

SUBJECT

cc Harles

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File

Bre

10 DOWNING STREET

From the Principal Private Secretary

13 December 1982

SCRUTINY OF NEW POWERS OF ENTRY

The Prime Minister has now had the opportunity to consider the Solicitor General's minute of 2 December and the preceding papers stemming from Sir Robert Armstrong's minute of 6 October.

The Prime Minister thinks that it is right in principle that the Law Officers and their Department should concentrate on legal advice on matters in respect of which such advice is required, and leave policy issues to the policy departments. The Home Secretary has confirmed that, although he is not eager to add to the burdens of Home Office Ministers, he thinks that the responsibilities in relation to scrutiny of proposals for new powers of entry at present undertaken by the Law Officers could be perfectly well and effectively undertaken by a Home Office Minister; and that he would therefore agree to a transfer if that was the Prime Minister's decision. Nevertheless, the Prime Minister has concluded that the balance of advantage lies in favour of leaving things as they are for the time being, and has decided not to make a change at present.

I am copying this letter to John Halliday (Home Office), Jonathan Spencer (Department of Industry), John Lyon (Northern Ireland Office), Muir Russell (Scottish Office), Christine Duncan (Lord Advocate's Office) and Richard Hatfield (Cabinet Office).

F. E. R. BUTLER

Jim Nursaw, Esq.,
Law Officers' Department

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ROYAL COURTS OF JUSTICE

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PRIME MINISTER

SCRUTINY OF NEW POWERS OF ENTRY

1. Sir Robert Armstrong has kindly sent me a copy of his further minute to you on this subject.
2. The amendments now proposed would introduce into the suggested alternative system the concept of special and personal ministerial responsibility which was central to your remit to me. So you now have the choice of two systems each based on that concept, rather than having to choose between one (the existing one) which is so based, and one (that first proposed) which would have abandoned that concept. I consider that to be a great improvement but it still leaves the all-important question of whether you wish to end my remit and substitute something else for it.
3. I am not entirely clear as to the mechanics of what is proposed. For instance, would all the proposals be vetted by one Home Office Minister and, if so, at which level? Nor do I fully understand the figures given in Sir Robert's paragraph 5. I think that those relate to Bills. Much of my work has been on S.I.s. But I think that those are matters for you rather than me.
4. As to bringing my remit to an end, here again I recognise, of course, that that is a matter entirely for you. I would, however, just add that I am not aware that any difficulties have arisen in practice. If there have been some that have not been brought to my attention I should be only too happy to discuss with those concerned any suggestions for improving the system. Indeed, if I am to continue, that is in my view the next stage, to take stock of what has been done and of how it might be improved. But it is first for you to decide whether I should continue.

I asked this question too: Sir R. Armstrong said that all the proposals would be vetted by a single Minister.

2 December, 1982.

Handwritten signature/initials



-2 DEC 1982

PRIME MINISTER

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Prime Minister

You should also see Sir Robert Armstrong's personal minute to me at flag A. Content with Sir R. Armstrong's proposals if Mr. Whitlam and Mr. Jenkin agree?
 FERB

8. 10

I spoke to you at the beginning of the year about the arrangements for scrutinising proposals for legislation to confer new powers of entry on public officials.

2. In 1979 the National Federation of Self-employed made a number of objections to the existing provisions for powers of entry of public officials into business premises. You invited Mr. David Mitchell to investigate these objections. One of the recommendations made in Mr. Mitchell's report was that the Law Officers should be asked to scrutinise any future proposed powers of entry. This recommendation was accepted, and the Law Officers have been doing this ever since. I understand that the Solicitor General has been the Law Officer who has undertaken this responsibility.

3. The arrangement has given rise to certain problems. Though proposals for conferring new powers of entry require legislation, and may on occasion raise issues on which specifically legal advice is required, the issues which determine decisions are primarily administrative, policy and political rather than legal. The Solicitor General is in this respect taking policy and political decisions rather than giving legal advice. The work which the Law Officers' Department is asked to do in support of this function is therefore different in kind from the rest of its work; and, as the Department is very small, this work is apt to divert its officers (most of whom are professional lawyers) from their main work in support of the Law Officers in their legal advisory role.

4. The Solicitor General has undertaken this work willingly, and would be content to continue to do so. It is clearly important and valuable that proposals for new powers of entry should be closely scrutinised at political level; and I think that the Solicitor General feels that the present arrangements enable him to supply a degree of close and critical political supervision which the previous arrangements did not provide. With the benefit of hindsight, however, it appears that the Solicitor General may have been given a task which is not strictly appropriate to the Law Officers and for which the Law Officers' Department is not properly resourced.



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5. I have therefore been examining with the relevant Departments, including the Law Officers' Departments in Scotland as well as in England, alternative proposals for vetting proposals for new powers of entry which would ensure that the "Mitchell principles" were applied, that administrative and political considerations were given due weight, that legal advice was sought where appropriate, and that the work was done by a Department resourced to do it properly without undue diversion of effort from other matters.

6. Proposals for powers of entry are already scrutinised by the Home Office, for local and private Bills as well as for public ones. It would make sense to bring together all the scrutiny responsibilities in one Department which should also be responsible for consulting others as necessary. I think that the Home Office (in Scotland the Scottish Home and Health Department) is the proper location for such a responsibility, and can deal with the policy and administrative issues for which the Law Officers cannot be expected and would not normally be asked to take responsibility.

7. After consultations with the Home Office, the Department of Industry, the Law Officers' Department, the Scottish Office and the Lord Advocate's Department, I should like to recommend the attached proposals for your approval. I believe that the proposals, and specifically the procedures in (3), (5), (6) and (8) provide for proper political supervision at each stage. I understand that the Attorney General, the Secretary of State for Scotland and the Lord Advocate have already indicated that they are content with the proposals, subject to your approval of them. The Home Secretary and Secretary of State for Industry can also be expected to agree. The Solicitor General is not, I think, persuaded of the need for change: he enjoys his involvement in this work, and he feels that the present arrangements provide a necessary degree of explicit Ministerial involvement in decisions about the introduction of new powers of entry. But he will of course accept your decision.

8. If you approved revised procedures on these lines, we should promulgate them in the "Guide to Legislative Procedures" which is currently being revised by the MPO and should be issued to Departments early in the autumn. As this



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Guide deals only with primary legislation, a circular would be issued drawing the attention of all concerned to the new procedures and the fact that they were to be applied equally to subordinate legislation. No public announcement of the change would be required; we have never declared that the central scrutiny role was to be exercised by the Solicitor General.

9. I am copying this minute to the Home Secretary, the Secretaries of State for Industry, for Northern Ireland, and for Scotland, the Attorney General, the Solicitor General and the Lord Advocate.

Robert Armstrong

6th October 1982

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SCRUTINY OF POWERS OF ENTRY - PROPOSED PROCEDURES

1. It should continue to be the duty of the Home Office to scrutinise all Bills (public, local or private) for proposals to create or re-enact powers of entry for the police or public officials in England and Wales, and in Great Britain or the United Kingdom as a whole. The Scottish Home and Health Department should have a similar duty in respect of exclusively Scottish Bills, and of UK and GB Bills creating or re-enacting powers of entry exercisable in Scotland. The Northern Ireland Office should have a similar duty in respect of exclusively Northern Ireland Bills and Orders in Council, and of UK Bills creating or re-enacting powers of entry exercisable in Northern Ireland. References in the procedures below to the Home Departments should be construed accordingly.
2. In their scrutiny of Bills and proposals the Home Departments should have the duty of applying the "Mitchell" principles - broadly the need to minimise the constraints and burdens which powers of entry can impose on the owners or occupiers of premises.
3. A Department should not propose new powers of entry in legislation for which it is responsible without the specific agreement of its Ministers.
4. Any proposal for new powers of entry contained in a private Bill should also be referred to Ministers by the Department responsible for considering the Bill.
5. A Department should, after obtaining the agreement of its Ministers, consult the appropriate Home Department(s) on any proposal, whether in a public or a private Bill, to create or re-enact powers of entry, whether into business or private premises, for the police or public officials. A Home Office Minister will have responsibility for the arrangements for considering all proposals in the Home Office; similar arrangements will be made in the Scottish Home and Health Department, which will arrange for clearance as appropriate by a Scottish Office Minister, and in the Northern Ireland Office.
6. The Law Officers must also be consulted (through the Law Officer's Department or the Lord Advocate's Department as appropriate) by the Department concerned, if there is any question requiring legal advice in connection with proposals for creating or re-enacting powers of entry.
7. Departments should initiate such clearance of proposals with the Home Departments and, where appropriate, the Law Officers at as early a stage as possible.
8. Proposals for creating new powers of entry should be specifically noted when a memorandum is put to the relevant Cabinet Committee for policy clearance; they should not be included in such a memorandum unless they have been agreed with the appropriate Home Department(s). Any proposals for new powers of entry arising after policy clearance should be cleared in correspondence with the relevant Ministers (members of the Cabinet Committee which gave policy clearance and others concerned), and the correspondence should make clear that the proposals have been approved by Home Department Ministers.

Home Affairs. Rights
of Entry, Pt 2



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MR. BUTLER

I attach a submission to the Prime Minister about the arrangements for scrutinising proposals for legislation to confer new powers of entry on public officials.

2. There is one piece of background which I mentioned to the Prime Minister when I discussed this with her last January, on the basis of a manuscript note which I sent your predecessor on 5th January, but which cannot for obvious reasons be reflected in this submission.

3. It is not merely officials with the Law Officers' Department who are diverted from their main work as legal advisers in order to carry out this work. The Attorney General feels strongly that he does not get the support he is entitled to expect from the Solicitor General on the ordinary work of the Law Officers; he has said to me that he has to do about 80 per cent of that work himself. One of the reasons which the Solicitor General gives for being unable to play a larger part in the legal advisory work is that he is preoccupied with the function of scrutinising proposals for new powers of entry. This is of course part of a deeper problem in relations between the Attorney General and the Solicitor General, and reflects the Solicitor General's preference for political rather than purely legal responsibility. But the Attorney General would like to be able to ask the Solicitor General to take a larger share of the burden of work falling on the Law Officers and would be helped in doing so if the Solicitor General could be relieved of scrutinising proposals for new powers of entry.

RA

Robert Armstrong

6th October 1982

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