PERSONAL

Re Wicks

CABINET OFFICE

With the compliments of

Mr Norgrove

Nearly AG –
C Whips is right

J. B. UNWIN

NCU
12.5.

70 Whitehall, London SW1A 2AS
Telephone 01 233

PERSONAL: Mr Wicks.

PERSONAL & CONFIDENTIAL

P 02103

From: J B UNWIN
12 June 1986

CHIEF WHIP

REMUNERATION OF BARRISTERS AND SOLICITORS

You were asked by the Prime Minister this morning to talk to the Attorney General to see whether you could persuade him to modify his proposals.

2. I have already sent you copies of my notes of 10 and 11 June to Nigel Wicks which discussed the handling and possible options for squaring the circle. I also now attach, in case you did not get a copy earlier, a copy of the Attorney General's paper for E(A). As I indicated, I have not yet circulated this, and I suggest it should still be regarded as a draft.

3. I am sure that you will not want to be drawn into the details of the various proposals (which are still obscure to most of us!), but you may find the following further summary material helpful.

Lord Chancellor's Proposal

4. The Lord Chancellor is proposing real increases for both barristers and solicitors on top of the 5 per cent agreed in February. The details are:-

	£ million
Barristers basic 2% increase	0.8
Barristers 3% productivity increase	1.2
Solicitors basic 3.5% increase	8.1
Solicitors 3% productivity increase	7

5. The basic increases proposed derive from a judgement of all the relevant factors. The 3 per cent for "productivity" is really a tactical figure to give totals over 10 per cent. Although he will want to register and challenge some points (eg the proposed Advisory Committee on fees) the Chief Secretary will go

along with this on the basis that it is not a bad package, and certainly an enormous improvement on the February proposals. It seems to have a sporting chance of preventing the Bar and Law Society from taking the Lord Chancellor to court again.

Attorney General's Proposal

6. It is extremely difficult to define what exactly the Attorney's proposals amount to. He denies himself that there is any valid basis of comparison with existing fees. Both the Treasury and the Lord Chancellor's office, however, maintain that the increase costing £7 million a year is equivalent to a 20 per cent increase in prosecution fees. In aid of this he prays various arguments relating to the need to launch the new Crown Prosecution Service (CPS) on a successful basis; and his belief that there need be no necessary parity between his fees and those of the Lord Chancellor. The Lord Chancellor, of course, asserts that it would "be indefensible for the two sets of fees to get significantly out of step".

Squaring the Circle

7. The task set you was to see whether the Attorney General would be willing to scale his proposals down so that they were no longer "significantly" out of step with those of the Lord Chancellor. I fear that I do not have sufficient knowledge or expertise to give you a precise proposal on this. In any case, if there were any changes, the Attorney himself would want to decide what they should be. The simple question, however, is whether he would be willing to reduce the scales listed in Annexes C and D of his paper so that they amount to (or at least can convincingly be so presented) as an increase of, say, not more than some 12.5 per cent over existing fee levels. You will form your own view on this, but I should have thought that this was about the upper limit on what could be accepted by the Lord Chancellor as not being "significantly" out of step with his proposals.

8. If the Attorney would simply not accept this, I think it would still be worth trying one or both of the two following options (which were included in my earlier notes);-

(i) accept a reduction in his proposals now (ie to the maximum of 12.5 per cent suggested above) against an undertaking that colleagues would reconsider them if they were later shown to be insufficient to get the CPS off on the right basis. This option would obviously give the Attorney more than the straight reduction suggested above, and by the same token might be more difficult to sell to the Lord Chancellor. But it might provide a way through;

(ii) to find some clever way of dressing up the proposals on at least standard fees as equivalent to an increase of 10 to 12.5 per cent, but to devise new ways of enabling the Attorney to top them up so that in practice remuneration, in at least deserving cases, could come near what he now proposes.

9. There are, of course, political arguments that you will want to deploy in support of a compromise. Other points you might make are:-

(i) the fact is that, as E(A) last February clearly showed, the colleagues are simply <u>not</u> sympathetic to large increases. If, therefore, the present proposals go to E(A), there is a distinct risk of them being rejected. Does the Attorney really want to invite this? Surely it would be preferable to find some way through in advance?

(ii) there are also real public expenditure problems. The amounts at stake on the Attorney's programme are not themselves very large. But the fact is that, whatever the Attorney may think about the separateness, if his proposals are accepted it would be almost impossible to stop them sooner or later reading across to the Lord Chancellor's fees. And that would start costing real money. In addition, although in pay policy and presentational terms it might just be possible to sell a figure near the Lord Chancellor's 10 and 11.5 per cent (subject to productivity), a 20 per cent increase is simply not on.

PERSONAL & CONFIDENTIAL

Attorney General's E(A) Paper

10. Whether or not you can persuade the Attorney to consider a compromise, it would be helpful if you could have a go at persuading him to modify some of the passages in his paper that (for reasons discussed this morning) could be very damaging if widely broadcast. I have in mind in particular the bottom paragraph on page 5 of Annex A and the observation on the Lord Chancellor in the sentence in brackets in the middle of paragraph 11 of Annex A. The former in particular could be very damaging if revealed in any subsequent squabbles, legal or otherwise, with the Bar or the Law Society. Only minor drafting changes would be necessary, and the Attorney would, of course, be perfectly free to speak his mind on these or any other points in discussion.

11. I hope this is helpful. I am, of course, at your disposal if you need any further material or help.

J B UNWIN

Cabinet Office
12 June 1986

CONFIDENTIAL

P 02101

From: J B UNWIN
11 June 1986

MR WICKS

REMUNERATION OF LAWYERS

You may like to have the attached note which summarises my further thoughts on how to square the circle.

2. Positions are so entrenched that it is extremely difficult to see any way through by agreement (bearing in mind the public expenditure constraint also). At the nub of the dispute is the deep difference between the Lord Chancellor and the Attorney General on whether it is possible to let defence and prosecution fees get out of step. The Lord Chancellor says they cannot; the Attorney General says they can.

3. However, unless any better ideas emerge, it might be worth pursuing further options (iii) to (v) in my note.

J B UNWIN

Cabinet Office

CONFIDENTIAL

REMUNERATION OF LAWYERS

The essence of the problem is as follows.

2. The Lord Chancellor's proposal is for (a maximum of) 10 per cent increase in defence fees for the Bar, and 11.5 per cent for Solicitors. The Attorney's proposal is (according to the Treasury) equivalent to a 20 per cent increase in prosecution fees.

3. The Attorney says the difference does not matter. There is no necessary connection between prosecution and defence fees. By contrast, the Lord Chancellor says the fee levels are inter-related and it would be indefensible for them to get out of step. Ergo, if the Attorney pays more, he will have to follow suit; and this could be expensive (no estimate is yet available).

4. How to square the circle? Among the possibilities are:-

(i) to accept that the situations are different and let the Attorney pay higher fees. The absolute cost is small (£7 million in the first full year). But:

- The Lord Chancellor simply will not accept this and the Treasury would oppose it also on expenditure and pay policy grounds;

- pace the Attorney, to regard the two categories as separate is not plausible. In many cases prosecution and defence counsel are the same people, and it would immediately be clear that under one hat they were being offered 10 per cent, and under another 20 per cent;

It would also look as though the Government thought defending people was less important than prosecuting them.

DLS

(ii) to reduce the Attorney's proposals to those of the Lord Chancellor. But there is no sign that the Attorney would accept this;

(iii) as a variant of (ii), to hold down the Attorney's proposals now, but against a promise to consider upping them if it later seemed necessary to do so;

(iv) to find some way of dressing up the Attorney's proposals as minima equivalent to the Lord Chancellor's proposals, but enabling him in practice to top them up for particular cases so that the overall effect is similar to what he proposes. The Lawyers tell me this could not be done; "topping up" occurs already and the ruse would quickly be seen through;

(v) to compromise halfway on an increase for both defence and prosecution fees of, say, around 12 to 15 per cent (including suitable elements of conditionality).

5. Given the deeply entrenched positions of the Ministers concerned, none of the above options at present appears to be a starter. But (iii) to (v) might be worth pursuing further.

NBPT.

PRIME MINISTER 11 June 1986

LAWYERS

We are very anxious that action is taken to avoid the resignation of another senior Minister even if in this case a compromise is reached. We support up to an additional 1 to 2% to lawyers on top of the Lord Chancellor's proposal in order to reach a compromise, in return for movement on restrictive practices. The Attorney's resignation is in our view likely and damaging if a compromise is not reached.

J. M. Evison.

pp. HARTLEY BOOTH

FROM THE PRIVATE SECRETARY

HOUSE OF LORDS,
LONDON SW1A 0PW

CONFIDENTIAL

11 June 1986

Nigel Wicks Esq
Principal Private Secretary
to the Prime Minister
10 Downing Street
LONDON
SW1

Dear Nigel,

Remuneration to Barristers and Solicitors

As you may know, the Lord Chancellor is very concerned that the late postponement of the E(A) meeting planned for tomorrow may put in jeaopardy the timetable which the court has imposed on him in the cases which stand adjourned on criminal legal aid remuneration. By order of the court the Lord Chancellor has to make his offer to the Bar and the Law Society on or before Friday 27 June. Once he has obtained the agreement of colleagues to the proposals in his EA memorandum of 4 June he will have to instruct counsel to prepare offer letters giving detailed reasons for what is proposed. We must allow sufficient time for this because, by common consent, any resumption of the court proceedings will go ahead on the basis of a "paper war" between the two sides. Our offer letters must be absolutely watertight.

The Lord Chancellor in common, of course, with the Prime Minister and other members of E(A) is under exceptional diary pressure in the weeks running up to the recess; there may thus be very few opportunities to reconvene a meeting of Ministers unless we move very quickly to do so. Only last week the Lord Chancellor re-affirmed the validity of the timetable. It would be unthinkable for the Lord Chancellor to be forced into a position requiring him to seek the leave of the court to amend the timetable. Apart from the fact that the Lord Chancellor has recently stated in the House that he is proceeding in accordance with the timetable any application to the Court would inevitably raise in the minds of the profession and the public questions as to the reasons for the slippage. Inevitably some either that the delay indicated dissent within the Government or would draw the conclusion that the Lord Chancellor was not acting in good faith. In any event the application would inevitably give rise to strong and unacceptable criticism from the court.

/Furthermore

CONFIDENTIAL

CONFIDENTIAL

Furthermore, we are far from confident that any application to the court for more time would be successful. You will readily appreciate that if no more time were granted the Lord Chancellor's position would be gravely embarrassing.

I am sorry to have written in such frank terms but I do not want there to be any doubt about how much importance the Lord Chancellor attaches to obtaining the early agreement of colleagues to the course he proposes.

Yours ever

Richard.

Richard Stoate

CONFIDENTIAL

P 02097

From: J B UNWIN
10 June 1986

MR WICKS

cc Mr Stark

REMUNERATION OF THE LEGAL PROFESSION

E(A) on 3 February (E(A)(86)4th Meeting) invited:

- the Attorney General, to agree a regime for the remuneration of Barristers engaged in prosecution work for the Crown Prosecution Service;

- the Lord Chancellor, to bring forward a revised offer to the Bar and Law Society for the annual up-rating of the legal aid remuneration scales, and proposals for the basis for longer term negotiations.

In their discussion E(A) rejected the Lord Chancellor's then proposal for an immediate interim increase of 20 per cent.

2. E(A) are scheduled to discuss these issues after Cabinet on Thursday (12 June). Two papers have been prepared:-

NOT ATTACHED (i) E(A)(86)24 of 4 June by the Lord Chancellor, which has already been circulated to E(A). It rehearses developments since February (leading to the suspension of the Bar and Law Society actions in return for a commitment by the Lord Chancellor to produce proposals for fee increases by 27 June) and proposes:

(a) for the Bar, an immediate further 2 per cent increase, with up to 3 per cent more conditional on the introduction of specific improvements (this is on top of the interim 5 per cent, making a possible 10 per cent in all);

(b) for the Law Society, an immediate further 3.5 per cent, with up to 3 per cent more conditional on specified changes in working methods, making a possible 11.5 per cent in all;

(c) the establishment of an Advisory Committee, under an independent Chairman , to provide information on fee levels in the future.

NOT ATTACHED (ii) E(A)(86)25 by the Attorney General. I have not yet circulated this to E(A). It recommends a scale of fees for the new Crown Prosecution Service (CPS) costing an extra £7 million in the first full year.

3. I see no major problems with the Lord Chancellor's paper. Although the idea of an Advisory Committee presents difficulties, the new fee proposals (compared with the interim increase of 20 per cent recommended last February) are much more realistic and I think the Chief Secretary may well be prepared to go along with them. Other things being equal, therefore, I would see no reason for E(A) not to discuss this on Thursday as proposed.

4. The Attorney General's paper, however, seems to me to present considerable problems. First, the implications of the fees recommended for the CPO are far from clear. The Treasury believe they represent a 20 per cent uplift in the general levels of remuneration, although the Attorney General denies that any comparison can be made. If the Treasury are right, the comparison with the Lord Chancellor's (maximum) 10 and 11.5 per cent could be very awkward, to say the least. More seriously, the paper appears both in drafting and in substance to be substantially at loggerheads with the Lord Chancellor's approach, and indeed there are certain passages that seem to be directly critical of him. This could have very damaging repercussions. If, for example, the Lord Chancellor's proposals were again contested by the Bar and the Law Society, the knowledge that the Attorney General had taken a substantially different view (and this would be bound to leak in one way or another) could seriously prejudice the Lord Chancel-

lor's position in any further legal action, and could damage the Government's public position generally.

5. I have therefore refused to circulate the Attorney General's paper to E(A) at this stage. I have done so partly because of the failure to clear the financial implications with the Treasury (though this has now been remedied following a meeting between the Attorney General and the Chief Secretary yesterday), but also because of my wider worries indicated above. These were increased later this morning when I discovered that the Lord Chancellor's Department had not yet even seen a copy of the Attorney General's paper, although he was asked by E(A) to settle his proposals in consultation with the Lord Chancellor.

Next Steps

6. The main options for taking this forward seem to me to be:-

(i) to take both the Lord Chancellor's and the Attorney General's paper at E(A) on Thursday as proposed;

(ii) to take the Lord Chancellor's paper only, and to delay circulation and consideration of the Attorney General's paper until its contents have been properly discussed and sorted out;

(iii) for the Prime Minister to take a smaller prior informal meeting of the principal Ministers concerned.

7. For the reasons indicated above, I am uneasy about (i). E(A) papers have a large circulation and, however the decision went, there would be a risk of leaks and prejudicial recriminations. (ii) is possible. The Attorney General needs to get on with settling the fees for the CPS, but he is not subject to the same tight timetable as the Lord Chancellor and this could be done on a slightly slower timescale. On the other hand, whatever the actual inter-relationships, the two sets of issues will be perceived to be connected, and they should really be considered

together. I think, therefore, that, if the Prime Minister agrees, option (iii) might be more prudent. It would be possible to explore the nature of the disagreements and to consider how best they might be brought to E(A). It might at the same time be possible at least to give the Lord Chancellor a provisional green light to his proposals.

8. I recommend, therefore, that you should put this course to the Prime Minister. As for the cast of such a meeting, I think it would be sufficient to invite the Lord Chancellor, the Attorney General, the Chief Secretary and the Lord President. The Home Secretary also has a locus, but the Prime Minister may think that it would not be necessary to involve him at this stage.

9. I should in conclusion stress the tightness of the Lord Chancellor's timetable. He is committed to putting his proposals to the Bar and the Law Society not later than 27 June. His Department tell me that they ought to start work on briefing Counsel on the proposals on 17 June; a further complication is that the Lord Chancellor himself is due to be abroad on 19 and 20 June, and sitting judicially on 23, 24 and (possibly) 25 June. I am sure that, if needs must, the timetable could be compressed; but the Lord Chancellor clearly needs a decision as quickly as possible.

J B UNWIN

Cabinet Office
10 June 1986

PRIME MINISTER 10 June 1986

LEGAL AID - "NO REVIEW BODY"

Pay proposals for this year

1. Barristers' pay: the Lord Chancellor suggests 2% now on top of the 5% already given, and hold out 3% offer against restrictive practices surrendered (total 10%). The Bar claims 25-35% (allowing for 5% offered). Coopers and Lybrand report on Bar fees, which is the basis of the Bar's case, is based on an inadequate sample. We believe that the average criminal earnings are more than the £15,000 gross given in the Coopers Report, and much less than the £30,000 net stated by the Treasury. Overheads have risen faster than fees and this does justify some better than average pay, but this must be paid for tough agreement on restrictive practices (list attached, annex).

2. Solicitors' pay: the Lord Chancellor suggests 3.5% now on top of 5% already offered and including London Weighting and 3% more for improved working practices. Solicitors will get a total of 11.5% including 5% already offered. The Law Society claims only 29% in London and 21% elsewhere. The Lord Chancellor makes an unnecessary precedent of London Weighting. London has higher overheads, but the volume of work is so much greater than the provinces in crime (25-50% of all crime in England

and Wales, eg 50% of drug crime) and allows factory-style bulk-handling of case loads, including the incredible practice, now common, of barristers writing their own backsheets. You might like to resist London Weighting.

Decisions now for future pay review and reform

Options:

1. The Review Body: the Bar quote the Royal Commission and cite TSRB and nurses pay body to support their suggestion for such a body. We oppose the idea because experience shows that these institutions hoist fees or pay above inflation. Solicitors admit the Review Body option is unrealistic in view of your Government's attitude.

2. The Review Panel: the Solicitors see this as a compromise between the establishment of a full quango (above) and the present situation. The Panel would be summoned into activity in years when there was a dispute between the legal profession and the Lord Chancellor. This may turn out to be even more expensive than a full-time quango. We oppose this one.

3. The status quo: everyone, including ourselves, believes that the present position cannot continue. It is gravely damaging for the legal system to have the Lord Chancellor as a defendant in legal action. We must get out of the situation of annual trouble on lawyers' pay.

4. A pay formula: the Lord Chancellor has stated he is not prepared to bind himself to the use of a single formula. However, if legal aid were to rise on an RPI basis, this would remove the whole problem once and for all. If this idea is supported, we must avoid the danger of raising legal aid scales annually. RPI must be fixed on the average fee paid on legal aid. Lifting the scales themselves will allow over-zealous Clerks to mark briefs ever higher inside the scale limits.

5. In any event, bargain away restrictive practices (Annex).

Conclusion

Both solicitors' and barristers' legal aid should be increased, probably by the Lord Chancellor's percentages, but without conceding London Weighting or a pay body. Instead, we must have action on restrictive practices, and go for an RPI pay formula for the future.

HARTLEY BOOTH

Annex

I Restrictive Practices To Scrap In Return For Better Pay

1. Barristers to forgo their right to demand attendance of clients for conference, and substitute a flexible rule permitting the Bar and solicitors to confer in any convenient place.

2. Solicitors to forgo their right to be paid automatically for attending all conferences, and substitute a rule that requires solicitors to justify their attendance.

3. Solicitors to forgo a similar right attending a barrister in court, substituting a similar duty to justify.

4. Barristers to forgo all rights of exclusive audience in court.

II Legal Aid Savings Also In Return For Better Pay

1. Reform committal proceedings to remove interminable adjournments. Make it an automatic speedy procedure in all serious cases. (Speed to be the civil liberty quid pro quo.)

2. Tighten clawback rules, especially in copyright and royalty cases.

DN.
Arranged for 1800-1845 tonight. (Lord Pres, C/W, Ch/Sec, Mr Unwin only)

PRIME MINISTER

REMUNERATION OF THE LEGAL PROFESSION

Brian Unwin's minute (Flag A) describes a potentially damaging quarrel between the Lord Chancellor and the Attorney General. The Attorney wants to propose to E(A) significantly more generous scales of remuneration for the Crown Prosecution Service than the Chancellor is recommending for legal aid work.

(i) The Attorney General is very committed to his proposals and has told me that "he would wonder what his position was" if they were not accepted. He has asked me to draw to your attention the Lords Debate of 4 June (Flag B) on Criminal Legal Aid. Predictably, all who spoke, mostly lawyers, were strongly critical of the Government's position.

(ii) The Lord Chancellor's position needs to be protected. He made a dignified speech in the Lords and has put to E(A) proposals which Brian Unwin believes the Treasury could broadly accept. In the perhaps unlikely event of E(A) agreeing the significantly more generous proposals for the Attorney's clients, the position of the Lord Chancellor with his would be very difficult.

Brian Unwin recommends that before E(A) discusses the issue, you should take a smaller informal meeting of the Ministers principally concerned including the Lord Chancellor and the Attorney General. I wonder, and the Chief Whip agrees, whether it might not be better to have a meeting first without the two lawyers (ie Lord President, Chief Secretary and the Chief Whip) to decide what your own line would be, and then ask the Lord President to sell it to the two lawyers, prior to an E Ameeting.

Agree this? Yes - it is certainly prudent course but

OR

Do you want to go to an informal meeting straight away which includes the Attorney General and the Lord Chancellor?

(We have a slot in the diary after Thursday's Cabinet.)

N.L.W.

Nigel Wicks

10 June 1986

A note on the substance from the Policy Unit went to Fly C. Rose for the meeting.

Note : Not yet circulated to E(A), on my instructions.

To be treated as DRAFT.

CONFIDENTIAL

10/VI/86.

THIS DOCUMENT IS THE PROPERTY OF HER BRITANNIC MAJESTY'S GOVERNMENT

E(A) (86) 25

COPY NO.

6th June 1986

CABINET

MINISTERIAL STEERING COMMITTEE ON ECONOMIC STRATEGY

SUB-COMMITTEE ON ECONOMIC AFFAIRS

REMUNERATION OF THE LEGAL PROFESSION: FEES OF PROSECUTION COUNSEL

Memorandum by the Attorney General

1. On 3 February 1986 E(A) considered the question of remuneration of the legal profession in respect of publicly funded criminal work and invited me:

> "In consultation with the Lord Chancellor and the Home Secretary, to agree with the Chief Secretary to the Treasury, a regime for the remuneration of barristers engaged in prosecution work for the Crown Prosecution Service".

It was also agreed that the Director of Public Prosecutions should have discretion to mark briefs with fees reflecting the complexity of the case involved and sufficient to secure the service of competent barristers.

2. In Annex A to this paper I have set my proposals for such a regime. Although I have discussed in outline the issues with the Lord Chancellor, for reasons which will become apparent from Annex A, I have not yet had an opportunity to discuss my proposals with the Chief Secretary but arrangements have been made for us to meet in advance of E(A).

Why?

3. The Crown Prosecution Service will be fully established in England and Wales with effect from 1 October 1986. Counsel briefed by the Service will be paid out of the Service's budget rather than as they are at present by the Crown Court on an individual case basis. The basis for payment of Counsel under the new arrangements will fall within one of the three following categories:

(a) standard fees;
(b) pre-marked fees, and;
(c) fees assessed ex post facto.

It is envisaged that standard fees would be applied to about 90% of prosecutions in the Crown Court. Although negotiations with the Fees and Legal Aid Committee of the Bar (FLAC) have made progress on the structure of the new fees regime, the Bar's agreement is dependent on the level of fees. In the light of discussions between the FLAC, the Lord Chancellor's Department and the DPP I must now decide the level of fees to be paid in relation to prosecution work (see paragraphs 1 to 7 of Annex A).

4. For the reasons I have set out in paragraphs 8 to 11 of Annex A, there are factors peculiar to prosecution work to which I must have regard in deciding the level of fees. In particular, I would stress that:

(i) The Crown Prosecution Service must be able to secure the services of sufficient Counsel of the right calibre for the conduct of prosecution work.

(ii) Lord Roskill strongly recommended (in the context of fraud cases) that levels of remuneration should be adequate to provide incentives for work to be done well.

(iii) The Crown Prosecution Service undoubtedly needs a substantial measure of co-operation from the Bar in its early days.

(iv) Unlike the Lord Chancellor, who is left to determine legal aid fees to be paid to Counsel without an effective voice as to the calibre of Counsel who are instructed to do this work, the Crown Prosecution Service has to select competent counsel since Counsel is instructed directly by the Service (assuming they are willing to accept briefs on the terms offered).

(v) The instruction of competent counsel is more cost effective and conducive to the better administration of justice.

5. It is my judgement that the needs of the Crown Prosecution Service can be met only by setting fees on the basis set out in Annexes C and D to this paper. It is not possible to directly to compare these rates with the present situation - no existing scales exist. The cost would amount to an additional £7m on the budget of the CPS for the first full year (1987/88) at current prices. Treasury say this = 20% increase. incl 5%

6. As will appear for paragraphs 12 to 18 of Annex A, the consequences of failure to agree levels of fees with the Bar for prosecution work could be alarming. The action which could be taken in the event of refusal of Members of the Bar to undertake prosecution work could well lead the Government into a situation in which we would be accused of skimping on law and order, evidenced by giving guilty defendants yet another advantage in court. Increased delays in the courts and increased acquittal rates would also result.

7. I invite the Committee to approve the modest additional expenditure necessary for the establishment of the proposed fees regime.

M.H

6th June 1986

ANNEX A

CROWN PROSECUTION SERVICE:
FEES OF PROSECUTION COUNSEL

Background

1. The Crown Prosecution Service was established on the 1st April 1986 in the six former metropolitan counties and in the counties of Northumberland and Durham. The Service will be fully established elsewhere in England and Wales with effect from 1st October 1986. At present the work for which the Service will be responsible is undertaken by county prosecuting solicitors or private practitioners instructed by chief constable and is funded for the most part by awards of costs out of central funds on an individual case basis. These awards include amounts allowed in respect of the fees of prosecuting counsel and that portion of the award is paid for convenience direct to counsel by the Crown Court.

2. The Crown Prosecution Service will, by contrast, be funded by direct subvention and it is essential for the effective, efficient and economical discharge of its duties that this, the largest single item within its budget, should be under the direct control of its own managers rather than another Department and (ultimately) taxing masters. We have adopted such a system and accordingly Part 2 of the Prosecution of Offences Act 1985 will mostly dismantle the existing arrangements for taxation of prosecution costs by officers of the court and taxing masters. This was very much the wish of the Lord Chancellor.

3. These proposals gave rise to legitimate concern on the part of the Bar because in practice the Crown Prosecution Service will have a near monopoly of prosecutions in the Crown Court and would thus be the "unappealable paymaster" with no competitor. Discussions with the Bar during the passage of legislation through

CONFIDENTIAL

Parliament and subsequently resulted in an understanding that the fees of counsel instructed by the CPS would fall within one of the three following categories:

(a) Standard fees; briefs in this category would attract the fees appropriate to the actual disposal of the case as laid down in tables agreed between the Bar and the CPS.

(b) Pre-marked fees; briefs would be marked with a fee appropriate to the particular case following negotiations between the CPS and counsel's clerk.

(c) Fees assessed ex post facto; only a handful of the most difficult and complex cases would fall into this category and if the assessment (made by an officer of the CPS) were unacceptable to counsel he would have a right of review and ultimately an appeal to a taxing master.

Under such a system counsel would know in all except the handful of cases mentioned in (c) above, what remuneration would be payable and could decide whether to accept the brief on those terms. In the latter case his position would be protected by the right of appeal mentioned above.

4. A further factor relevant to the issues under consideration is the certainty that in its early days the CPS will be heavily dependent on the services of private practitioners (both barristers and solicitors) in the magistrates courts to enable it to discharge its responsibility for the conduct of all those prosecutions currently conducted by the police and local firms of solicitors as well as those which at present fall to county prosecuting solicitors and to the DPP. There is no prospect, particularly

in London, of the CPS being able from the outset to deal with the entire volume of magistrates courts work from within its own resources. For a considerable time it will have to rely on the services of private practitioners (in reality the Bar because solicitors would cost more) to supplement its own resources. The Bar has co-operated to the extent of amending its rules of professional conduct to permit (or, to be more accurate, regularise) the practice of whole list advocacy in magistrates courts without a solicitor present. Officials from the CPS have endeavoured to negotiate scales applicable to this type of work.

Negotiations

5. Following the meeting of E(A) on the 3rd February, I was able to persuade the Chairman of the Bar that they should treat the question of sessional work in magistrates courts as a separate issue from work in the Crown Court. However, negotiations between officials and the Bar have not so far produced any agreement. Accordingly I was obliged to notify the Bar that the Director would instruct chief crown prosecutors in those areas where the Service was operative that if they found it necessary to instruct counsel for sessional work in magistrates courts, it should be on the basis of the fees proposed to the Fees and Legal Aid Committee of the Bar (FLAC), subject to the honouring of existing agreements for higher levels of remuneration in those areas where these existed. The decision whether to accept work on the terms offered would be for individual barristers and so far we have encountered no major difficulties. But our requirements in the shire counties and London especially will be considerably greater and it remains to be seen whether the young members of the Bar concerned will be influenced most by the advice they receive from their professional body or the increase in income at a vulnerable stage in their career if they accept the offer of instructions from the CPS.

6. Officials have also had lengthy discussions with FLAC about the structure of the new fees regime necessitated by the circumstances I have outlined above. Here, subject to minor points of detail, we have reached an agreement with FLAC although they have made it clear at all stages that acceptance of the new structure is dependent upon the level of fees. In short, we now have to put figures into the boxes which we have created.

7. The decision by the Bar to institute proceedings for judicial review against the Lord Chancellor following his decision to increase legal aid rates by 5% effectively precluded any discussions about levels of remuneration for prosecution work until after those proceedings had been adjourned when the Lord Chancellor agreed to further negotiations with the Bar on the basis of a firm timetable. I agreed with the Chairman of the Bar that I would be content to adopt a broadly similar timetable for discussions. The information gathering stage of these discussions concluded on 30th May. Although officials from the Lord Chancellor's Department have taken the lead in discussions which have followed, officials from the DPP have also participated on the basis that the information and conclusions derived from those discussions would inform my decision as to the levels of fees to be paid in relation to prosecution work.

Relevant factors

8. During the course of the discussions with the Bar, the Lord Chancellor's Department provided the Bar with a document setting out the matters to which the Lord Chancellor proposed to have regard in making criminal legal aid regulations. A copy is at Annex B. Broadly speaking, the considerations listed by the Lord Chancellor can be applied, to prosecution work although there will be certain exceptions and there are also factors peculiar to prosecution work and the Crown Prosecution Service to which I must have regard. I believe that the level of remuneration available to counsel and solicitors employed in civil legal aid work is of only limited relevance to the narrower

question of counsel's fees for prosecution work. In addition, there is less scope for changes in working methods (factor (viii)) to affect my judgement. The principal available area of saving which has been discussed is dispensing with the attendance of solicitors in some cases.

9. In weighing the various factors, I have accorded greatest weight to the need to ensure that fee levels are commensurate with the amount of time and expertise necessarily devoted to the work because I need to attract practitioners of sufficient quality. This seems to me to be of more importance than calculations as to the net incomes which might be achieved by a specialist practitioner relying on one form of publicly funded work. Even if an accurate method of assessing the notional incomes attainable from any given level of fees could be developed, it would not answer the question 'what fees need to be paid?' Several major flaws in Coopers & Lybrand's report remain. The criticisms fall into two main groups:

(a) Doubts about the reliability of the evidence collected in surveys conducted by Coopers & Lybrand; and

(b) Doubt about some of the assumptions used by Coopers & Lybrand to calculate the earnings of the hypothetical barrister working full time on criminal legal aid.

But in my view the paper produced by Hay-MSL (consulted by Lord Chancellor's Department) adopts an approach to notional incomes which is wholly unrealistic. Indeed it departs from reality to such an extent that any decision which relied significantly on its findings would, in my view, be at risk in proceedings for judicial review. I have so advised the Lord Chancellor.

10. The additional matters to which as the Minister responsible for the Crown Prosecution Service I must have regard can be summarised as follows:

(a) The importance of ensuring that the Director is able to secure the services of sufficient counsel of the right calibre for the conduct of prosecution work. I believe that this is vital and complements our actions in ensuring that the police are fully equipped in the fight against crime as regards the provision of both the necessary powers and equipment. I know from my own experience that many counsel who have mixed practices, often the most able practitioners for my work, are giving up criminal work and asking to be removed from the lists I maintain for DPP cases. These impressions are strongly confirmed by the views frequently expressed to me by members of the judiciary. Unless our resolve in this respect is firm, the effect can only be to give guilty defendants yet another advantage in court.

(b) The strong recommendation by Lord Roskill (in the context of fraud cases) that levels of remuneration should be adequate to provide incentives for work to be done well.

(c) The undoubted need of the Crown Prosecution Service for a substantial measure of co-operation by the Bar in its early days. Whilst we should not allow the Bar to derive an unmerited benefit from our dependence upon it at this time, we cannot ignore the damage which a bitter dispute with the Bar would inflict upon an important Government policy.

(d) Unlike the Lord Chancellor, who is left to determine legal aid fees to be paid to counsel without an effective voice as to the calibre of counsel who are instructed to do this work, the Crown Prosecution Service has to be selective, since counsel is instructed directly by the Service. Thus, the Crown Prosecution Service can esnure that only competent, effective and efficient counsel are engaged for prosecution work if they are willing to accept the briefs.

(e) There is no doubt that competent counsel get through their cases more quickly thus reducing both costs and the ever increasing delays in getting cases to court.

11. During my brief discussion with the Lord Chancellor he informed me that, in reaching his decision as to the appropriate level of fees for legal aid work, he had felt unable to take into account factors special or mainly relevant to the CPS. It follows that if both he and I are to properly and lawfully discharge our respective Ministerial and statutory obligations, the result may be some divergence between prosecution and legal aid rates. I do not think that this is necessarily wrong in principle so long as both decisions are intrinsically sound (and here I am heartened by the Lord Chancellor's confidence that the data available to him is sufficient to enable him to rebut criticism of his decision). I am advised and accept that, if a differential were to emerge between prosecution and legal aid rates, it does not follow that the lower would rise to the level of the higher. Given the tighter control provided by the funding arrangements for the CPS, the Lord Chancellor's ability to control legal aid rates by regulation and the proposed switch to a system of fixed standard fees for certain categories of legal aid work, I believe we can resist any pressure for 'ratcheting up'.

Proposed fees regime

12. The structure of the fees arrangement provisionally agreed by officials with the Bar contemplates standard fees being applied to categories of cases which would embrace about 90% of prosecutions in the Crown Court. Of the balance, the majority would be the subject of negotiations and only a handful would remain for ex post facto assessment. Annex C to this paper sets out the guidelines for standard feesto be paid to the Bar for which, in my considered judgement, I now need authority. Annex D sets out the guidelines which would be issued to staff of the Crown Prosecution

Service responsible for the conduct of negotiations in relation to non-standard cases. Because we are introducing a completely new system, no directly comparable rates are available. There are no existing scales for payments out of central funds and fees for individual cases are assessed by taxing officers. Such data as is available does not enable us to establish the prevailing rate for any individual category of prosecution case.

Cost

13. Though the level of fees which I now propose is substantially below that suggested by the Bar during the course of discussions (a suggestion which we have so far declined to discuss), it would represent only an additional £7 million on the budget of the Crown Prosecution Service for the first full year, 1987/8, at current prices. Against this, there must be off-set the 5% which has been incurred as the result of the routine uprating based solely on inflation. I believe that provision of this amount will enable the Crown Prosecution Service satisfactorily to negotiate a new fees regime for 1st October 1986 which would include the Bar's package providing a package of cost-saving improvements. But this paper would not be complete unless it dealt with the consequences of failure to reach agreement.

Absence of agreement

14. It was originally intended that the Crown Prosecution Service should be responsible for the assessment and payment of its own fees with effect from its inception in all areas. But when it became clear that we could not hope to conclude negotiations with the Bar in time to implement any arrangements by the 1st April 1986, it was decided to defer implementation of the new arrangements in CPS areas until the 1st October with the result that Crown Courts are continuing to tax CPS briefs in the manner and according to the principles previously applicable to awards of costs on an individual case basis. That arrangement is due to end on the 1st October.

15. The present level of high feeling amongst members of the Bar is directed at levels of fees for both prosecution and legal aided defence work. But the Bar has made it clear that whilst it would find the refusal of defence work unpalatable on the basis that individuals accused of crime ought not to have to appear unrepresented before the court, there would be little hesitation in refusing prosecution work if the fees were considered unacceptable. Such refusal would not constitute overt action on the part of the Bar as a whole but the exercise by individual barristers in a consistent manner (doubtless on advice from the Fees and Legal Aid Committee) of their right to refuse instructions if they do not consider the brief fee offered to be adequate. The kaleidoscope of different characters and individuals who make up the Bar makes it impossible to predict with any certainty the degree of unity which might emerge.

16. Section 14 of the Prosecution of Offences Act 1985 empowers me to make regulations as to the level of fees to be paid for prosecution counsel. But I am not presently minded to exercise this power and to do so would not be a solution to refusal by the Bar to accept prosecution work.

17. In theory it would be possible to respond to the rejection of a brief by counsel of the appropriate calibre for that particular case by offering it to less experienced counsel willing to accept it at the marked fee. But such lowering of standards would quickly attract criticism, increase acquittal rates, delay trials and expose us to potentially embarrassing accusations of "skimping on law and order".

18. Even if the Government were minded to grant rights of audience in the Crown Court to solicitors, this would provide only limited relief. The Crown Prosecution Service already faces considerable

difficulty in recruiting sufficient numbers of qualified staff to provide the advocates needed for magistrates court work and, as indicated earlier in this memorandum, will have a substantial requirement for private practitioners to supplement their own manpower resources for this work. The Service would thus remain dependent on private practitioners for Crown Court work and solicitors are considerably more expensive to engage than barristers. In the worst situation, I am advised that solicitors would be unable to provide the necessary service.

CONFIDENTIAL

MATTERS TO WHICH THE LORD CHANCELLOR PROPOSES TO HAVE REGARD IN MAKING THE CRIMINAL LEGAL AID REGULATIONS

1. The Lord Chancellor's statutory duty is to "have regard to the principle of allowing fair remuneration according to the work actually and reasonably done."

2. In exercise of that duty, he considers it proper to have regard to various matters, including the following:

(i) the rates payable for different items of work, the amount of time reasonably devoted to each such item, and the skill which should be devoted to it;

(ii) the levels of income that can be achieved and that are achieved from legally aided criminal work by firms of solicitors of different sizes, structure and location;

(iii) the overheads that are to be borne by solicitors firms;

(iv) the level of remuneration available to counsel and solicitors employed in civil legal aid work;

(v) whether competent people are continuing to be attracted to and retained in criminal legal aid work;

(vi) the basic structure of fees for criminal legal aid;

(vii) the relative merits of other claims on the public

purse;

(viii) changes in working methods.

3. He will also wish to bear in mind:

(i) the outcome of discussions which are taking place in relation to similar assumptions, analyses and arguments which have been advanced on behalf of the Bar; and

(ii) the outcome of discussions concerning the proposed remuneration of counsel and solicitors instructed by the Crown Prosecution Service.

LORD CHANCELLOR'S DEPARTMENT
April 1986

ANNEX C

PROSECUTION FEES - CROWN COURT CASES

STANDARD FEES

		Proposed fee £
(1) Appeals against	Brief:	100
	Refresher:	100
	Adjournment:	45
(2) Appeals against Sentence	Brief:	65
	Adjournment:	45
(3) Committals for Sentence (incl. breaches of court orders)	Brief:	60
	Adjournment:	45
(4) Trials	Brief:	165
	Refresher:	125
	Adjournment:	45
(5) Pleas	Brief:	100
	Refresher:	45

ANNEX D

GUIDELINES FOR PRE-MARKED BRIEFS

JURY TRIALS

1. Brief Fees

	Lower	Average	Higher
	£	£	£
(a) Around 2 days to less than a week	160	225	375
(b) Around 1 week	250	450	650
(c) 1-2 weeks	400	550	900
(d) 2 weeks - 1 month	550	2,000	3,750

2. Refresher Fees

All cases	100	125	160