believes it could be politically attractive to offer a better system, which is faster, cheaper and less bureaucratic than the present arrangements.

In the first instance, the Prime Minister would like to see a comparison between the English system of conveyancing and that applied in other countries. Many have drawn a favourable comparison between the present Scottish system and that in England. But the Prime Minister would like the comparison to go wider to include, say, the USA, Germany and Sweden, as well as Scotland and England.

Accordingly, the Prime Minister would be grateful if the Lord Chancellor and the Environment Secretary jointly could take forward this exercise, in consultation with HM Treasury and No.10 Policy Unit. The aim should be to complete a study of the pros and cons of the conveyancing systems in each of the above countries (and any others which have specific features worthy of study) within the next two months. Thereafter, in the light of the findings, the Prime Minister proposes to hold a Ministerial discussion.

I am copying this letter to Phillip Ward (Department of the Environment), Jeremy Heywood (HM Treasury) and Sir Robin Butler.

Yours,

Barry

(BARRY H. POTTER)

Miss Jennie Rowe,
Lord Chancellor's Office.

CONFIDENTIAL

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Yours,

Barry

(BARRY H. POTTER)

Miss Jennie Rowe,
Lord Chancellor's Office.

CONFIDENTIAL

Boro/. (1) Can we associate NH + J.H. + say I want a faster, cheaper system + suggest (a) the comparison Carolyn proposed on p.3. (b) other ideas they may have for discussion in Manifesto process. It wd. be attractive to offer a better system. J 24.12

Prime Minister

Probably best taken forward in the context of the Manifesto discussions on housing. Content to proceed on that basis?

DHP 20/12

(2)

PRIME MINISTER 20th December 1991

CONVEYANCING SCOTTISH STYLE

1. You asked at the Chequers retreat whether we should consider moving to the Scottish system of conveyancing.

2. It is not the law which is different in Scotland. It is practice. There is nothing to stop people in England from using the Scottish procedures if they want to. In 1985 the Law Commission produced a booklet telling people how to do this.

3. Why then has it not happened? Probably for several reasons:

- it is not widely known that the Scottish system can be used in England and Wales;

- estate agents and solicitors have little interest in publicising the fact. They probably benefit from the lengthy procedures south of the border;

- there are downsides as well as upsides to the Scottish system. Purchasers may have to pay for surveys of houses they do not secure, and in a system of sealed bids, may pay more than is necessary to get the house they want.

The Case for Change

Defenders of the English system of conveyancing - including the Lord Chancellor's officials - point out the safeguards it provides for purchasers. The length and uncertainty of the

proceedings (typically 3 months, though currently 6) and the possibility of gazumping or gazundering are seen as the price to be paid for a system which

- does not commit purchasers until the transaction is well advanced;

- minimises the need for bridging loans;

- gives certainty as to title and the results of local searches.

The system has evolved, it is argued, to reflect the needs of a densely populated country in which home ownership has moved well down the income scale.

All this has to be taken with a pinch of salt. The English system of conveyancing appears uniquely slow and nerve-racking. It is true that the swiftest systems seem to be found in countries with relatively small populations. Sweden is frequently cited (a Swedish friend of mine saw a house on Tuesday and owned it by Saturday). But house ownership is widespread in the USA and conveyancing is certainly less of a hassle there.

How do We Change?

It appears that the problem is not so much the law in England, as the scope for dragging out the process of conveyancing. This can be justified by reference to the time it takes to conduct local authority searches and check title at the Land Registry. If we could speed up these steps, we could make it harder for the professionals to spin things out.

The Land Registry has embarked on computerisation, and some local authorities are computerising. But it is all being done in piecemeal fashion. We are not constructing a single data bank of the kind which exists in Sweden, where information on title, planning proposals etc are all held centrally and can be accessed direct by lawyers. Of course setting up such a system would cost money and would involve requiring local authorities to pass information on local plans to a central data bank. Local authorities might be quite relieved to be spared the task of carrying out local searches, but they might not.

One step which would improve matters north and south of the border would be a 'log book' for homes. Those selling would be obliged to have an independent survey carried out before putting property on the market. The survey results would be available to all prospective purchasers.

Conclusion

The procedures used to buy and sell houses in England have developed in the way they have because it has suited the professionals and, it must be said, some of those involved in the lengthy 'chains' which characterise the system. Delay is not just a matter of bureaucratic inefficiency. It avoids legal commitment, which people can find useful. Public acceptance of any other system would therefore require a change in attitude.

Exhaustive studies have been made of the English versus the Scottish system, mainly by lawyers. They are inconclusive. What would be useful would be a comparison of the procedures in, say, the USA, Germany, Sweden, Scotland and England. The comparison should not be made by lawyers, though a lawyer could be included in a small study team. It might be useful

to include someone from one of the consumer organisations. Particular attention should be paid to the systems for establishing title (the US has title insurance), carrying out searches and surveying the property. Such a study should not take long - say 2-3 months.

The question is whether you launch such an exercise now, with a view to proposing specific changes in the Manifesto; or simply say in the Manifesto that the Government will examine the scope for a quicker and more certain procedure for conveyancing. The politics of saying anything about this in a flat market need to be considered.

Michael Heseltine as well as the Lord Chancellor should be involved in any exercise. You might want to sound them both out first.

CAROLYN SINCLAIR

137.cs

The Rt. Hon. Peter Lilley
Secretary of State for Trade and Industry

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

Department of Trade and Industry

Ashdown House
123 Victoria Street
London SW1E 6RB

Direct line
071-215 4440

DTI Enquiries
071-215 5000

22 November 1991

Dear James

LEGAL SERVICES IN NORTHERN IRELAND

Thank you for sending me a copy of your letter to Peter Brooke of 31 October.

Your proposal for a short delay in implementing the Policy Paper on legal services seems to me reasonable in the special circumstances of Northern Ireland.

I agree that we should emphasise our continued commitment to improving competition and choice in the provision of legal services.

It will also be important, in any new arrangements for conveyancing, to ensure that consumers are adequately protected against the tying-in of other services to the provision of mortgage loans.

I am copying this letter to the Prime Minister, Peter Brooke, Patrick Mayhew and EA(CP) colleagues.

Yours

Robin

JW11176

NORTHERN IRELAND OFFICE
WHITEHALL
LONDON SW1A 2AZ

SECRETARY OF STATE
FOR
NORTHERN IRELAND

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

21 November 1991

Dear James,

LEGAL SERVICES IN NORTHERN IRELAND

Thank you for your letter of 31 October. I am pleased to see that you had a fruitful meeting with the President of the Law Society of Northern Ireland when you were last in Belfast.

I wish to endorse fully the decisions which you arrived at as a result of that meeting. In particular, I support the establishment of a Legal Services Liaison Group to examine further how best to achieve the Government's stated objectives in relation to legal services in Northern Ireland. Incidentally, I hope that the Bar would involve itself in a similar exercise. Any assistance which my officials can give to yours in the course of the next months' discussions and deliberations will have my full backing.

I am copying this letter to the Prime Minister, Patrick Mayhew and to EA(CP) colleagues and to Sir Robin Butler.

Yours ever
Peter

PB

LEGAL PROC: Powers pt 4

NORTHERN IRELAND OFFICE
WHITEHALL
LONDON SW1A 2AZ

SECRETARY OF STATE
FOR
NORTHERN IRELAND

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

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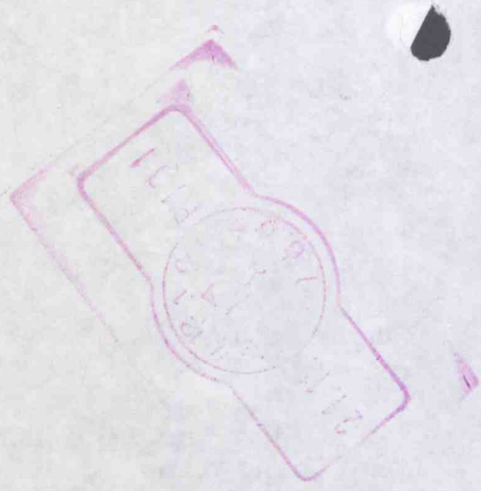
Yours ever
Peter

PB

LEGAL PROC: Legal Power: pr 4



HOUSE OF LORDS,
SW1A 0PW

The Right Honourable Peter Brooke MP
Secretary of State for Northern Ireland
Northern Ireland Office
Stormont Castle
BELFAST
BT4 3ST

31 October 1991

Dear Peter,

LEGAL SERVICES IN NORTHERN IRELAND

I am writing to bring you up-to-date concerning the proposals on legal services in Northern Ireland outlined in the Policy Paper ('Legal Services in Northern Ireland: The Government's Proposals') published on 1st July this year.

I had the opportunity to meet the President of the Law Society of Northern Ireland when I visited Belfast recently. The President outlined his Society's principal concern that the proposal to allow the financial institutions to provide in-house conveyancing services could have a harmful effect on the network of local solicitors' firms. At the same time, the President indicated that the Law Society may be prepared to consider possible new arrangements under which solicitors in private practice would provide conveyancing services for the clients of financial institutions. There have been developments along these lines recently in England and Wales and it may be that this approach could provide the most practicable way of securing a "one stop shop" for conveyancing in Northern Ireland.

The President of the Law Society also impressed on me the importance of the role played by the solicitors' profession in Northern Ireland in providing independent legal advice to all sections of the community. In this way, the profession has helped to promote respect for the rule of law in very difficult circumstances.

In view of the concern expressed by the President of the Law Society regarding the continued viability of the network of local solicitors (a concern which was echoed by the General Consumer Council in its response to the Policy Paper), I consider it would be prudent to allow some further time to reflect on how best to secure our overall objectives without indirectly causing unwarranted harm to the solicitors' profession. I have therefore concluded that it would not be appropriate to try to bring forward primary legislation to implement the proposed reform of legal services in Northern Ireland until after the General Election. As well as

producing greater certainty, this short delay ought to provide a useful "window of opportunity" enabling all of the parties concerned to consider further how best to achieve increased competition and choice in the provision of legal services in Northern Ireland.

For my part, I have asked my officials in the Northern Ireland Court Service to consider whether it would be possible to further streamline the measures outlined in the recent Policy Paper so as to reflect the circumstances to which they will apply. At the same time, I shall wish to ensure that any such streamlining does not undermine our goals in relation to legal services.

For its part, I shall look to the legal profession in Northern Ireland to use the next few months to give further thought as to how the profession might play its part in advancing the objectives outlined in the Policy Paper. In this regard, I have agreed to the establishment of a Legal Services Liaison Group to provide a forum for discussions between the Court Service and the Law Society. I am inviting the Chairman of the Bar Council to consider whether he would find it helpful to establish a similar forum for parallel discussions with the Bar. In my opinion, the more that we can achieve by way of consensus, the less need there may be for an all-embracing legislative solution. At the same time, I anticipate that it may in due course be necessary to bring forward primary legislation to put in place reforms such as the appointment of a Legal Services Ombudsman and the creation of an Advisory Committee to provide independent advice to Government on a range of legal services matters.

I hope you will agree that the next few months should be used to seek to initiate a constructive dialogue with the legal profession and with other interested groups in Northern Ireland. While the carriage of these discussions will remain my responsibility, I know that I can look to you and to Patrick Mayhew to lend your encouragement and support to this process. At the very least, I think it will be important that we send a clear signal to the legal profession that while the decision to allow further time for discussion and reflection indicates a willingness on our part to adapt our proposals to the particular circumstances of Northern Ireland, it does not in any sense constitute any lessening of our resolve to promote the objectives of improved competition and choice which underpin these proposals.

Copies of this letter go to the Prime Minister, Patrick Mayhew, and to EA(CP) colleagues.

Yours ever,

James.

ex.kf/sj2/35 **CONFIDENTIAL**

NDPM

MT 24/6

Treasury Chambers, Parliament Street, SW1P 3AG
071-270 3000

25 June 1991

Rt Hon Lord MacKay of Clashfern MP
Lord Chancellor
Lord Chancellor's Office
House of Lords
LONDON
SW1A OPW

Dear Lord Chancellor,

LEGAL SERVICES IN NORTHERN IRELAND – flap

Thank you for your letter of 6 June. I have also seen Andrew Turnbull's letter of 25 June.

Subject to any further comments you receive from colleagues tomorrow I am content with your proposals, and you may take it that you have EA(CP) approval.

I am copying this letter to the recipients of yours.

Yours sincerely,

pp **NORMAN LAMONT**

(Agreed by the Chancellor and signed in his absence)

IRELAND - SIR pt 2

FILE: A/PPS/LEGAL
DAS.

10 DOWNING STREET
LONDON SW1A 2AA

From the Principal Private Secretary

25 June 1991

Dear Jennie.

THE LEGAL PROFESSION AND LEGAL SERVICES

The Lord Chancellor wrote to the Chancellor or the Exchequer on 6 June setting out his final proposals in relation to legal services in Northern Ireland. These proposals are sufficiently close to those which Ministers approved in July of last year that I do not think it is necessary to seek further endorsement from the Prime Minister.

I am copying this letter to the Private Secretaries to members of EA(CP), Tony Pawson (Northern Ireland Office), Juliet Wheldon (Law Officers' Department) and to Sir Robin Butler.

Yours sincerely
Andrew Turnbull

ANDREW TURNBULL

Miss Jennie Rowe
Lord Chancellor's Office

MRT.

Ref. AO91/1571

MR TURNBULL

Legal Services in Northern Ireland

The Lord Chancellor wrote to the Chancellor of the Exchequer on 6 June seeking agreement to publish a Policy Paper outlining the Government's proposals in relation to legal services in Northern Ireland and the subsequent preparation of enabling legislation. A copy was sent to the Prime Minister. The Lord Chancellor referred to this matter in Cabinet last week, and is, I understand, keen to issue these proposals before the end of the Northern Irish legal year on 27 June.

2. One of the proposals is that the Lord Chancellor, rather than the Secretary of State for Northern Ireland, would be responsible for certain functions required under any new scheme of reform. Generally the functions involved do not currently exist except in the statutory framework for the regulation of the solicitors' profession where policy responsibility currently rests with the Secretary of State for Northern Ireland. In the interests of consistency the Lord Chancellor and the Secretary of State propose that this responsibility should be transferred to the Lord Chancellor through, I understand, an Order in Council.

3. The proposal reflects concern expressed during earlier consultation on a Green Paper that it would be inappropriate for any Ministerial involvement in the regulation of the legal profession to be vested in the Secretary of State for Northern Ireland in view of his perceived political role in the Province. Since 1978 the Lord Chancellor has had an increasingly

significant role in matters relating to the administration of justice in Northern Ireland and would be more likely to command the respect of the legal profession.

4. The proposal was put to the then Prime Minister in July 1990 who agreed that the Lord Chancellor, rather than the Secretary of State for Northern Ireland, should be responsible for certain functions arising form the reforms of legal services in Northern Ireland. Nothing has changed since then and I therefore recommend that the Prime Minister gives his approval through a letter from you in response to the Lord Chancellor's letter of 6 June.

R.E.R.B.

ROBIN BUTLER

24 June 1991

IRELAND: Sit pt29

fst.nb/fst/17.06.91

FINANCIAL SECRETARY TO THE TREASURY

Treasury Chambers, Parliament Street, SW1P 3AG

Lord Chancellor
House of Lords
LONDON
SW1A 0PW

June 1991

Dear Francis

LEGAL SERVICE IN NORTHERN IRELAND

Thank you for your letter of 6 June to Norman Lamont about the Policy Paper on legal services in Northern Ireland.

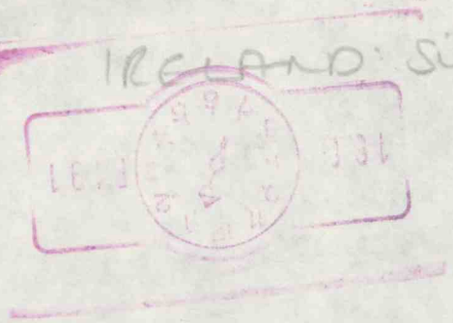
I am glad that this framework for better quality and greater choice in the provision of legal services in Northern Ireland is now ready for publication, and note that it should be possible to implement the bulk of its proposals fairly quickly using the Order in Council procedure under the Northern Ireland Act 1974.

I am copying this letter to the Prime Minister, to EA(CP) colleagues, and to Peter Brooke, Patrick Mayhew and Sir Robin Butler.

Yours ever

FRANCIS MAUDE

IRELAND: Situation Pt 29



NBPM
AT 19/6

cc PC.

Foreign &
Commonwealth
Office

London SW1A 2AH

From The Parliamentary Under Secretary of State

19 June 1991

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

Dear Lord Chancellor,

LEGAL SERVICES IN NORTHERN IRELAND

Thank you for sending Douglas Hurd a copy of your letter of 6 June to Norman Lamont. I am replying in his absence overseas.

I am content with your proposals which carry no apparent implications for our relations with the Republic of Ireland. I would however like to see a copy of the proposals passed to the Irish, perhaps through the Anglo-Irish Secretariat, as soon as they are on the point of publication and I should be grateful if this could be agreed to. I understand Peter Brooke would have no objection.

Copies of this letter go to the members of EA (CP) and also to the Prime Minister and to Norman Lamont, Peter Brooke, Patrick Mayhew and Sir Robin Butler.

Yours,

Mark

Mark Lennox-Boyd

FCOADG

IRELAND: Sit ff 29

HOUSE OF LORDS,
SW1A 0PW

The Right Honourable Norman Lamont MP
Chancellor of the Exchequer
HM Treasury
Parliament Street
LONDON
SW1P 3AG

6th June 1991

Dear Norman,

LEGAL SERVICES IN NORTHERN IRELAND

It is now more than two years since the sub-committee on Economic Policy agreed to the publication of the White Paper "Legal Services: A Framework for the Future" and approved the policy proposals now contained in Part II of the Courts and Legal Services Act 1990 (Memorandum E(CP) (89) 9 refers). In that time, a broadly similar framework of reform has been brought forward for Scotland. I am now writing to ask colleagues to agree to an analogous programme of reform in relation to Northern Ireland. In doing so, I have the support of Peter Brooke and Patrick Mayhew.

You will be aware that, when Secretary of State for Northern Ireland, Tom King put in hand a consultative process beginning with publication of a Northern Ireland Supplement to the three Green Papers on 'The Work and Organisation of the Legal Profession', 'Contingency Fees', and 'Conveyancing by Authorised Practitioners'. The closing date for responses to the Supplement was extended to allow consultees time to have regard to my White Paper.

The proposals outlined in the Supplement were very similar to those in the Green Papers and the responses closely paralleled those received in England and Wales. There was, however, one point of principle which was peculiar to Northern Ireland. This was the extensive criticism of the suggestion that the proposed Ministerial responsibilities should be discharged by the Secretary of State for Northern Ireland. It was suggested that, if any Ministerial role were to be provided in relation to legal services, it would be inappropriate for this to be vested in the Secretary of State in view of his perceived political role in the Province. A number of consultees argued that the Ministerial role should instead be vested in the office of the Lord Chancellor. This view was also supported by Patrick Mayhew in correspondence with Tom King.

The strength of opinion on this point led Peter Brooke to suggest that I should agree to assume responsibility for the various Ministerial functions that would be required under any new scheme of reform. Following an analysis of the issues involved, I indicated that I would be content to accept responsibility as suggested. Approval for the proposed allocation of Ministerial functions was obtained from the then Prime Minister last August.

Peter Brooke, Patrick Mayhew and I have agreed that it would now be appropriate to proceed to publish a Policy Paper outlining the Government's proposals in relation to legal services in Northern Ireland. If colleagues agree with us, it would be my intention that we should seek to publish the Policy Paper before the Summer Recess. I am enclosing a copy of the proposed Policy Paper which has been worked-up following extensive consultations at official level among our various Departments. I have also shown an earlier draft of the paper in confidence to the Lord Chief Justice of Northern Ireland. For ease of reference, I am also enclosing an outline of the principal features of the Policy Paper.

As you will see, the proposed scheme of reform outlined in the Policy Paper is closely modelled on that enacted for England and Wales in the Courts and Legal Services Act of last year. At the same time, I have sought to take account of adjustments on points of detail that may be necessary to reflect the particular circumstances of Northern Ireland. For example, the proposed Advisory Committee on Legal Education and Conduct would be numerically smaller, but would have essentially the same functions, as the equivalent committee in England and Wales. Also, I am minded to extend the remit of the Authorised Conveyancing Practitioners Board to cover probate services as well; I am convinced that this would better reflect the particular circumstances of the relevant market in Northern Ireland.

You may also wish to note that while I favour removing the legal obstacles to multi-disciplinary partnerships, I would not wish this proposal to cause undue concern in Northern Ireland regarding the future of the Bar Library system. As you will be aware, barristers in Northern Ireland have traditionally practised from the Library rather than chambers and I am strongly of the opinion that, in putting forward our proposals, we should take the opportunity to give a clear signal of the Government's continued support for this arrangement. I think we all recognise the risk that the Bar might divide on sectarian lines if the Library were to be undermined, and the signal of support given at paragraph 11.04 of the Policy Paper would, I am confident, be likely to improve the acceptability of this aspect of our proposals.

With publication of the Policy Paper, the way would be clear to begin drafting a Legal Services Order in Council. This could possibly be introduced at the end of the current Parliament or, more likely, early in the next Parliament. It

would also be necessary to make some consequential amendments to the legislation regulating eligibility for judicial appointments. For constitutional reasons, the latter changes would require a Bill, but it would be possible to hold these back until a suitable legislative vehicle becomes available.

I hope that it will be possible for you, and for colleagues to whom I am copying this letter, to agree to publication of the Policy Paper and the subsequent preparation of enabling legislation. In order to allow for the Policy Paper to be published before the end of the Legal Year in Northern Ireland, I would be most grateful if you could let me have your response by close-of-play on Wednesday 19 June. I regret having to impose such a tight deadline, but as colleagues are already familiar with the overall shape of our policy proposals in this area, I hope this will not prove too onerous.

Copies of this letter go to the members of EA(CP) and also to the Prime Minister and to Peter Brooke, Patrick Mayhew and Sir Robin Butler.

Yours ever,

James.

OUTLINE OF PRINCIPAL FEATURES OF POLICY PAPER ON LEGAL SERVICES IN NORTHERN IRELAND

The principal features of the Policy Paper on Legal Services in Northern Ireland are:

* the establishment of an Advisory Committee on Legal Education and Conduct;

* appointment of a Legal Services Ombudsman;

* establishment of an Authorised Conveyancing and Probate Practitioners Board and the introduction of greater choice in the providers of conveyancing and probate services;

* establishment of Conveyancing and Probate Appeal Tribunals;

* opening-up of rights of audience and the right to conduct litigation along the lines enacted in the Courts and Legal Services Act 1990;

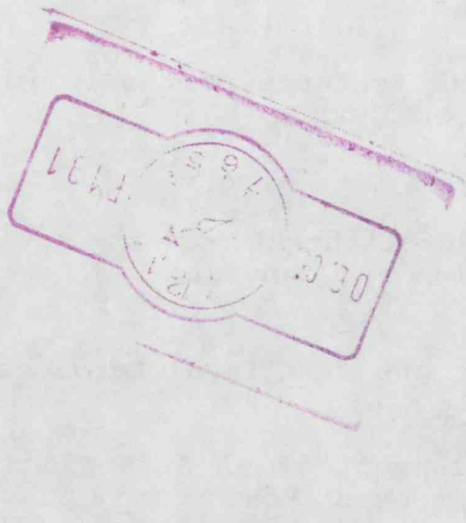
* removal of any statutory barriers which would prevent the professional bodies providing for multi-disciplinary or multi-national partnerships;

* facilitating rights of establishment for legal practitioners between Northern Ireland and the rest of the United Kingdom on a similar footing to that of practitioners from other EC Member States;

* facilitating conditional fee arrangements along the lines enacted in the Courts and Legal Services Act;

* consequential changes in the legislation determining eligibility for judicial appointment;

* a consultative role in the practical implementation of the above policy for the Lord Chief Justice on behalf of the judiciary.



KW

dlwpdocs/pps/stockton

10 DOWNING STREET

LONDON SW1A 2AA

From the Private Secretary

7 August 1990

THE LEGAL PROFESSION AND LEGAL SERVICES IN NORTHERN IRELAND

The Prime Minister has seen the joint minute from the Lord Chancellor and the Secretary of State for Northern Ireland and was content that the functions arising from the reform of the legal profession and legal services in Northern Ireland should be vested in the Lord Chancellor.

I am copying this letter to Stephen Leach (Northern Ireland Office) and Sonia Phippard (Cabinet Office).

ANDREW TURNBULL

Paul Stockton Esq
Lord Chancellor's Office

Prime Minister content to proceed in this way AT 2/8

Prime Minister

Yes pls

THE LEGAL PROFESSION AND LEGAL SERVICES IN NORTHERN IRELAND

1. The purpose of this minute is to ask your agreement to the vesting of certain Ministerial functions in the office of Lord Chancellor under our proposals for the reform of the legal profession and legal services in Northern Ireland.

Background

2. The broad conclusion we have drawn from the responses to the Northern Ireland Supplement to last year's Green Papers and the subsequent White Paper is that the Government should proceed to implement the proposed reforms by bringing forward provisions similar to those contained in Part II of the Courts and Legal Services Bill, with appropriate modification to suit the particular circumstances of Northern Ireland. We attach an Annex outlining our proposals in this respect.

Ministerial responsibility

3. The responses to the Supplement to the Green Papers exposed a concern which we feel should properly be addressed before proceeding to further develop Government policy in this area; namely, the role proposed in the supplement for the Secretary of State. Many respondents were opposed to the idea of any Ministerial involvement in the regulation of the legal profession while others suggested that, if any Ministerial role were to be provided, it would be inappropriate for this to be vested in the Secretary of State for Northern Ireland in view of his perceived political role in the Province. A number of consultees argued that the Ministerial role should instead be vested in the Lord Chancellor.

4. Since the enactment of the Judicature (Northern Ireland) Act 1978, the office of Lord Chancellor has had an increasingly significant role in matters relating to the administration of justice in Northern Ireland. We have concluded that in assuming responsibility for the Ministerial functions that would arise under the proposed scheme of reform, the Lord Chancellor would be more likely to command the respect of the legal profession than would the Secretary of State and this would be likely to add to the acceptability of the Government's proposals.

Extent of transfer

5. The proposed scheme of reform would give rise to Ministerial functions in a number of areas where none currently exist, as has been the effect of the Courts and Legal Services Bill in respect of England and Wales. We recommend that these new functions be vested in the Lord Chancellor.

6. One area where there is at present an element of governmental involvement is the statutory framework providing for the regulation of the solicitors' profession. Policy responsibility in this area is currently discharged by the Secretary of State for Northern Ireland, while operational matters are vested in the Department of Finance and Personnel for Northern Ireland. In the interests of consistency, we recommend that these functions should be transferred to the Lord Chancellor.

Expenditure and manpower implications

7. It is proposed that the new regulatory agencies created under the scheme (as described in the enclosed outline) will be in place by year 1992/93. Additional resources will be required to service these agencies (which would be funded by grant-in-aid from the Northern Ireland Court Service) although the staff numbers involved are unlikely to exceed single figures. The Conveyancing and Probate Practitioners Board may become self-financing after an initial period.

The way forward

8. If you approve of the proposed allocation of Ministerial functions outlined above, we would propose to write to Members of E(CP) seeking agreement to the scheme of reform with a view to publication of a policy statement in the Autumn. The way would then be clear to begin drafting a Legal Services (Northern Ireland) Order in Council. It is thought that a Draft Order could be laid before Parliament reasonably early next year.

Conclusion

9. You are asked to agree to the vesting of the proposed Ministerial functions in the office of Lord Chancellor.

M1C

The Lord Chancellor

P.B.

Secretary of State for Northern Ireland

July 1990

OUTLINE OF PROPOSED REFORMS OF LEGAL SERVICE IN NORTHERN IRELAND

The principal features of the proposed scheme are:-

* the establishment of an Advisory Committee on Legal Education and Conduct;

* appointment of a Legal Services Ombudsman;

* establishment of an Authorised Conveyancing and Probate Practitioners Board;

* establishment of Conveyancing and Probate Appeal Tribunals;

* opening-up of rights of audience and the right to conduct litigation along the lines proposed in the Courts and Legal Services Bill;

* removal of any statutory barriers which would prevent the professional bodies providing for multi-disciplinary or multi-national partnerships;

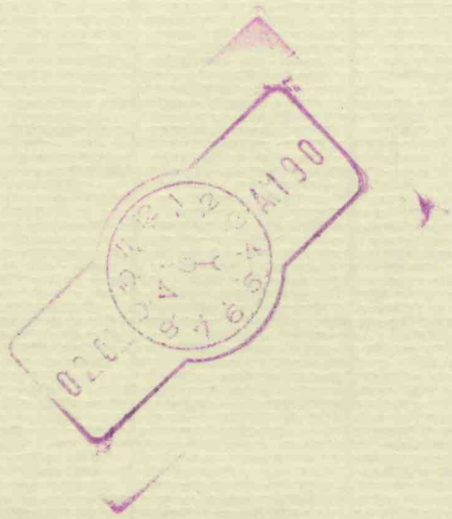
* facilitating rights of establishment for legal practitioners between Northern Ireland and the rest of the United Kingdom on a similar footing to that of practitioners from other EC Member States;

* facilitating conditional fee arrangements along the lines proposed for England and Wales;

* consequential changes in the legislation determining eligibility for judicial appointments similar to those contained in the Courts and Legal Services Bill;

* a consultative role in the practical implementation of the above policy (where appropriate) for the Lord Chief Justice on behalf of the judiciary.

LEGAL PROCEDURE: Legal Papers Pt 4



CONFIDENTIAL

Prime Minister
Agree I minute to Rifkind to urge that he avoids any statements which close off option of opening up conveyancing further at a later date? (The preamble to the letter would recognise the pressure that had led to the current compromise)
AT 12/7

MR TURNBULL

10 July 1990

SCOTTISH LAW REFORM BILL

Your minute of 3 July to the Prime Minister described the compromise reached to save the Scottish Law Reform Bill as a two-stage process, with conveyancing being opened up:

- initially to licensed conveyancers only;

- subsequently to financial institutions and others.

You went on to say that you were not sure how firm the commitment was to the second stage.

The answer seems to be not at all. Nothing was said about a second stage in Malcolm Rifkind's announcement last week. I understand from the Lord Chancellor that the point was not raised at the evening meeting of Ministers which decided the deal.

It would clearly help the English legal reforms if the Scots appeared to be following the English as far as the break-up of the monopoly on conveyancing is concerned. Putting it another way, it will not help the English reforms if the Scottish solicitors are seen to have kicked away the hated conveyancing proposals sine die. The injustice will be felt especially keenly by English solicitors because conveyancing is almost certainly less important in commercial terms to Scottish solicitors than to English ones, because of different practices in house purchase.

In England the second stage was clearly heralded by a provision in the 1986 Building Societies Act. It just took time to

CONFIDENTIAL

realise. It would obviously be very difficult in the present political situation to press Malcolm Rifkind to say something definite now about the longer term. But it would be helpful if he could avoid saying anything in the next few weeks which closed off bringing Scotland into line with England on conveyancing in the not too distant future.

The Lord Chancellor is very much of this view. But for various reasons he does not feel that he can or should speak to Malcolm Rifkind about it.

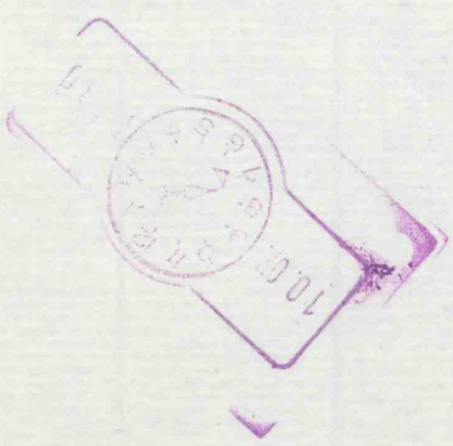
Politics may continue to determine what is said and done on the Scottish Law Reform Bill. But the implications for the English Bill are worrying - especially as it now looks unlikely that the latter will be able to get Royal Assent this summer (because of timetable problems in the Lords). The Law Society may conclude from what happened in Scotland that they need to step up their campaign against the conveyancing proposals in England. (Up till now this has been muted, because of the wider benefits which the legal reforms will bring to solicitors.)

Conclusion

Everything should be done to keep alive the idea of a two-stage process in Scotland, so that it cannot be argued that solicitors north of the border have been able to keep their monopoly more or less intact.

CAROLYN SINCLAIR

LEGAL PROC : Pouvoirs PT4



cc P.U.
DM
Q.
Press

SCOTTISH OFFICE
WHITEHALL. LONDON SW1A 2AU

FAX

Tim Sutton Esq
Private Secretary
Lord President's Office
Privy Council Office
Whitehall
LONDON
SW1A 2AT

F/A

4 July 1990

Dear Tim

LAW REFORM (MISCELLANEOUS PROVISIONS) (SCOTLAND) BILL

Further to the (second) meeting which the Lord President chaired late yesterday evening on this subject, I attach the text of an oral answer which my Secretary of State will be giving this afternoon to Mr Frank Doran.

Copies go to Dominic Morris (No 10), Robert Canniff (Chancellor of the Duchy's Office), Paul Stockton (Lord Chancellor's Department), Murdo Maclean (Chief Whip's Office) and Muir Russell (Cabinet Office).

Yours
Jim

J D GALLAGHER
Private Secretary

EJD00504.070

WEDNESDAY 4 JULY 1990 ORAL

HOUSE OF COMMONS

*MR FRANK DORAN: To ask the Secretary of State for Scotland, what representations he has received about the proposed changes set out in Part II of the Law Reform (Miscellaneous Provisions) (Scotland) Bill; and if he will make a statement.

MR MALCOLM RIFKIND:

I have received a number of representations. I am pleased to be able to report to the House that as a result of informal discussions with the Law Society of Scotland over the last few weeks we have now reached agreement with regard to the proposals in Part II of the Bill.

The Law Society have informed us that they are able to accept that the solicitors monopoly with regard to conveyancing should cease. The Government for its part accepts that the provisions in the Bill allowing persons other than solicitors to provide conveyancing services should be limited to independent qualified conveyancers. The provisions will not apply to the financial institutions.

The Government and the Law Society have also agreed that the provisions in the Bill with regard to multi-disciplinary practices should be made the same for solicitors as advocates. There are also some detailed points in Part II which I have recently discussed with the Law Society and am considering.

On this basis the Law Society have informed us that they are able to welcome Part II of the Bill and are anxious to see it appear on the Statute Book. I am also able to inform the House that the Scottish Consumer Council have indicated that they too welcome the agreement that has been reached.

I would like to thank the Law Society for the constructive and helpful discussions we have had that have enabled us to reach this amicable agreement.

SCOTTISH OFFICE

10 DOWNING STREET

Andrew

Noisy scenes in the Chamber just now when Mr Rifkind gave the attached answer to Frank Doran (Alec Eadie asked to leave the Chamber by the Speaker). But Nicky Fairbairn was fairly supportive & Jim Gallagher thinks that this may have solved their backbench problems with the backbench rebels (He put it at a 70% chance)

Dominic

SCOTTISH OFFICE
WHITEHALL. LONDON SW1A 2AU

FAX

Tim Sutton Esq
Private Secretary
Lord President's Office
Privy Council Office
Whitehall
LONDON
SW1A 2AT

4 July 1990

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SCOTTISH OFFICE

[redacted]S/AG

NOTE FOR THE RECORD

From: T J Sutton
Date: 3 July 1990

LAW REFORM (MISCELLANEOUS PROVISIONS) (SCOTLAND) BILL

The Lord President held a meeting with the Lord Chancellor, the Secretary of State for Scotland, the Chancellor of the Duchy of Lancaster and the Chief Whip (Commons) at 3.45pm on Tuesday 3 July, to discuss the problems which had arisen during the Committee Stage of this Bill. Mr Russell, Mr Maclean, Mr Gallagher and I were also present. Ministers had before them a factual note on the Bill's contents and the progress that had been made so far, circulated with Mr Gallagher's letter to me of 2 July.

The Secretary of State said that he was hopeful of getting through most of Part 1 (Clauses 1-13), which dealt with charities, in the next day or so. Part 2 was the most important part of the Bill, implementing in Scotland the provisions of the Courts and Legal Services Bill which covered England and Wales. The problems in Commons Committee were being caused by Sir Nicholas Fairbairn, Mr Walker and Mr Stewart: Sir Nicholas Fairbairn was opposed to all elements of the Bill consistently; Mr Walker and Mr Stewart both claimed to be opposed to the Government's timetabling the Bill. Mr Stewart had said that if a timetable motion was passed despite his opposition, he would support the Government on the remaining parts of the Bill and would not back amendments unless the Government was content for them to be passed. Mr Walker was being more difficult; although

he had claimed to be objecting to the length of the Bill, he now seemed to be concerned equally about its content, and the prospect of abandoning Parts 3 and 4 of the Bill did not seem likely to change his mind.

The Chief Whip said that he had seen Mr Walker twice, on the Prime Minister's behalf, with Mr Fallon the Scottish Whip present. Despite assurances that the timetable motion would be designed to give more time to Part 2 of the Bill, Mr Walker had confirmed this morning to Mr Fallon that he would vote against a timetable and Part 2 of the Bill, although he knew that this would put in jeopardy his Vice-Chairmanship of the Scottish Conservative Party. Taking Mr Walker's decision at face value, the result was that the Government would lose votes in Committee, if all Members were present, by one vote, so even if the timetable motion were passed, the likelihood was that Part 2 of the Bill would be defeated in Committee clause by clause.

There followed a general discussion on the implications of the intransigent stand of the Scottish MPs for the future handling of the Bill, in the course of which the following points were made:

i Mr Walker's behaviour was very hard to reconcile with his position as Scottish Conservative Party Vice-Chairman; if he persisted in his attitude, there was a case for withdrawing the Party Whip from him. On the other hand, this could only be done if he had first been removed from his position of office in the Scottish Party; and it would be necessary to withdraw the Whip from Sir Nicholas Fairbairn as well. Previous advice had been against doing this. But failure to take stern action would mean admitting that these two backbenchers effectively determined the course of Government business affecting Scotland;

ii It would be possible to bring the Scottish Bill back into Committee of the whole House, under a timetable motion. But there was little Parliamentary time in the present Session to allow for this, even if only 8 or 9 clauses from Part 2 were brought back to the Floor of the House in this way, and it was not clear that this course would necessarily reduce the scope for difficulty with the Scottish MPs;

iii Another course would be to press ahead in Committee, and reintroduce at Report Stage all the Clauses that were lost upstairs. But use of Report Stage for such wholesale reversal of Committee Stage defeats was unprecedented, and this course would also occupy considerable Parliamentary time;

iv There was no point in trying to press ahead without a guillotine, since it would be impossible to make any progress in Committee beyond the beginning of Part 2 (Clause 14). This course seemed the least attractive of all and was not worth considering further;

v There was a case for deciding now to withdraw the Bill because of the serious opposition it had run into with the Government's supporters in Scotland, in the hope that tempers would cool over the Summer and with a firm promise that it would be reintroduced in the next Session. On the other hand, the issues would be no less controversial in the Autumn and there were good reasons for wishing to avoid such a controversial Scottish Bill in what could prove to be the last Session before the next General Election. If the Bill had to be withdrawn, it would on balance be better to withdraw it now and accept that it would not make progress hereafter;

vi Particularly if Mr Walker could be made to realise the serious implications of the stance he was taking, there was also a case for securing the timetable motion and pressing ahead regardless in the hope that he would not after all maintain opposition to the entirety of Part 2. But it was far from clear that Mr Walker would be any more open to persuasion even if he was called in by the Prime Minister in person, and No 10 had made clear that the Prime Minister would be reluctant to become personally involved while the position remained so uncertain.

Summing up the discussion, the Lord President said that no decisions had been reached. The Secretary of State had made it clear that he was not prepared to consider withdrawing the Bill until Mr Walker had been seen by the Prime Minister in person and told that if he persisted in obstructing the Bill, he would lose the Party Whip. The Chief Whip had made clear that he could not consider withdrawing the Whip while Mr Walker continued to hold an office in the Scottish Conservative Party, and that it would be difficult to move against Mr Walker in this way without taking similar action against Sir Nicholas Fairbairn. Further thought should be given to these and the other options that had been discussed. But it was very unlikely that the Prime Minister would agree to be involved until a way forward had been identified that would stick with all concerned.

T J SUTTON
Principal Private Secretary

CONFIDENTIAL

PRIVY COUNCIL OFFICE
WHITEHALL. LONDON SW1A 2AT

TJS/AG

3 July 1990

Dear Jim

LAW REFORM (MISCELLANEOUS PROVISIONS) (SCOTLAND) BILL

I enclose a record of this afternoon's meeting chaired by the Lord President.

Copies go to Dominic Morris, Murdo Maclean, Paul Stockton, Robert Canniff and Muir Russell.

Yours sincerely

Mira Thomson

pp **T J SUTTON**
Principal Private Secretary

Jim Gallagher Esq
PS/Secretary of State for Scotland

CONFIDENTIAL

PRIME MINISTER

SCOTTISH LAW REFORM BILL

The latest development is that a compromise is being sought which would bring Bill Walker and possibly even Sir Nicholas Fairbairn back on side. The opening up of conveyancing in England was done in two stages. In 1984 or 1985 the solicitors' monopoly was broken by allowing in licensed conveyancers but at that stage financial institutions were still excluded. The further opening up was not completed until this year's Law Reform Bill in England.

The proposal is to adopt a similar two-stage process in Scotland so that the Scottish Law Reform Bill would advance only to the first stage. (I am not sure how firm the commitment would be to move on ultimately to the second stage.) It is hoped that the Scottish Law Society could be induced to issue a message of support tomorrow afternoon. In the face of that it is hoped that the rebels would come into line.

I am told that the Lord Chancellor would be content with such an outcome.

The Chief Whip will report further when he sees you at 0900 tomorrow.

You may also like to see Sir Nicholas Fairbairn's over dramatic letter.

AT

ANDREW TURNBULL
3 JULY 1990

a:\pps\Law.mrm

From Sir Nicholas Fairbairn QC, MP

HOUSE OF COMMONS
LONDON SW1A 0AA

317

2nd July, 1990.

Dear Margaret,

Over the years I have written to you many urgent letters, but none begins to compare with the fundamental importance of this one. I do not understand how the Government can have been misled as to the resentment and hostility which the so-called Law Reform Bill for Scotland has generated and would be resented in and out of Parliament.

At every Meeting with Ministers and Whips and on every occasion in public and private over 15 months at lease I have warned again and again that the central changes were deeply resented in Scotland, not by the lawyers, but by the gut feeling of the Scottish people in the street, about which I think I know a little, having spend my legal life addressing Juries of ordinary Scots folk. In addition I am able to address my family in Scotland back for more than 1500 years.

Section X1X of the Act of Union, which is the guarantor of a Greaty and is therefore inviolable, enshrined the law of Scotland and the construction of its services. The Law of Scotland since 1707 has been the tree of life of Scottish personality, unlike the Church which is also protected under the Treaty, but which has been schismatic and fragmented.

Alas, although this is called a Miscellaneous Reform Bill, it is in fact a major constitutional Bill, seen as such by those who have read it and hunched as such by those who haven't. Indeed we have to reach Part 4 before the words Miscellaneous Reform even appear.

The Press allege, in different forms, and no doubt with wicked and destructive intent, that this is a war between personalities. It is nothing of the kind. My admiration for Malcolm and Michael are total and my loyalty to them is as obvious and constant as my loyalty to you.

If 1,2 and 3 of this Bill which precede the Miscellaneous Reforms was to be guillotined on the votes of English Members of Parliament who are entirely ignorant of the law of Scotland and this Bill, a constitutional crisis would, I believe, be inevitably resultant and not only would we be likely to lose the bulk of our seats in Scotland, but the very fundament of the soul and Scotland would be seen by the voting public as having

...been stolen

The Rt. Hon. Margaret Thatcher, M.P.

2nd July, 1990.

been stolen and squinted by English Members.

Please do not misunderstand me. Nobody is a more fervent Unionist than I am. Nobody is a more committed Tory and nobody is a more faithful and earnest supporter of yourself, but I must, as a patriotic Scot, that to obtain this Bill by guillotine will, I believe, destroy the United Kingdom. It is my love of Scotland, the Union and our Party which compels me to write to you in this forceful, entirely sincere, terms.

Warmest regards always.

Yours ever,

Ian Lang.

The Rt. Hon. Margaret Thatcher, M.P.,
Prime Minister,
10, Downing Street,
London, SW1A 2AA.

10 DOWNING STREET

Prime Minister

The most difficult Parliamentary issue is the Scotland Law Reform Bill on which Mr Whitelaw has submitted a note.

Further damage may be done if the Scottish Press are to regard us as the protagonists in these differences publicly.

AT
29/6

Prime Minister

You may want us touch on this at Monday's business meeting with business manager colleagues.

JM

HOUSE OF LORDS,
LONDON SW1A 0PW

29th June 1990

Dear John,

COURTS AND LEGAL SERVICES BILL: LORDS CONSIDERATION

Our Private Offices have been discussing the timetabling of the final stages of this Bill, and I am writing now to ask that we should make every endeavour to complete the passage of this Bill before Parliament rises for the Summer Recess. This will mean finding a day in the last week of July for Lords consideration of Commons amendments.

I appreciate that it may be difficult to find space before the Recess for this, but, as I said when I brought the Bill before L Committee, I am anxious to keep up the momentum of implementation, in order to confirm the Government's commitment to achieving reform in the legal profession. L Committee agreed specifically that we should endeavour to secure Royal Assent to the Bill before the summer break (L(89) 9th conclusions).

There are also direct operational considerations. In particular, I would like to make and announce two key appointments to the bodies the Bill sets up (the Legal Services Ombudsman and the Chairman of the Advisory Committee on Legal Education and Conduct) before the summer break, so that work on their establishment can be taken forward. I do not think that I can do this before we have obtained Royal Assent.

There is perhaps an even more pressing concern. It is now clear that there will be considerable difficulties in handling the Commons stages of the Law Reform (Miscellaneous Provisions) (Scotland) Bill, and Malcolm Rifkind may need to make significant concessions of presentation or substance to secure its passage. I have little doubt that I would then be pressed to make similar concessions. I would be most reluctant to do this, but - given that the Government was defeated twice in the Lords during my Bill's passage there - I might be forced to do so. The more

The Right Honourable
The Lord Belstead, JP, DL
Lord Privy Seal and
Leader of the House of Lords
House of Lords
London SW1A OPW

quickly my Bill can complete its passage, and the longer Malcolm Rifkind can delay formally conceding points on his Bill, ideally from this point of view until Report Stage in the autumn, the more chance there is of my Bill reaching the statute book undiluted. I am very keen therefore to secure Royal Assent before the Summer Recess, since this should significantly lessen the chances of my having to agree concessions in the closing stages of the Bill in order to secure its passage.

I am sending a copy of this letter to the Prime Minister, Geoffrey Howe, John Major, Nicholas Ridley, Malcolm Rifkind, Patrick Mayhew, Tim Renton, Bertie Denham, and to Sir Robin Butler.

Yours ever,

James.

cc PJ
PA

Prime Minister

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DM

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LONDON SW1A 0PW

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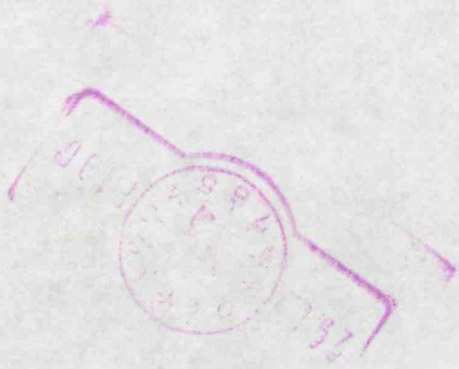


PRIME MINISTER

cc Mr. Whittingdale

SCOTTISH REBELS

The Chief Whip has spoken to Allan Stewart and has made some progress. The latter has indicated that, even if he voted against the guillotine, he would not undermine his subsequent progress on the remainder of the Bill.

Not much progress was made with Bill Walker. He voted against a clause this morning, though the absence of a Labour Member meant that it went through.

Sir Nicholas Fairbairn remains passionately opposed to the Bill. He sees it as an attempt to bring Scottish Law into line with English Law, something he rejects in principle. It is very likely that he cannot be won round, even after a meeting with you.

All three conversations were amicable and all three of them have agreed to reflect over the weekend and to speak to the Chief Whip. He will then advise on whether there is any scope for you to intervene. It is looking as though Allan Stewart can be won round anyway but the other two may be lost causes.

ANDREW TURNBULL

28 June 1990

A:\pps\rebels (Pmm)

LAW REFORM (MISCELLANEOUS PROVISIONS) (SCOTLAND) BILL

The Bill

This Bill was one of two Scottish Bills in the Queen's Speech (compared to a normal Scottish Legislative Programme of three). Much of its content is uncontroversial and not central to the Government's objectives. Part I of the Bill reforms Scottish charities law. Part III of the Bill reforms Liquor Licensing Law. It is not politically controversial (but of great interest to backbenchers) and is an attractive package, with tightening up on sensitive areas like late night extensions. The Opposition will allow a free vote. Part IV contains some worthwhile miscellaneous reforms. The only provision to attract attention relates to divorce, on which we have said we will allow a free vote. These reforms are useful but not essential.

Part II is the important part of the Bill. It implements the Government's policy on the reform of the Legal Profession in Scotland, parallelling James MacKay's reforms in England and Wales. It abolishes the solicitors' conveyancing monopoly. It has attracted opposition from the legal profession. Until now, we have been winning the argument on this. The reforms have been strongly welcomed by consumer interests including the Scottish Consumer Council.

The Bill spent an interminable time in the Lords, coming at the end of the queue for several reasons, partly because of the tactics of lawyers speaking from the cross benches. The Bill got a Second Reading in the Commons on 12 June, with all Scottish Conservatives supporting it, except Nicky Fairbairn. We now only have a few weeks for Committee before the Recess.

The Problem

After the Bill had its Second Reading 3 Scottish Conservative backbenchers publicly pressed us to drop the Bill. Nicky Fairbairn says he is implacably opposed to any change in the legal profession. He is of course a senior, highly eccentric, member of the Scottish Bar. Both Bill Walker and Allan Stewart say publicly that the late arrival of the Bill means that there is insufficient time to consider it properly. Allan

Stewart says publicly that he is content with the substance of the Bill. Bill Walker may have concerns about the effect of the legal services provisions on rural solicitors. Hector Monro, with similar concerns, does not oppose the Bill.

None of the 3 gave the Whips advance notice of their intention to destroy the Bill though they had been grumbling for some time about the effect of the legal services provisions on rural solicitors. It had been indicated to them that some concessions might be made which they could present back to their constituents. The situation has been made very much more difficult by the decision of one or more of them to leak to the Press the contents of their discussions with Ministers. That has of course alerted the Opposition to an opportunity to destroy a Government Bill.

Recommended Approach

Our priority for the Bill must be to safeguard the legal provisions of Part II. They form an integral part of the Government's programme; to withdraw or postpone them would leave James MacKay's Courts and Legal Services Bill dangerously exposed. It is essential that all three backbenchers are left in no doubt as to the importance the Prime Minister and the Government attach to the reforms of the legal profession and that there is no possibility of this Part of the Bill being dropped. The Lord Chancellor, of course, agrees with this view.

~~It is probable that~~ the Bill will need a timetable motion on the floor of the House. It is obviously desirable that as many as possible Scottish backbenchers should support it. Nicholas Fairbairn is likely to be beyond redemption, but it should be possible to meet Walker and Stewart's expressed concerns. Parts III and IV of the Bill are not crucial to the Government's programme, and we could be relaxed about them in order to secure agreement to the timetable motion.

There may be some suggestion that the legal reforms should be withdrawn and reintroduced next session. This should be rejected as it would be widely and correctly interpreted as a capitulation by the Government. The last thing we will want is to have to go through this again next year closer to a General Election.

The three MPs have been encouraged to believe that dropping the legal reforms is a reasonable and desirable outcome of the present discussions. It is essential that they are disabused of this notion.

Scottish Office
26 June 1990

fst.sb/fst/3.22

CONFIDENTIAL

Treasury Chambers, Parliament Street, SW1P 3AG

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

25 June 1990

Dear Malcolm

LAW REFORM (MISCELLANEOUS PROVISIONS) (SCOTLAND) BILL: CONVEYANCING PRACTITIONERS

Thank you for sending me copies of your letters of 11 and 20 June. I have also seen Nicholas Ridley's and Nick Lyall's letters of 18 June.

I have to say that I share their concerns about your proposals. However, I appreciate the particularly difficult circumstances you are facing over the passage of the Bill and understand why you felt it necessary to offer concessions to Scottish backbench colleagues in this area.

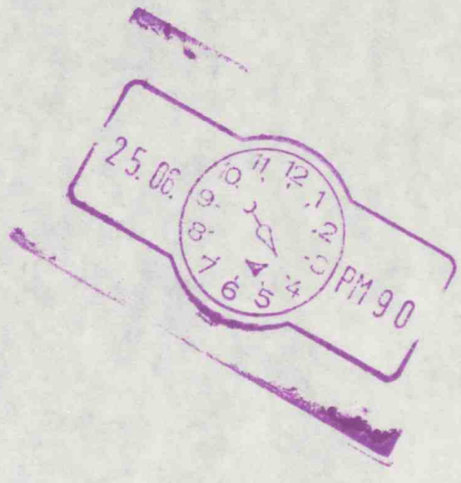
But I remain very concerned that we should do all we can to limit the danger of weakening our primary objective of opening up conveyancing services. As you will appreciate, the more we concede in the Scottish Law Reform Bill, the greater the pressure for equivalent amendments in the Courts and Legal Services Bill. It is essential, therefore, that we restrict any concessions to the absolute minimum needed to secure the passage of the Bill. We shall need to consider the wording of the necessary commitment on cross-subsidy particularly carefully, and I should be grateful if my officials can be kept closely involved with the consultations.

I am copying this letter to the Prime Minister, Geoffrey Howe, James Mackay, Nicholas Ridley, Peter Brooke, Peter Fraser, Nicholas Lyall and Sir Robin Butler.

Yours ever

Peter

PETER LILLEY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PM 90

PA

SECRETARY OF STATE FOR SCOTLAND

SCOTTISH OFFICE
WHITEHALL, LONDON SW1A 2AU

Prime Minister 2

Probably a necessary price to secure backbench support in Committee

Mr Ridley might want to report on this in Cabinet under Parliamentary business.

DM
20/6.

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

20 June 1990

Dear Lord Chancellor

LAW REFORM (MISCELLANEOUS PROVISIONS) (SCOTLAND) BILL: CONVEYANCING PRACTITIONERS

I wrote to you on 11 June on this subject, and as you know there has been considerable movement since. I have also since seen letters of 18 June from Nick Ridley and Nicholas Lyall. As my Private Office have already explained to yours and Nick Ridley's, we have had to undertake to Scottish backbench colleagues privately that we will be tabling, or enabling them to table, amendments to the Bill on the question of rural solicitors' practices and the effect of conveyancing on them. Without these concessions, colleagues were unwilling to support the sittings motion for the Bill, which would thereby have been lost. I will be writing separately to Geoffrey Howe about the handling of the Bill, which remains extremely problematic.

I am grateful to Nicholas Ridley for his agreement on the proposed amendment which relates to the Director General of Fair Trading; and I quite understand the points he made about the amendments on having regard to accessibility when making regulations. But, as you see, we had no real choice in the matter.

I also fully understand the points made about cross subsidy, and in the circumstances would be happy to talk about the wording of the necessary commitment. But of the 3 points, this was undoubtedly the most persuasive so far as the backbench colleagues are concerned, and if we are to have any chance of maintaining their support and in due course enacting the provisions on legal services in the Bill, this is an area on which I will have to offer some movement. It may however be possible to amend the Bill to bring it more in line with the Courts and Legal Services Bill on this point and that may go some way to meet their concerns.

(i.e. to limit the ability of the Banks to use their leading to enter the conveyancing market).

I am grateful for the tolerant attitude which colleagues are taking on these difficulties.

I am copying this letter to the Prime Minister, Geoffrey Howe, Nicholas Ridley, Peter Lilley, Peter Brooke, Peter Fraser, Nicholas Lyall and Sir Robin Butler.

Yours sincerely

for MALCOLM RIFKIND

(Approved and signed in the SofS's absence)

→ seen by PM

P/A

SCOTTISH OFFICE
WHITEHALL, LONDON SW1A 2AU

Prime Minister
Mr Rifkind may want to raise this in Cabinet.

20 June 1990 JM

The Rt Hon Sir Geoffrey Howe QC MP
Lord President of the Council
Privy Council Office
Whitehall
LONDON

Dear Lord President

LAW REFORM (MISCELLANEOUS PROVISIONS) (SCOTLAND) BILL

I thought I should write to you to put on record the very difficult situation which we are currently facing in handling of the Law Reform (Miscellaneous Provisions) (Scotland) Bill.

The genesis of the problems which we are facing is the very late arrival of the Bill from the Lords, about which I wrote to John Belstead in April. The Bill made very slow progress there, for a number of reasons, and as a result only started Committee Stage in the Commons yesterday. The time available for Committee is modest but should be enough for a proper consideration of the Bill - a majority of whose provisions are useful and uncontroversial, and many have been widely welcomed; indeed only the provisions on courts and legal services, which parallel James MacKay's, have attracted any real opposition.

But the timetable has been seized upon by some of our backbench colleagues as an excuse to be very difficult about co-operating in the passage of the Bill. As you know, we only have 6 Scottish Conservative backbenchers, and of them one, Nicky Fairbairn, is implacably and irrationally opposed to any changes affecting the legal profession. Other colleagues, particularly Allan Stewart and Bill Walker, say they have no objections to the principle of the Bill, but have expressed concerns about the timetable. Unforgivably, however, the private discussions which I was having with them were comprehensively leaked to the press, making what would have been a difficult situation almost impossible as now the Opposition are aware of the scope for mischief.

The Scottish Whip, Michael Fallon, has done extremely well to persuade Stewart and Walker to vote for the sittings motion which we need to get the Bill properly considered, on the basis of some minor concessions on policy, and some understandings on the demands which we made on their time. But we are by no means out of the wood yet. Nicholas Fairbairn is settling down to filibuster on the first part of the Bill, and it is already clear that in the 5 or 6 weeks available for Committee before the House rises for the summer he could, with Opposition help, spend so much time on Part I of the Bill that we could not give reasonable consideration (which is other colleagues' expressed concern) to the more controversial Part II of the Bill.

seems likely that the only way in which the Government's objectives can be achieved, and the changes to the courts and legal services in Scotland enacted, would be if we were prepared to consider a timetable motion for the Committee Stage. It is too early to do so at the moment and there is now considerable doubt as to whether Walker and Stewart would support such a motion.

I should say that, given the volatility and unpredictability of the backbenchers concerned, the situation may change quite markedly before long, and I will of course keep you and other colleagues in touch.

A copy of this letter goes to the Prime Minister, the Lord Chancellor, Nicholas Ridley, Peter Lilley, Peter Brooke, Peter Fraser, Nicholas Lyall and Sir Robin Butler.

Yours Sincerely
Jim Gallagher

for MALCOLM RIFKIND

(Affixed & signed in the Sec's absence)

CCPO

SOLICITOR GENERAL

01-936 6269

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

18 June 1990

The Rt Hon Malcolm Rifkind QC MP
Secretary of State for Scotland
Scottish Office
Whitehall
LONDON S W 1

Dear Malcolm,

LAW REFORM (MISCELLANEOUS PROVISIONS) (SCOTLAND) BILL :
CONVEYANCING PRACTITIONERS

I have seen a copy of your letter dated 11 June addressed James Mackay and his reply to you.

I share the concerns expressed by James about the proposals set out in your letter dealing with regulations to protect accessibility, and to proscribe cross-subsidy.

I have little doubt that, were you to announce your intention to include such provisions in your Bill, we would come under very strong pressure at Report Stage of the Courts and Legal Services Bill to introduce similar provisions, and I do not at present see how a convincing distinction could be made to justify a refusal to do so. Nor do I believe, for the reasons which James Mackay has explained, that such provisions are required. Notwithstanding the great concerns expressed by solicitors about the consequences of implementation of the proposals on conveyancing in the Courts and Legal Services Bill, those clauses were approved without too much controversy by the Standing Committee, and it would be a great shame if we were to fuel a dying fire at this stage.

I am copying this letter to the Prime Minister, James Mackay,

SOLICITOR GENERAL

Geoffrey Howe, Nicholas Ridley, Peter Lilley, Peter Brooke, Peter Fraser and Sir Robin Butler.

Yours ever

Nick.

LEGAL POWERS

PRIME MINISTER

SCOTTISH LAW REFORM BILL

The Scottish Law Reform Bill, which has now emerged from the House of Lords, has caused a major row between Mr. Rifkind and the Scottish Conservative back-benchers. Only in part is this about substance - Nicholas Fairbairn is particularly strongly opposed to the proposals to end the solicitors' monopoly of conveyancing - but it is more about the general handling. The back-benchers are angry about what they see as lack of consultation by Mr. Rifkind and about the proposal to push the Commons stages of the Bill through very fast. They are threatening to vote against the Sittings Motion which would require morning and afternoon sessions.

The attached report from the Telegraph reports a "flaming row". Bill Walker has been told by the Chief Whip that if he votes against the Sittings Motion he will have to resign as Vice-Chairman of the Party. Bill Walker's reaction was "then so be it".

This situation calls for mediation. You might like to talk to the Lord President and the Chief Whip to see what can be done.

AT

ANDREW TURNBULL
15 June 1990

c:\pps\scottish (ecl)

Rifkind's future in balance after law reform row

By George Jones, Political Editor

MR MALCOLM Rifkind's future as Scottish Secretary was under renewed threat last night after Scottish Tory backbenchers refused to support legislation proposing changes to the legal system in Scotland. They called for the Scottish law reform Bill to be withdrawn and reintroduced next year.

It was the most serious confrontation Mr Rifkind has had with his backbenchers.

The row is the latest in a series of mishaps which have recently clouded the career of Mr Rifkind, one of the most promising and able younger generation of Cabinet Ministers.

The Scottish law reform Bill contains proposals to end solicitors' monopoly of conveyancing, to extend police powers, to open off licences on Sundays and liberalise divorce laws.

Scots Tory MPs, backed by Labour, are protesting at the speed with which the Government are trying to push the Bill through the Commons.

Mr Rifkind failed to secure the support of his backbenchers at a heated private meeting at the Commons, which broke up in disarray.

According to those present, there was a flaming row — "the nearest thing there has been to open rebellion." None of the five backbenchers at the meeting spoke in favour of the Bill.

Ministers are concerned that Mr Rifkind could face defeat next week over a motion for the Scottish Standing Committee to meet mornings and afternoons in an attempt to complete the committee stages of the Bill before the summer recess at the end of July.

If this happened, they fear it could make his position as Scottish Secretary almost untenable, as he would be seen no longer to command the loyalty of his backbench MPs.

Sir Geoffrey Howe, leader of the Commons, is to hold behind-the-scenes consultations to defuse the row.

Mr Rifkind recently came close to resigning in the furore over backdating the Budget poll tax rebates in Scotland; had differences with Cabinet colleagues over the future of the Ravenscraig steel plant threatened with closure; and was at the centre of an alleged attempt to replace him by his right-wing junior Minister, Mr Michael Forsyth, at the Scottish Conservative conference last month.

Rifkind: serious challenge to his authority

COPY

THE RT HON JOHN WAKEHAM MP

N.6 P.M.
BTHP
15/6

Department of Energy
1 Palace Street
London SW1E 5HE

071 238 3290

The Right Honourable the Lord Mackay
of Clashfern
The Lord Chancellor
House of Lords
LONDON
SW1A OPW

15 June 1990

Dear James

COURTS AND LEGAL SERVICES BILL

Thank you for your letter of 25 May.

I am grateful to you for considering the potential difficulties for the electricity and gas industries under the current drafting of Clause 11 of the Courts and Legal Services Bill.

It is not our intention that those utilities should have an unfair advantage over other creditors in order to recover debts which are the subject of an administration order. Our concern has been in respect of the recovery of monies owed which are not the subject of an administration order. In this respect the electricity and gas industries are in a rather different position to other suppliers of goods and services in that they traditionally supply on a credit basis. We therefore provided a number of protections both for the supplier and the consumer in the electricity and gas legislation and in the electricity licences and the authorisation for British Gas in recognition of this.

An amendment such as you propose would meet our concerns that these procedures should continue to apply. I confirm that I am content with the proposal, subject to my officials agreeing the wording of the proposed amendment before it is tabled.

I am copying this letter to the Prime Minister, Malcolm Rifkind, Norman Lamont and Patrick Mayhew.

Yours ever

JOHN

JOHN WAKEHAM

FROM THE RIGHT HONOURABLE THE LORD MACKAY OF CLASHFERN

CC PLA

HOUSE OF LORDS,
LONDON SW1A 0PW

25 May 1990

N.B.P.M
BAP
6/6

The Right Honourable
John Wakeham MP
Secretary of State for Energy
Department of Energy
1 Palace Street
LONDON
SW1E 5HE

Dear Secretary of State

COURTS AND LEGAL SERVICES BILL

Thank you for your letter of 18 May.

The purpose of the new provision in Clause 11 of the Bill that you refer to is to prevent monopoly suppliers who are scheduled to an administration order or an order restricting enforcement from taking an unfair advantage over other scheduled creditors by using the threat of disconnection as a means of recovering immediately the whole amount owing to them. It is obviously important to ensure fair treatment as between the creditors of multiple debtors, and that is what, following the recommendations of the Civil Justice Review, I am here trying to achieve.

It is of course not my intention that the gas and electricity companies should be required to maintain for an indefinite period supplies for which they are not being paid. As the Bill stands, however, they would normally have to apply to the court for leave to disconnect while the order was in force. I accept that this would be an additional burden on them and in the light of your letter I have been considering how this burden might best be reduced while retaining the necessary protection for the other creditors.

I think this could best be achieved by amending the Bill to allow the suppliers to disconnect without leave for any reasons not connected with non-payment of any charges which were owing on the date when the order was made. This would make it clear that the companies could disconnect (having gone through the normal procedures) in respect of

any subsequent debt, while ensuring that they did not abuse their position to gain preferential payment of the debt scheduled to the order.

If you are content with this, I will table the necessary amendment on Report.

I am copying this to the Prime Minister, Malcolm Rifkind, Norman Lamont and Patrick Mayhew.

Yours sincerely

John Lamont

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

LEGAL PROC. Lecia Powers Atty.

THE RT HON JOHN WAKEHAM MP

Department of Energy
1 Palace Street
London SW1E 5HE
071 238 3290

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

18 May 1990

Dear James,

COURTS AND LEGAL SERVICES BILL

Your officials have been in discussion with mine and with representatives of the electricity supply and gas industries about Clause 11 of the Courts and Legal Services Bill. I am concerned about the provision which would oblige electricity and gas suppliers to continue to supply to someone whose debts are the subject of an administration order or an order restricting enforcement, unless leave of the court is obtained to disconnect the supply (except for reasons unconnected with non-payment of the debt).

As you will know, Section 20 and Schedule 6, paragraph 1(6) of the Electricity Act 1989 give public electricity suppliers, in certain circumstances, the power to cut off supplies. This right is modified by conditions in the licences issued under the Act, requiring suppliers to adopt a Code of Practice on the payment of bills and, separately, a procedure for dealing with consumers in debt. Together, these provide a number of protections against disconnections for those in genuine difficulty, whilst at the same time protecting the electricity suppliers' position. The effect is that an electricity consumer will not be disconnected if he continues to meet payments for current supply - perhaps by agreeing to a budget scheme or the installation of a prepayment meter - and also makes an arrangement to pay off his debt.

I appreciate that your officials have explained that it is intended to make the procedure for seeking the leave of a Court to cut off supplies as little burdensome as possible. Nevertheless, the effect remains that the provision in the Bill will subject electricity (and gas) suppliers to considerable uncertainty about the decisions which courts may make - as well as imposing on them an administrative burden. I believe that the

provisions in and under the Electricity Act 1989 Bill deal fully and fairly with the question of disconnection of electricity supplies, with due regard to the interests of consumers; and I do not think it is justified that a further impediment should be placed in the way of action to disconnect. As it stands, the provision in the Bill would oblige a gas or electricity supplier to continue to provide supplies, even if he was not being paid for them, if a Court decided against granting leave to disconnect. (I should add that installation of a prepayment meter is not always an acceptable solution, given their vulnerability to theft).

You will appreciate that, by encroaching on the safeguards for suppliers provided for in and under the Electricity Act, the amendment in Clause 11 results in a potentially open-ended obligation which has serious implications for the revenues of the regional electricity companies and for the proceeds from their flotation later this year.

I understand that an amendment to Clause 11 of the Bill would have to be introduced at Report stage, which is likely to fall in the latter part of June. I shall be grateful if you will consider urgently the preparation of an amendment to the Bill which would remove the interference with the present rights of electricity and gas suppliers to disconnection. Such an amendment might distinguish between non-payment of debts which were in existence when the order was made and non-payment in respect of subsequent supplies. My officials will be ready to discuss further the amendments which you may propose to achieve this.

I am copying this to the Prime Minister, Malcolm Rifkind and Norman Lamont.

Yours ever

John

JOHN WAKEHAM


18.05.
AM90

CONFIDENTIAL

10 DOWNING STREET
LONDON SW1A 2AA

From the Principal Private Secretary

12 April 1990

Dear Paul,

COURTS AND LEGAL SERVICES BILL: MEMBERSHIP OF THE ADVISORY COMMITTEE ON LEGAL EDUCATION AND CONDUCT

The Prime Minister has seen the Lord Chancellor's letter to the Chancellor of the Exchequer of 9 April. She agrees with his proposal to add a Circuit judge to the Committee but also to add a further lay member in order to preserve the lay majority. She believes it is right to resist proposals to put a Presiding judge on to the Committee. Circuit judges are likely to have direct experience of solicitor advocates appearing before them and this should make them more open-minded on rights of audience. She has also observed that a few Circuit judges are solicitors. Though it would probably be seen as too provocative to appoint a solicitor judge to the Advisory Committee initially, this could be an option in the longer run.

I am copying this letter to the Private Secretaries to members of E(CP) and to 'L' and to Sir Robin Butler.

Yours sincerely,

Andrew Turnbull

ANDREW TURNBULL

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

CONFIDENTIAL

Prime Minister
(i) Agree to Lord Chancellor's proposal on the Advisory Committee
(ii) To note the position on the cab rank rule

Yes - pushing that reason for a Circuit Judge

MR TURNBULL

11 April 1990

Noted AT 11/4

COURTS AND LEGAL SERVICES BILL

The Lord Chancellor's letter of 9 April to John Major proposes to add a Circuit judge to the Advisory Committee. He would balance this with an additional lay member, to preserve the lay majority.

This proposal is satisfactory provided it sticks. The Lord Chief Justice wants a Presiding judge. It is important to resist this because:

- Circuit judges are likely to have direct experience of solicitor advocates appearing before them. This should make them more open-minded on rights of audience;

- a few Circuit judges are solicitors. It would probably be seen as too provocative to appoint a solicitor judge to the Advisory Committee initially. But in the longer run this must be an option.

The Attorney General's position is unclear. He is likely to go along with the Lord Chancellor's proposal because he is saving his fire for the cab rank rule (see below).

I recommend that the Prime Minister should support the addition of a Circuit judge to the Advisory Committee.

Cab rank rule

You will remember that Lord Alexander managed to get a clause inserted in the Bill enshrining the 'cab rank' rule in statute.

The Lord Chancellor and the Attorney feel that they cannot simply reverse this amendment in the Commons. They have

been looking for a formula with which the Government, the Bar Council and the Law Society could live.

Various texts are now flying about. Basically the debate hinges on whether the new clause can be seen as a general statement of principle; or a specific condition applying only to certain kinds of advocates.

Barristers, and solicitors exercising their existing rights of audience, will be deemed to have rules satisfying any general statements of principle. The Law Society therefore feel that they could live with a very general statement about availability. It could not be used to block their access to advocacy in the higher courts (because existing solicitor advocates in partnerships would be deemed to be complying with it).

The Alexander amendment is not sufficiently general. It specifically does not apply to existing solicitor advocates. The Law Society fear that it could be used by the four Heads of Division to make it virtually impossible for solicitors in partnerships to move into new areas of advocacy in the higher courts. They would be forced to become sole practitioners.

The Lord Chancellor favours a general statement of principle. But the Attorney General sides with the Bar in wanting more specific wording.

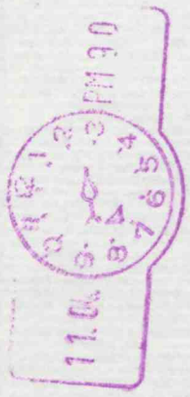
We have not yet come to the crunch point. I will keep you posted.

Carolyn Sinclair

CAROLYN SINCLAIR

LEGAL PROCEDURE : Legal Parers

#14



n.b.p.m.
BHP
9/4

HOUSE OF LORDS,
LONDON SW1A 0PW

CONFIDENTIAL

4th April 1990

Dear John,

THE COURTS AND LEGAL SERVICES BILL : MEMBERSHIP OF THE ADVISORY COMMITTEE ON LEGAL EDUCATION AND CONDUCT

As you know, the Courts and Legal Services Bill provides for the creation of a statutory Lord Chancellor's Advisory Committee on Legal Education and Conduct. In the light of the debate on the Bill in the House of Lords, I came to the conclusion that it would be preferable to make some slight changes in its composition. I am therefore writing to let you know what I propose.

In accordance with the White Paper "Legal Services: A Framework for the Future", the Bill currently provides for the Advisory Committee to have 15 members. These would be a Lord of Appeal or a Supreme Court Judge as Chairman, 2 practising barristers, 2 practising solicitors, 2 legal academics and 8 laymen (i.e. those who do not fall into any of the preceding four categories). As you know, the Committee is intended primarily to represent the views and interests of the users of legal services, and will therefore have a lay majority.

The Bill has just finished its passage through the Lords. Various amendments were tabled at all stages on the membership, mostly proposing additions. The strongest arguments were advanced for adding a judge to the committee, to give experience of presiding over trials at first instance. There was pressure to have both a Presiding and a Circuit judge. Although there was more support expressed in the House for a Presiding Judge, it is the second which I am proposing to accept.

Cont/d....

The Right Honourable
John Major MP
The Chancellor of the Exchequer
HM Treasury
Parliament Street
London SW1P 3AG

The advantages of adding a circuit judge to the membership would be twofold. First, one of the Committee's main tasks will be to consider applications from bodies wishing to grant their members rights of audience for the first time. The courts in which such rights are likely to be exercisable will be those at the lower end of the court structure; and a circuit judge is likely to have some actual knowledge and experience of these. Secondly, the Committee will at an early stage have to consider an application from the Law Society for extended rights of audience for solicitors. A suitably chosen circuit judge would already have day to day experience of the conduct of solicitor advocates, who, of course, already have full rights of audience in the county courts and some rights of audience in the Crown Court. He or she would thus be well placed to contribute effectively to discussions on what further training and additions to the current solicitors' code of conduct might be needed in order to equip solicitors for advocacy in the higher courts.

During the Third Reading I undertook to add one judge and one lay member to the Committee but said that I wished to try and secure agreement within the profession on the precise description of that judge. I have therefore discussed this proposal with Patrick Mayhew, who is content with what is proposed and also in confidence with the Chairman of the Bar and the President of the Law Society.

In order to preserve the lay majority I propose also to add one more lay member. The Committee would become unwieldy if it became much larger, so I regard these additions as the maximum possible. There will then be 17 members of the Committee. Unless I hear to the contrary by Friday 20 April, I will assume that colleagues are content with what I propose.

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

Yours ever,

James.

ATTORNEY GENERAL

01-936 6201

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

23 March 1990

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

Dear James:

COURTS AND LEGAL SERVICES BILL

I have seen copies of your letters to Nicholas Ridley and Richard Ryder in which you expressed your unwillingness to include in the Bill an order-making power which would allow modifications to the rights of notaries to be made without the need for primary legislation. I share your views that it would be undesirable to attempt to include such a provision in the Bill particularly as it would be bound to provoke further arguments about Henry VIII clauses. I do not at present see on what grounds such an accusation could be denied.

I am copying this letter to the Prime Minister, the Lord President, to other members of E(CP), the Home Secretary, the Lord Privy Seal and to Sir Robin Butler.

Yours ever,

Mackay

LEGAL PROCEDURE
legal Powers
Pt 4

FROM THE RIGHT HONOURABLE THE LORD MACKAY OF CLASHFERN

HOUSE OF LORDS,
SW1A 0PW

Your Reference: JW3AHT

Our Reference: DL70/285/33

20th March 1990

Dear Nicholas,

COURTS AND LEGAL SERVICES BILL

Thank you for your letter of 8 February 1990 in which you expressed general approval for the amendments I have proposed in relation to the Law Society's compensation powers, notaries and commissioners for oaths.

You suggest in your letter that the amendments should provide also for an order-making power which would allow for any subsequent modifications to the rights of notaries to be made without recourse to primary legislation. This would permit alteration to the monopoly enjoyed by the Scriveners Company on the performance of notarial acts within a 3 mile radius of the Royal Exchange.

Whatever the attractions of that, I doubt that this is a starter because of handling problems in Parliament. As you may know, there has been considerable opposition in the Upper House to every aspect of the Bill which has been seen as reserving Henry VIII powers to the Lord Chancellor. This is not just a sectional question - you may recall that broadly similar proposals in the Companies Bill last year ran into the same sort of problem. The power you suggest is unequivocally of that category. I would find it impossible to argue that this provision would be on all fours with the other powers to change primary legislation already in the Bill, since it is clearly neither a consequential provision, nor a matter of minor detail. Indeed, the only justification for it would be that I have not had time to undertake the necessary consultation to enable me to amend the Scriveners' monopoly in this Bill.

The Right Honourable
Nicholas Ridley MP
Secretary of State for Trade and Industry
Department of Trade and Industry
1-19 Victoria Street
London SW1H 0ET

The consultation aspect is of particular importance here, as not only the Scriveners Company, but their clients and the Faculty Office of the Archbishop of Canterbury would need to be involved. The repercussions for 1992, when a strong notarial profession will be required, must also be considered. I hope therefore that on reflection you will agree that your suggestion is one that I could not realistically put to Parliament because of the way the Lords debate has turned out.

I am copying this letter to the Prime Minister, the Lord President, to other members of E(CP), the Home Secretary, the Lord Privy Seal, the Attorney General and Sir Robin Butler.

Yours ever,

James.

LEGAL PROCEDURE.
Legal Powers Pt4

FROM THE RIGHT HONOURABLE THE LORD MACKAY OF CLASHFERN

HOUSE OF LORDS,
SW1A 0PW

Reference: DL7/285/33

20th March 1990

Dear Richard,

COURTS AND LEGAL SERVICES BILL

Thank you for your letter of 9 February 1990.

On the Law Society's proposed new compensation jurisdiction, I am satisfied that £1,000 is a reasonable level at which to limit claims. There are two balancing factors to weigh up here: one is the desirability of finding a better way to deal with as many such potential claims against solicitors as possible; the other is the need to acknowledge the problems in applying a somewhat rough and ready scheme where there is a considerable sum at stake. The "Judicial Statistics" collected and published by my Department indicate that an alternative means to resolve disputes involving less than £1,000 is likely to be well worthwhile. Indeed, that is the sum which we have just adopted as the new limit in county court small claims actions, and I think there are good reasons for the new Law Society jurisdiction to mirror that. You also expressed some concern about the in-house procedures which should be pursued before a claim can be made under this scheme. I understand your caution but I am confident that the Law Society is anxious to make the most of its complaints machine, and the new arrangements, both to serve aggrieved clients better, and to improve the profession's public image.

Turning to the subject of notaries, I note that you are prepared to accept my view that to amend the Scriveners monopoly in the Bill at this late stage would be unwise. You also suggest that steps should be taken to ensure that full competition can be brought to the three mile radius from the Royal Exchange without the need for primary legislation.

Richard Ryder Esq OBE MP
Economic Secretary to the Treasury
Treasury Chambers
Parliament Street
London SW1 P3AG

This is a course I am extremely reluctant to adopt. I faced considerable opposition in the Upper House to those aspects of the Bill which have been seen as reserving Henry VIII powers to the Lord Chancellor. Nicholas Ridley has made the same suggestion, and you will see that I have today written to him about it, arguing that in the light of the adverse reaction to lessor powers of the same kind I do not think it is realistic. I hope you can agree.

I am copying this letter to the recipients of yours.

Yours ever,

James.

LEGAL PROCEDURE
Legal Powers Pt 4

fine MRM

PRIME MINISTER

LETTER FROM LORD JUSTICE PARKER

Lord Justice Parker has written to you requesting a meeting on an unspecified matter of public importance, through which it might be possible to avoid "a deal of conflict and acrimony". I have spoken to him to establish what this issue is.

You will remember from Miss Sinclair's note, attached, that the House of Lords passed an amendment tabled by Lord Alexander building into the legislation a provision that the cab-rank rule should apply to both Barristers and Solicitors.

The Lord Chancellor had argued that he accepted the principle that Solicitors exercising the right of audience alongside Barristers should be subject to some conditions. But he opposed building this into the legislation, as it would be difficult to provide for all the caveats and exceptions which would be necessary. These were better dealt with as professional rules. In any case, the analogy between Solicitors and Barristers is not exact. In an extreme case, the cab-rank rule would force Solicitors to act for whoever came in off the street, no matter how cranky; Barristers accept clients after they have been filtered by Solicitors.

The Lord Chancellor and the Attorney General have not decided how to handle the amendment. It could be accepted on the grounds that it is very general; it could be amended or it could be struck out in the Commons. In any case, they do not want to declare their hand before the Bill leaves the Lords.

Lord Justice Parker wants to argue that the Government should announce that it will allow the amendment to remain in the Bill as this will avoid conflict and acrimony with the Bar. I think he is being disingenuous. It would certainly produce peace with the Bar but only at the expense of acrimony with the Law Society and Consumer Organisations.

I see little advantage in your seeing Lord Justice Parker who has no more locus in this matter than any other High Court Judge. The Lord Chancellor would be happy to see him and I suggest you refer Lord Justice Parker to him.

AT

ANDREW TURNBULL
28 FEBRUARY 1990

c:\wpdocs\pps\parker.mrm

PERSONAL

FILE: PM

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

14 February 1990

Dear Paul,

You take me to task for using the term "shortcoming" in my letter of 7 February to Lord Justice Parker.

Although the Prime Minister may not have used that specific term, it reflected accurately her feelings about the issue. I notice that Lord Renton described the need for the change as "considerable"; Lord Hooson thought it was "probably an oversight".

You say the Bar did not want a reference to the Inns of Court in the Bill but that it subsequently changed its position. Is not a more plausible explanation that the Bar, ie the General Council, did not want a reference to this but that the Inns of Court objected?

Yours sincerely,

Andrew Turnbull

ANDREW TURNBULL

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

KK

PERSONAL

HOUSE OF LORDS,
LONDON SW1A 0PW

13th February 1990

Andrew Turnbull Esq.
10 Downing Street
London SW1A 2AA

Dear Andrew,

Thank you for copying to me your letter of the 7th February to Lord Justice Parker.

I hope you do not mind my quibbling with your use of the work 'shortcoming' in the last line of your letter. The Bill, as drafted, correctly reflected the policy as it was intended to be at that time. We believed, when the Bill was prepared, that the Bar did not want a reference to the Inns of Court in the Bill and we were content with that. However, circumstances changed, and the Bar changed its position, and so the Lord Chancellor was happy to accept the amendment.

Perhaps you would not mind checking with us if there is any further correspondence on these rather delicate matters.

Yours ever,

PAUL STOCKTON

LEGAL PROC : Powers pt 1.

est.to/RRyder/2.8.2

LCO

ECONOMIC SECRETARY TO THE TREASURY

Treasury Chambers, Parliament Street, SW1P 3AG

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

NBfm
RRyder 9/2

9 February 1990

Dear James,

file with PG.

COURTS AND LEGAL SERVICES BILL

Thank you for your letter of 2 February to John Major seeking agreement to three additions to the Bill in time for its Report stage in the House of Lords.

On the proposed compensation scheme to be operated by the Law Society, while I welcome it in principle, I trust that the initial £1000 limit will cover the great majority of complaints about incompetent performance, that the in-house procedures through which complainants will have to go first will be adequately publicised and objectively exercised, and that the proposed fee will not be a deterrent.

I am disappointed that you are not proposing to carry through the removal of restrictions upon notaries to the inner radius of 3 miles from the Royal Exchange since this is the sort of continuing monopoly that the Bill was intended to bring to an end and the Scriveners Company should be well able to compete against all others on the strength of their greater expertise and training. However, if you are satisfied that such a step would be too controversial at this late stage, I am prepared to go along with what you propose. But it is, I think, important to ensure that bringing full competition into the inner radius at some later date can be secured without the need for primary legislation.

Your proposal on commissioners for oaths causes no problems.

I am copying this letter to the Prime Minister, the Lord President, to the other members of E(CP), the Home Secretary, the Lord Privy Seal, the Attorney General and Sir Robin Butler.

Yours ever,

RICHARD RYDER

LEGAL PROC: Legal Powers
Party

dti

the department for Enterprise

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

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

Department of
Trade and Industry

1-19 Victoria Street
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01-215 5000

Telex 8811074/5 DTHQ G
Fax 01-222 2629

Direct line 01 215 5622
Our ref JW3AHT
Your ref
Date 8 February 1990

Dear James

COURTS AND LEGAL SERVICES BILL

Thank you for copying me your letter of 2 February to John Major about the amendments you propose to introduce to the Lords at Report stage of the Bill.

I am content that you should proceed with provisions covering the Law Society's Compensation Powers, Notaries and Commissioners for Oaths. They all seem to me to represent worthy improvements.

The amendment you have put forward to enhance the availability of notarial services in the outer London area are particularly welcome. I also note that you have the position of Scrivener notaries under review. I wonder therefore if there might not be merit in providing in the amendments here for an order making power which would allow for any subsequent modification to the rights of notaries to be made without recourse to primary legislation. This would enable the potential abuse of a monopoly position to be more readily countered. I should be interested to hear your views on this suggestion.

I am copying this letter to recipients of yours.

Yours ever

Nicholas

Recycled Paper

LEGAL PROC: Legal Powers Pt 4

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

7 February 1990

I attach an extract from the House of Lords Official Report covering the discussion of Lord Renton's amendment to acknowledge specifically the role of the Inns of Court in the Courts and Legal Services Bill. The Prime Minister was grateful for your timely warning on this question which enabled the shortcoming in the Bill to be put right.

ANDREW TURNBULL

The Rt. Hon. Lord Justice Parker

10 DOWNING STREET

Prime Minister

The amendment giving recognition to the Inns of Court was discussed at Cols 31-32. The Lord Ch. promised to give effect to the proposal.

AT 6/2

I think we should forward the relevant pages to Lord Justice Parker - together with a note that, thanks to his timely warning, we were able to achieve the relevant Inns of Court

Lord Stoddart of Swindon: My Lords, are we to have a debate on the report?

Earl Ferrers: My Lords, that is a matter for the usual channels. I am sure that if the noble Lord wishes to pursue that he will do so.

Courts and Legal Services Bill [H.L.]

4.24 p.m.

House again in Committee on Clause 24.

Lord Renton moved Amendment No. 139 AZA:

Page 19, line 11, at end insert—

("(2A) No person shall have a right of audience as a barrister by virtue of subsection (2)(a) above unless he has been called to the Bar by one of the Inns of Court and has not been disbarred or temporarily suspended from practice by order of an Inn of Court.").

The noble Lord said: This amendment adds a new subsection (2A). It is supported by four noble Lords who have been treasurers of each of the four Inns of Court. Those Inns of Court have not so far been mentioned in the Bill. I was treasurer of Lincoln's Inn; the noble and learned Lord, Lord Ackner, was treasurer of Middle Temple; the noble Lord, Lord Hooson, was treasurer of Gray's Inn; and the noble and learned Lord, Lord Bridge of Harwich, was treasurer of Inner Temple.

Our amendment follows paragraph 3.10 of the White Paper. The purpose of it and the need for it, which is very considerable, are twofold. The first arises because the word "barrister" is not defined in the Bill, so it should be made clear, we suggest, that in England and Wales the only way in which a person can become a barrister is by being called to the Bar by one of the Inns of Court. That has been so since the 15th century.

The second reason for the amendment is that it is surely necessary in the public interest that the Bill should make clear that no barrister should retain the right of audience after being disbarred or while temporarily suspended from practice. I suggest that this is clearly a necessary amendment. I beg to move.

Lord Ackner: I do not wish to take up the time of the Committee, which is anxious to get on. I assume that this is non-contentious. Perhaps my noble and learned friend the Lord Chancellor can indicate that now. If he can, I shall weary the Committee no further.

Lord Hooson: I was going to say something very similar. Looking at paragraph 3.10 of the White Paper, it seems to me that it is probably an oversight that this provision was left out of the Bill. Perhaps the noble and learned Lord the Lord Chancellor can indicate his view on this.

The Lord Chancellor: I welcome the principle of this amendment and wish to give effect to it. If my noble friend Lord Renton, the noble Lord, Lord Hooson, and my noble and learned friends Lord Ackner and Lord Bridge of Harwich are agreeable, I wish to take the advice of parliamentary counsel as to the precise way in which this should be done.

I personally had in mind that something of this sort was required but I felt that it was primarily a matter for the General Council of the Bar to resolve with the Inns. I am told that that is agreed. Therefore, I am happy to give effect to the amendment, particularly as I happen to be an honorary bencher of the Inner Temple.

Lord Renton: I too have been told that this amendment has the blessing of, at any rate, the officers of the General Council of the Bar. I am very grateful to my noble and learned friend the Lord Chancellor for saying that he will have this amendment looked at by parliamentary counsel. It would be surprising but very exciting indeed if parliamentary counsel found that our wording was acceptable. I beg leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Lord Hutchinson of Lullington moved Amendment No. 139B:

Page 19, line 11, at end insert—

("(2B) Nothing in this section shall permit an employee of a prosecuting authority to have a right of audience to conduct trials on indictment.").

The noble Lord said: In moving this amendment, I cannot be as brief as the movers of the last amendment because I suggest that it raises a matter of principle of great importance. This is a principle which has been considered in depth by two Royal Commissions and by the Marre Committee.

The question at issue is: is it in the public interest that prosecutions should be conducted in the Crown Courts by employed lawyers, either on the staff of the prosecution service or as civil servants in various government departments? A second question is raised. Under the provisions of the Supreme Court Act 1981 the noble and learned Lord the Lord Chancellor has the power to direct that solicitors may have rights of audience in the Crown Court. He has similar powers under the Prosecution of Offences Act in relation to employees of the Crown Prosecution Service. Although Clause 24(1) states in terms that the rights of audience shall be determined solely in accordance with Part II of the Bill and although the powers of the judges to regulate rights of audience have been swept away, it appears that the powers of the noble and learned Lord the Lord Chancellor will continue.

A careful examination of the repealing Schedule 13 shows no sign of repeal of either section of the Acts of Parliament I have mentioned. Although there was no reference to the point in the speech of the noble and learned Lord at Second Reading, it would appear that there is a back-door possibility of all prosecutions in the Crown Court being conducted by employees of a state prosecution service and of the procedures under Schedule 4 of this Bill being entirely bypassed. Therefore, I suggest that this matter of principle should be discussed by the Committee. It was put very clearly by the Benson Royal Commission at paragraph 18.43. In moving

whereas they have completely ignored the feeling in both Houses of Parliament. How does that square with talk about the sovereignty of Parliament?

4.14 p.m.

Earl Ferrers: My Lords, it squares perfectly well. The Government produced a Bill because they were concerned about the state of public order and the conduct of football matches where people were being subjected to the most terrifying things including death. They brought the Bill into Parliament and the Bill was passed. Parliament then had two other opportunities to discuss what was going to be produced when the scheme, as it was, was introduced. Parliament then had the right to give its views on that. When a disaster occurred my right honourable friend asked Lord Justice Taylor to consider everything. Lord Justice Taylor stated that he could not support this part. The Government accept that.

The Earl of Onslow: My Lords, if my noble friend takes notice of the Lord Justice will he take more notice of the Lords of Appeal on the courts Bill? It might be interesting to see the difference in attitude on the advice given.

Earl Ferrers: My Lords, I regard that as a frivolous interjection and nothing to do with the Statement.

Lord John-Mackie: My Lords, Aberdeen has an all-seats stadium. My friends and family who attend that stadium say that it has made a tremendous difference. The time that the Government are giving football clubs to provide all-seats stadia is too long. The Minister should pay attention to what the noble Lord, Lord Dean, said about the Government helping through taxation. The Minister said that it is a leisure issue and should receive no help. However, other leisure areas such as tourism receive help. The Government should not shut their eyes to that aspect.

Earl Ferrers: My Lords, I am grateful to the noble Lord, Lord John-Mackie, for at least saying that the Government are being too generous in their treatment of the football situation. I shall bear in mind what he said. When I gave my reply about taxation, I implied that it was a matter for my right honourable friend. Of course the suggestions of Lord Justice Taylor will be considered. I gave the overall view of the Government.

Lord Hatch of Lusby: My Lords, I have not had an opportunity to read the report. However, on the Statement made by the noble Earl, I agree with him and with Lord Justice Taylor on the strictures about the conduct of many football clubs in this country and the gross transfer fees that have been bandied about. But that is part of the socio-economic system that the Government support. I also agree with the strictures on the actions of some players. I was glad that the noble Earl said—and I believe I heard him correctly—that it was not just soccer players who were to be condemned for giving a bad example on the field of play.

Having said that, I should like to take further the point made by the noble Lord, Lord Jenkins of Hillhead. I do that in a personal capacity. On 20th February last year, at cols. 412 and 413 of *Hansard,* I warned the Government against the increased dangers of the use of identity, dangers which had been pointed out by the police, the clubs and supporters. Unfortunately, six weeks later at Hillsborough that warning was borne out in tragic practice.

That point was made on all sides of this Chamber. It was not just those noble Lords in Opposition. The noble Lord, Lord Harmar-Nicholls, moved an amendment partly dealing with that very point. Lord Justice Taylor has now confirmed the warnings which we then gave to the Government. I repeat what my noble friend Lord Mishcon said at the beginning: how is it that the Government have no apology to make to this House for the amount of parliamentary time and public money which have been wasted because they would not listen at that time to reasoned arguements from those of us who had some experience of football grounds? How is it that the will of one woman was allowed to prevail——

Noble Lords: Order!

Lord Hatch of Lusby: —against the criticisms of her own supporters as well as those of us who are politically opposed to her?

This was not a political issue but an issue of experience and common sense. We warned the Government at that time of the dangers of their ID scheme. Lord Justice Taylor has now borne out that warning. The Government listen to Lord Justice Taylor but do not listen to Parliament. Apparently they are not prepared to come and say, "We were wrong. We regret the time and public money which were wasted. We shall not put into effect the scheme which took so much time in this House an in another place and which took so much money, much of which came from the clubs themselves".

Earl Ferrers: My Lords, the noble Lord, Lord Hatch, seems to be momentarily unaware of the parliamentary processes. A Bill only reaches the statute book with the approval of both Houses of Parliament. This Bill had that approval.

He asks why the Government have not apologised. The simple answer is that the Government asked the football authorities to do something about the game because of the disasters which had occurred. The authorities did not do that and the Government brought in a Bill to try to meet that criticism. That is why that Bill was brought in. Therefore, there is no reason to apologise for bringing in a Bill which is aimed at trying to combat hooliganism. The noble Lord keeps trying to interrupt from a sedentary position. He has asked me a question and I am endeavouring to answer. Of course the Bill was controversial. Lord Justice Taylor has now looked at the matter and has advised that that part of the Bill should not be brought into effect, and we accept that advice. However, let us be clear that this Bill passed both Houses of Parliament.

FROM THE RIGHT HONOURABLE THE LORD MACKAY OF CLASHFERN

CCPA

HOUSE OF LORDS,
LONDON SW1A 0PW

2nd February 1990

Dear John,

COURTS AND LEGAL SERVICES BILL

Law Society's Compensation Powers

I said in my paper to L Committee introducing the Courts and Legal Services Bill (L(89)39) that I expected to be able to bring forward amendments agreed with the Law Society to achieve a very welcome improvement in the Society's role in relation to clients whose solicitors perform incompetently. I undertook to let colleagues have details when these were confirmed. The broad changes required have now been agreed with the Law Society and I hope to be able to introduce the relevant amendments in the Lords at Report stage.

The Law Society has accepted that the Solicitors Act 1974 should be amended to improve the Society's capacity to deal properly with complaints, and to allow it to set up a compensation scheme covering cases which involve relatively small sums. The initial limit proposed for the compensation scheme is £1000. The new arrangements will complement the arrangements we are making in the Bill for the new office of Legal Services Ombudsman and, by creating a specific power to compensate, will deal with the major outstanding concern of the consumer lobby in this regard.

The changes will also make a clearer distinction between the Society's disciplinary powers and those to compensate for inadequate services. At present, their power to compensate is limited to reduction or waiver of a solicitor's bill, or an order to rectify poor work, or to pay another solicitor to do so. Separating these roles, which should not be difficult to achieve, should secure full use of the new powers.

Some cases will be inappropriate for this procedure, which must be quick, inexpensive and administratively simple, if it is to deliver the benefits for clients which we seek. The Law Society should therefore have the right to refuse to consider an award of compensation in cases where there are complex issues of law or fact; where an oral hearing may be required; and where the complainant has not sought to use the solicitor's own in-house

The Rt Hon John Major, MP
The Chancellor of the Exchequer
Treasury Chambers
Parliament Street
London SW1

complaints procedure. The Law Society should also be able to charge a fee once a complainant has decided to use this procedure (which will be refunded if the complaint succeeds), but the charge will generally be waived where the complainant is legally aided. The Society should also have power to recover costs from the solicitor in question.

The Law Society's current powers to deal with the provision of inadequate professional services were created in 1985, and these powers were broadly adopted and applied to licensed conveyancers when that new profession was created. I would therefore also be grateful for colleagues' agreement to a comparable change in the arrangements for licensed conveyancers, so that those using licensed conveyancers can also benefit from such a scheme.

It would also be desirable to make two other small and uncontroversial additions to the Bill.

Notaries

Although my original intention was to leave the notarial profession untouched in the Bill, my attention has been drawn by correspondence from a Member of Parliament to a small improvement which could be made now to remove a significantly inconvenient and anachronistic limitation on client choice.

Under the Public Notaries Acts of 1801 and 1883, notaries who are members of the Incorporated Company of Scriveners enjoy a statutory monopoly on notarial acts within a 3 mile radius of the Royal Exchange in London. Of the other two kinds of notaries, district notaries may not operate within a 10 mile radius of the Royal Exchange, and few of the general notaries who can practise within this 3-10 mile penumbra do so in practice. Thus the scriveners enjoy an effective monopoly within the 10 mile radius. This has led to a dearth of persons entitled to perform notarial acts in Outer London.

All interested parties have said they favour action to abolish the 10 mile exclusion, and thus provide a wider choice. I therefore seek agreement for the Bill to merge district and general notaries, by allowing the Master of the Faculty Office of the Archbishop of Canterbury (who has responsibility for notaries) to make rules converting district notaries into general notaries and halting the appointment of any new district notaries. This would increase the number of general notaries available in the area between 3 - 10 miles from the Royal Exchange by turning all the district notaries into general ones. I would also like to deal at the same time with three minor anomalies by removing the valueless anachronism by which all notarial faculties at present have to be registered with the Clerk of the Crown in Chancery; allowing notaries to certify copies of powers of attorney under the Powers of Attorney Act 1971; and exempting notaries (who are as much members of the legal profession as barristers and solicitors) from jury service under the Juries Act 1974. None of this would be at all controversial: indeed there may be more comment in Parliament if we seek to do nothing.

In contrast, I do not, at present, propose to amend the 3 mile monopoly enjoyed by the Scriveners Company for two reasons. First there is no consensus for such an amendment, and no time to secure one; and I would not want to include in the Bill at this stage something that would be controversial without prior consultation. Secondly, the degree of training and experience that the Scriveners Company requires of its members means that they provide a special service amounting almost to a profession apart; and there is already a significant degree of competition between the Central London firms. I recognise, however, that this is an area that should be kept under review and that steps might need to be taken to alter the position in the future.

Commissioners for Oaths

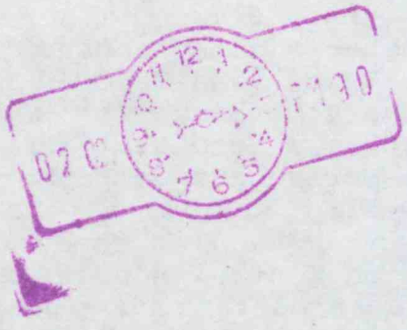
I should also like to repeal section 1 of the Commissioners for Oaths Act 1889, which provides for the Lord Chancellor to appoint as a Commissioner for Oaths any "fit and proper person" and to revoke any such appointments. This provision is no longer required; all solicitors with practising certificates are able to administer oaths, and I am planning to make a consequential amendment to the Bill to extend the right to practising notaries, and to the prospective new classes of authorised advocates and litigators. The provision has not been used since 1976, and any applications are in practice refused as a matter of course. On this basis, I think it is preferable to repeal the power altogether, particularly as it has no place in the new framework the Bill establishes.

These amendments should not add significantly to the length of the Bill or create any problem of handling. The most substantial, on complaints against solicitors, should significantly help its passage, since they will mean we can present to the Commons a Bill containing a comprehensive package of improvements on complaints. Colleagues will appreciate that I am under considerable pressure of time if I am to get as much as possible done by Report Stage in the House of Lords. I would therefore be grateful to know whether I can proceed by noon next Thursday, 7 February.

I am sending a copy of this letter to the Prime Minister, the Lord President, to the other members of E(CP), the Home Secretary, the Lord Privy Seal, the Attorney General, and to Sir Robin Butler.

Yours ever,

James.



Prime Minister
To note

AT 19/1

MR TURNBULL

19 January 1990

COURTS AND LEGAL SERVICES BILL:
GOVERNMENT AMENDMENTS TO CLAUSE 14

Following pressure from the Attorney General, the Lord Chancellor proposes to table some amendments to Clause 14 which would go some way to meeting the concerns voiced by the Bar Council, Lords Donaldson and Campbell and others.

Annex A shows Clause 14 as published. Annex B shows the effect of the proposed amendments (underlined). The Lord Chancellor believes that the amendments should go some way to dispelling opposition because the clause now mentions "the proper and efficient administration of justice" twice. But it avoids doing so in a way which could seriously compromise the thrust of Clause 14(1). This is important, since it is this wording which sets out in statute the Government's objective of encouraging new ways of providing legal services, and a wider choice of persons providing them.

The Treasury, like me, would have preferred the wording as its stands. But we accept the tactical argument for putting forward amendments before the clause is discussed in committee next week as a way of avoiding less acceptable amendments which might be forced on the Government.

Andrew - what about the point Lord Justice Parker raised with me?

CAROLYN SINCLAIR

I have written to Paul Stockton on this.

AT

ANNEX A

PART I

(ii) such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of that person and his family;".

County court rules.

1984 c. 28

13. In section 75 of the County Courts Act 1984 (county court rules) the following subsection shall be inserted after subsection (6)—

"(6A) County court rules may—

(a) to any extent (and with or without modification) apply any rules of court, or other provision—

(i) made by or under any enactment; and

(ii) relating to the practice or procedure of any other court,

to the practice or procedure of county courts; and

(b) amend or repeal any statutory provision relating to the practice or procedure of county courts so far as may be necessary in consequence of any provision made by the rules."

PART II

LEGAL SERVICES

Introductory

The statutory objective and the general principle.

14.—(1) The general objective of this Part is the development of legal services in England and Wales (and in particular the development of advocacy, litigation, conveyancing and probate services) by making proision for new ways of providing such services and a wider choice of persons proviing them.

(2) In this Act that objective is referred to as "the statutory objective".

(3) As a general principle the question whether a person should be granted a right of audience, or be granted a right to conduct litigation, should be determined only by reference to—

(a) whether he is qualified in accordance with the educational and training requirements appropriate to the court or proceedings in question; and

(b) whether he is a member of a professional or other body which—

(i) has rules of conduct (however described) providing for standards of conduct on the part of its members which are appropriate in the interests of the proper and efficient administration of justice in relation to the court or proceedings concerned;

(ii) has an effective mechanism for enforcing those rules of conduct; and

(iii) is likely to enforce them.

(4) In this Act that principle is referred to as "the general principle".

The statutory duty.

15.—(1) Where any person is called upon to exercise any functions which are conferred by this Part with respect to—

(a) the granting of rights of audience;

(b) the granting of rights to conduct litigation;

DRAFT CLAUSES/SCHEDULES

The statutory objective and the general principle. [J319]

14.—(1) The general objective of this Part is the development of legal services in England and Wales (and in particular the development of advocacy, litigation, conveyancing and probate services) by making provision for new or better ways of providing such services, and a wider choice of persons providing them, ~~while maintaining the proper~~ and efficient administration of justice.

STET S

(2) In this Act that objective is referred to as "the statutory objective".

(3) As a general principle the question whether a person should be granted a right of audience, or be granted a right to conduct litigation, in relation to any court or proceedings should be determined only by reference to—

(a) whether he is qualified in accordance with the educational and training requirements appropriate to the court or proceedings;

(b) whether he is a member of a professional or other body which—

(i) has rules of conduct (however described) governing the conduct of its members;

(ii) has an effective mechanism for enforcing those rules of conduct; and

(iii) is likely to enforce them; and

(c) whether that body's rules of conduct are, in relation to the court or proceedings, appropriate in the interests of the proper and efficient administration of justice.

(4) In this Act that principle is referred to as "the general principle".

PART 3 ends:-

SCOT. OFF to PCO. 28.11.89

PART 4 begins:-

C. SINCLAIR to AT. 19.1.90

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