

RESTRICTED



10 DOWNING STREET

*From the Private Secretary*

5 March 1985

Legal Aid in Scotland

The Prime Minister has seen your Secretary of State's minute of 28 February and agreed his proposal that the draft paper for H Committee should be circulated.

The Prime Minister has however asked that, since much of the practical attraction of withdrawing legal aid work from the Law Society relates to the potential for improving control over expenditure on legal aid, the H paper should say a little more about how your Secretary of State sees control of legal aid schemes being tightened and what abuses he considers need remedying.

I am copying this letter to Richard Stoate (Lord Chancellor's Office), Rachel Lomax (HM Treasury), Steve Godber (Department of Health and Social Security) and Richard Hatfield (Cabinet Office).

(Mark Addison)

John Graham, Esq.,  
Scottish Office

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Per Minister:

Ref. A085/665  
PRIME MINISTER

*Suggest the paper be considered as a part of the paper on Robert Armstrong's advice? Mr Toongers paper is attached. Agree to its circulation in view of Sir*

Legal Aid in Scotland

*W 4/3*

The Secretary of State for Scotland seeks your approval of his circulating to H Committee a paper proposing the setting up of a Non-Departmental Public Body (NDPB) to administer legal aid in Scotland.

2. The NDPB would bring together legal aid functions of the Secretary of State (which you recently agreed should be transferred to him from the Secretary of State for Social Services), of the courts, and of the Law Society of Scotland. Some 50 staff would be transferred to the NDPB from the Civil Service and some 230 to the NDPB from the Law Society. The consultation paper canvassing the change would make clear that the proposal was related to Scottish circumstances and did not imply a similar change in England and Wales, where the Law Society is currently considering its legal aid role.

3. In principle there is much to be said for the Secretary of State's proposal. The Law Society of Scotland is spending public money on civil legal aid without properly defined arrangements for control over and accountability for its activities. While it would be possible to take statutory powers to remedy these deficiencies the Secretary of State considers that this would be less effective than setting up a statutory NDPB, and in any case there could be no assurance that the Law Society would be prepared to operate in the way the Secretary of State would find satisfactory. There is also the potential conflict between the Law Society's determination of access to civil legal aid and its interest in providing work for the legal profession.

4. It would perhaps have been preferable if you had been able to look at these proposals at the same time as possible changes in the legal aid machinery in England and Wales. You will note





that although the Lord Chancellor believes the Law Society arrangements work well in England and Wales, there is a possibility that the Law Society itself may decide to withdraw from the work. In that event you may well be faced before long with a similar decision for England and Wales. On the other hand the situation in Scotland is clearly unsatisfactory and the Secretary of State believes that he has the right solution for the particular requirements of Scotland. The Lord Chancellor for his part is content that the decision, if presented as a proposal, will not pre-empt decisions in England and Wales.

5. In these circumstances I think that it would be right to give the Secretary of State's proposal an airing in H Committee and, if colleagues are content, in public through the consultation document. Since, however, much of the practical attraction of withdrawing legal aid work from the Law Society relates to the potential for improving control over expenditure on legal aid, you may wish to suggest that the H paper should say a little more about how the Secretary of State sees control of legal aid schemes being tightened and what abuses he considers need remedying.

RTA

ROBERT ARMSTRONG

4 March 1985





SCOTTISH OFFICE  
WHITEHALL, LONDON SW1A 2AU

PRIME MINISTER

28 February 1985

#### LEGAL AID IN SCOTLAND

I have been reviewing the arrangements for the provision of legal aid in Scotland, and I am convinced that fundamental changes are necessary to improve our control over what has been an area of rapid growth in public expenditure; to make possible improved public and Parliamentary accountability; and to achieve both greater consistency of practice and more discrimination in the granting of legal aid. I am satisfied that in Scotland this objective can best be secured through the integration of as many aspects of legal aid administration as possible within a single body in place of the present diffuse arrangements and that establishment of a Non Departmental Public Body (NDPB) is the right solution. Although I propose that a new NDPB should be created, I think that this addition to the number of NDPBs is acceptable, if not indeed notional, given that the new NDPB would supersede the Legal Aid Central Committee of the Law Society of Scotland which has the expenditure functions of a statutory body but is not subject to the disciplines normally available to a Minister responsible for a NDPB.

I have consulted the Lord Chancellor. He considers that the arrangements in England and Wales (where the Law Society there also administers legal aid) help to preserve a useful measure of voluntary input from the profession south of the Border and work reasonably well. His approach has been therefore to seek ways of increasing efficiency and refining his controls over legal aid with the existing arrangements. But the Law Society of England and Wales have recently engaged management consultants, and the outcome may be a decision to seek to withdraw from legal aid administration. So the Lord Chancellor is concerned that we should avoid giving the impression that the Government has pre-empted the outcome of that discussion. He is also concerned about how far differences between the arrangements north and south of the Border could be readily defended. In deference to his views I have agreed that the consultation paper which I propose to issue shortly in relation to changes in the administrative and other arrangements for legal aid should refer to establishment of a NDPB in Scotland as a proposal rather than a decision.



E. R.

My officials have also consulted Management and Personnel Office and the Treasury who have not raised any objections in principle to the establishment of a NDPB although they made some comment on detail. The attached draft paper for H Committee which sets out the main arguments for change is designed to take account of their views as well as those of the Lord Chancellor on consultation. Before I give this wider circulation I should be glad to know that you see no fundamental objection to what I propose.

I am sending copies of this minute to the Lord Chancellor, the Chancellor of the Exchequer and the Secretary of State for Social Services. (My draft H Committee paper would of course have a wider circulation.)

G.Y.

G.Y.

Encs



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SCOTTISH OFFICE  
WHITEHALL, LONDON SW1A 2AU

David Barclay Esq  
Private Secretary  
10 Downing Street  
LONDON SW1

28 February 1985

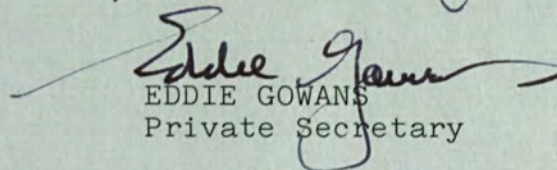
Dear David,

LEGAL AID IN SCOTLAND

I refer to my Secretary of State's minute of 27 February on this subject. Unfortunately this did not incorporate changes suggested by the Lord Chancellor. I therefore attach a revised version of this minute and would appreciate it if this could be substituted for the original. The duty clerk has been informed of the problem and is holding the papers. My Secretary of State's paper is on the agenda for H on Wednesday of next week and we would like to be in a position to circulate the paper on Monday. To this end it would be appreciated if the Prime Minister's clearance could be given as soon as possible.

I am sending copies of this letter and the attachment to Michael Romberg, David Peretz and Steve Godber whose offices have been made aware, by telephone, of the problem.

Yours sincerely

  
EDDIE GOWANS  
Private Secretary





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- Cabinet Office advice requested on letter of 28/2 which  
SCOTTISH OFFICE <sup>pt of</sup> ~~let to~~ <sup>supercedes</sup>  
WHITEHALL, LONDON SW1A 2AU <sup>this one</sup>  
- Await also  
had Chancellor's views

PRIME MINISTER

27. February 1985

#### LEGAL AID IN SCOTLAND

I have been reviewing the arrangements for the provision of legal aid in Scotland, and I am convinced that fundamental changes are necessary to improve our control over what has been an area of rapid growth in public expenditure; to make possible improved public and Parliamentary accountability; and to achieve both greater consistency of practice and more discrimination in the granting of legal aid. I am satisfied that in Scotland this objective can best be secured through the integration of as many aspects of legal aid administration as possible within a single body in place of the present diffuse arrangements and that establishment of a Non Departmental Public Body (NDPB) is the right solution. Although I propose that a new NDPB should be created, I think that this addition to the number of NDPBs is acceptable, if not indeed notional, given that the new NDPB would supersede the Legal Aid Central Committee of the Law Society of Scotland which has the expenditure functions of a statutory body but is not subject to the disciplines normally available to a Minister responsible for a NDPB.

I have consulted the Lord Chancellor who is concerned that any announcement about a firm decision to establish a NDPB for Scotland would prejudice the possibility of acceptance by the Law Society, who have engaged management consultants to review their administration arrangements, that a similar body might be established for England and Wales. He also has doubts whether this is the right solution for England and Wales and about how far differences between the arrangements north and south of the Border could be readily defended. In deference to his views I have agreed that the consultation paper which I propose to issue shortly in relation to changes in the administrative and other arrangements for legal aid should refer to establishment of a NDPB in Scotland as a proposal rather than as a decision.

My officials have also consulted Management and Personnel Office and the Treasury who have not raised any objections in principle to the establishment of a NDPB although they made some comment on detail. The attached draft paper for



E. R.

H Committee which sets out the main arguments for change is designed to take account of their views as well as those of the Lord Chancellor on consultation. Before I give this wider circulation I should be glad to know that you see no fundamental objection to what I propose.

I am sending copies of this minute to the Lord Chancellor, the Chancellor of the Exchequer and the Secretary of State for Social Services. (My draft H Committee paper would of course have a wider circulation.)

C.Y.

G.Y.

Encs



RESTRICTED

DRAFT

H(85)

LEGAL AID IN SCOTLAND

Memorandum by the Secretary of State for Scotland

My review of the legal aid arrangements in Scotland has convinced me that fundamental changes are required in a system which has developed in a piecemeal fashion since 1950. Much more effective control is required and I have concluded that this can best be achieved and most cost-effectively by the establishment of a Non Departmental Public Body, more directly answerable to me, with responsibility for all aspects of legal aid administration insofar as I do not exercise this myself. I accordingly seek agreement that I should publish shortly a consultation document outlining my proposals, which would also cover other changes in the arrangements for legal aid, with a view to legislation, if possible, in 1985-86.

Present arrangements

2. At present responsibility for legal aid is diffuse. I am concerned with the overall policy and the legislative framework and of course I am answerable to Parliament for voted expenditure on the service. The Law Society of Scotland is responsible for the administration and variation of legal aid schemes, its day-to-day functions being discharged through its Legal Aid Central Committee which services most of the local legal aid committees and processes all legal aid accounts. The local legal aid committees have responsibility for the determination



of the merit of applications for civil legal aid and authorising increases in payments for legal advice and assistance. DHSS is responsible for assessing the financial eligibility of applicants for civil legal aid although the intention is that my Department should assume this function from 1 April 1985. The various courts have responsibility for determination of applications for criminal legal aid.

3. While the present arrangements for the consideration of applications for civil legal aid work reasonably well and there remains a strong case for the involvement of the profession in the arrangements it is clearly anomalous that the Law Society should administer this and more particularly other aspects of legal aid. The Royal Commission on Legal Services in Scotland (Cmnd 7846 para 8.68 and 8.71) saw a clear conflict of interest between that responsibility and the Society's role of looking after the interests of its members. This conflict has been increased by my assumption last year under the Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983 of responsibility for the determination of legal aid fees, since the Society now negotiate directly with my Department on legal aid fee levels.

4. As for criminal legal aid, there are serious objections to having a court determine applications in that the court which will hear the case has to enquire into the circumstances bearing upon whether legal aid would be justified. There are widespread variations in the interpretation by the courts of the criteria for the grant of legal aid, which have been the subject of several Parliamentary Questions.

5. Moreover, there are inherent inadequacies in the degree of control which I can exercise over the arrangements and over expenditure. These have been highlighted by our policy of seeking to secure improved financial practice in the public sector. While I, and the Treasury, have to approve changes in legal aid schemes, the initiative for making changes rests with the Law Society and I have no power to enforce them. The administration of legal aid services on the ground through an



NDPB would not differ significantly from the conduct of this service by the LACC. But the change would provide me with well proven machinery for the exercise of control and accountability, and with a clear and uncluttered means of giving general directions; under present arrangements I have to delegate authority for expenditure to a body over which I have an extremely uncertain and weak authority. Expenditure on legal aid (other than administration) in a period of financial restraint has increased from £9.6 million in 1979-80 to £33 million in 1983-84. It is important that we should have the means to strengthen our control and ensure that legal aid is made available in cases where it is justified and that abuses of the system are limited. While some improvements are possible within the present framework, I am satisfied that the best solution is the integration in a single body of as many as possible of those functions for which my Department is not directly responsible.

6. I have considered the possibility of leaving responsibility with the Law Society - or enhancing it with criminal legal aid determination - but this would have accentuated rather than resolved the problem of conflict of interest. Even if I were to assume formal power to give directions to the Law Society to initiate administrative changes, I do not consider that this would be fully effective in securing the radical changes required. This holds even more true of powers simply to issue guidance.

7. The alternative of my Department assuming direct responsibility for all aspects of legal aid administration is neither acceptable nor appropriate. This would involve an increase of at least 230 in Civil Service numbers to deal with administration with undoubtedly difficulties of securing the transfer of the existing experienced staff of the Law Society and putting them into appropriate Civil Service grades. More fundamentally my Department could not credibly undertake direct responsibility for determining each and every legal aid application and for



justifying each decision on the basis of an assessment not only of the financial but also of the legal merits, which might involve the recruitment of a significant additional number of lawyers. The merits of individual applications must be considered by a clearly independent source of adjudication and not one which would be seen to have an inbuilt bias towards rejecting them. Such a proposal would also engender a quite unnecessary degree of hostility from the profession which we should not incur. Accordingly I do not consider this option to be practicable, acceptable or defensible, politically or otherwise, since such judgments must be made by a body at arm's length from the Secretary of State.

8. I appreciate that my proposals for administrative and other changes have implications for legal aid in England and Wales, at least to the extent of raising the question whether comparable changes are envisaged there. The Lord Chancellor considers that the present arrangements for administering legal aid in England and Wales work well. The statute provides that the Law Society in England and Wales administer legal aid under his guidance, and they accept in practice that they are acting as his agent in this respect. He has therefore been seeking ways of increasing efficiency and refining his controls over legal aid within the existing arrangements. But the Law Society in England and Wales themselves have recently been considering whether it is any longer desirable for them to continue with this task.

9. The Lord Chancellor is anxious to avoid giving the impression that the Government is pre-empting the outcome of this discussion. I have therefore agreed that the consultation paper should refer to the establishment of a NDPB as a proposal rather than as a decision. If the Committee approve my recommendations, I would seek to agree with the Lord Chancellor the terms of the consultation paper, which must be issued shortly if I am to complete consultations to enable me to legislate in 1985-86. In general, I am confident of being able to defend the proposals for change as arising out of the different arrangements north of the Border. There are indeed significant differences, particularly in relation to



criminal legal aid, reflecting the wide disparities in criminal procedure; and in any event the proposals in relation to criminal legal aid will be more tentative.

#### Financial and manpower implications

10. The Annex gives a brief outline of organisation and functions of the NDPB and of the financial and manpower implications. This suggests that the cost of administering the legal aid scheme through an NDPB will be broadly the same as those which arise from LACC's administration. Significant savings should however be obtained in the long term by tighter control of the various legal aid schemes and by their appropriate modification. While the initial impact may be small the savings in future years could be sizeable. Control of fees has already produced considerable savings as compared with the previous arrangements. In manpower terms there would be a reduction of about 50 in civil service numbers with the transfer to the NDPB of the responsibility for financial assessment of legal aid applications but an increase in the staff of NDPBs with the transfer of those presently administering legal aid within LACC (about 230). I do not envisage any major difficulties about staff transfer or redundancy as all the present staff have civil service salaries and conditions and will become part of a "controlled body" with the same conditions. The total number should be roughly similar and the existing premises, which are entirely separate from those of the Law Society, can be taken over. Finally, the numbers of Civil Servants involved is small enough to avoid difficulties of absorbing into Scottish Office those who do not wish to transfer. Nor do I foresee any strong objections being made to the various tasks being carried out by a NDPB rather than existing bodies. Financial assessment for example is at present carried out in different circumstances by DHSS, the courts and individual solicitors without any material complaints from the public that these bodies or persons are involved and I do not envisage that transfer to a NDPB should of itself give rise to any more material complaints than there are at present.



EC effects

11. My proposals have no EC effects.

Conclusion

12. Accordingly I invite the Committee

(a) to agree in principle to the establishment of a NDPB to administer legal aid in Scotland; and

(b) to authorise me to prepare and issue after clearance with the Lord Chancellor a paper as a basis for consultation with the Law Society, the courts and other outside interests with a view to legislation at the earliest opportunity, preferably in 1985-86.



ANNEX  
NDPB FOR LEGAL AID IN SCOTLAND

Functions

1. A body appointed by the Secretary of State to administer legal aid would have the following functions:

- (a) Consideration of applications for civil legal aid, including both merits and financial eligibility.
- (b) Consideration of applications for criminal legal aid in summary cases, including both merits and financial eligibility, after the pleading diet, if consultation confirms feasibility. (Legal advice and assistance would be available as appropriate up to the pleading diet without need of an application for legal aid.) In consideration of the merits of legal aid applications, assistance would be provided as appropriate by local legal aid committees including experienced lawyers in private practice.
- (c) Consideration of applications for legal advice and assistance above certain levels.
- (d) Administration of legal aid schemes.
- (e) Assessment and payment of legal aid accounts.

In addition the body would be in a position to offer more disinterested advice on the operation of legal aid and on possible changes in policy than is feasible under the present arrangements.

Composition

2. The body should have a Chairman and up to 10 members, appointed by the Secretary of State. The Chairman should have the personal characteristics necessary so to lead and motivate his colleagues and his full-time officials as to secure the smooth operation of an organisation with approximately 300 staff and expenditure of around £40m mainly on payments to lawyers for the provision of legal aid. The membership should include solicitors and an advocate but also those with expertise, in finance, information technology, machinery of government and consumer affairs.



### Supplementary changes

3. The change in responsibility for administration would be accompanied by improvements in the legal aid system which will be more effective with an integrated body than under the present arrangements. The criteria for the grant of criminal legal aid require clarification in statute. Their inconsistent application by the courts has been widely criticised. The possibility for closer alignment, if not amalgamation, of legal aid and legal advice and assistance will be examined. The outcome will be a significant recasting of the Scottish legislative framework.

### Financial and manpower implications

4. In 1983-84, expenditure in Scotland on legal aid was about £33m; expenditure on administration (including the functions exercised by DHSS and the courts) about £2.5m and manpower was about 300. While estimates are difficult, integration of legal aid administration, through greater use of information technology and standard forms and streamlining of checking procedures and Committee procedures, could result in manpower savings of around 30 although this would be offset to some extent by the transfer from summary criminal courts of responsibility for consideration of legal aid applications after the pleading diet even if this would result in some savings in court work. The costs of the members of the new body would be offset by savings in expenses of members of the Law Society and its committees.

5. While changes would produce limited savings in expenditure on administration, the main benefit should arise from more rigorous scrutiny of legal aid applications in particular those for criminal legal aid. This is made available too freely except in the case of a few courts which may not make it available freely enough. For every 1% reduction in certificates granted for criminal legal aid there would be savings of about £0.2m. With the stricter application of criteria for the granting of civil and criminal legal aid savings of up to £2 or £3 million may be possible.

### Accountability and control

6. Neither the courts nor the Law Society are accountable to the Secretary of State for the way in which they deal with legal aid applications and although the Law Society are accountable for some aspects of legal aid administration, because their administration costs are cash limited, there is no power for the Secretary of State to give them directions. In an area of rapidly expanding demand-led



expenditure it is essential that the Secretary of State should be able to exercise a much greater degree of control and have greater and more flexible powers to influence policy and other decisions which have significant implications for public expenditure. The appointment of a NDPB answerable to the Secretary of State would be of material help in achieving this.



