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PRIME MINISTER

RESTRICTIVE PRACTICES IN THE LEGAL PROFESSION

22 DECEMBER 1988

1. Lord Mackay is proposing to publish three Green Papers at the end of January on

- 1) Corporate conveyancing
- 2) The organisation and work of the legal profession
- 3) Contingency fees for lawyers.

The three Green Papers amount to a major reform of the legal profession. They form a balanced package. Solicitors will be cross, but not surprised, at the proposals in (1) to allow banks and building societies to provide conveyancing services. They will be pleased at the proposals in (2) which would widen their rights of audience in court, and make them eligible for the highest judicial appointments.

3. Consumers of legal services stand to benefit from the greater competition envisaged in the first two papers. They will be particularly interested in (3), which could make it easier for people who do not qualify for legal aid to bring claims to court.

CORPORATE CONVEYANCING

4. The Building Societies Act 1986 heralded arrangements which would allow banks, building societies, other institutions and individuals to offer conveyancing services. But the Schedule providing for this has not been implemented.



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5. James Mackay has taken a fresh look at the issue. He proposes a different approach to achieve the same end. It will be less elaborate than that envisaged in the 1986 Act.
6. Instead of the Lord Chancellor considering individual applications from those who wish to provide conveyancing services to the public, he proposes to set out a number of requirements which must be met by anyone offering conveyancing services. There will be a statutory code of conduct for such practitioners. The system will operate on a self-regulatory basis. Banks and building societies already have their own regulatory authorities. Others wishing to become authorised practitioners will need to submit themselves to an authority which satisfies the Lord Chancellor.
7. This approach has the advantage of disengaging the Lord Chancellor (and the Government) from specifically approving firms and individuals as suitable people to carry out conveyancing. The thrust of self-regulation is in line with that being adopted elsewhere.

Recommendation

8. Welcome the Green Paper proposals as offering a better way to achieve to a "one-stop shop" for people buying and selling houses.

THE ORGANISATION AND WORK OF THE LEGAL PROFESSION

9. This is the most important of the three Green Papers. The contents were outlined in my minute of 22 November (copy attached). You approved them in principle.
10. Chapter 5 of the Green Paper makes it clear that the Government believes that rights of audience in Court should depend on people being able to demonstrate that they are



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properly trained and subject to codes of conduct on advocacy. The practical effect of this would be to open up advocacy to suitably experienced solicitors.

11. Nigel Lawson, David Young and other members of E(CP) will welcome this clear steer. But the Attorney General and the Solicitor General have been trying to persuade the Lord Chancellor to water it down. To do so would undermine the logic of the whole Green Paper; and would go against Lord Mackay's own views. So far he has resisted the Law Officers' drafting changes. But he may need support.

Recommendation

12. Agree that the Green Paper should issue, and say that you particularly welcome the clear statement of the Government's views in Chapter 5 on future arrangements for advocacy.

CONTINGENCY FEES FOR LAWYERS

13. The Green Paper re-examines the arguments for and against introducing a contingency fees system here on the lines of those common in the USA (the practice is not widespread elsewhere). Under a contingency fee arrangement, a lawyer who wins a case is paid a share of the damages awarded by the Court. If he loses, he is paid nothing. Previous consideration (eg by the Benson Royal Commission in 1979) has always come down against the introduction of contingency fees in the UK.
14. There is a separate system in Scotland whereby lawyers can act on a "speculative" basis ie they will receive their normal taxed costs if they win the case, but nothing if they lose. It does not appear to be widely used.



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15. The main argument in favour of contingency fees is that they enable people who would not qualify for legal aid to bring their claims to court.
16. Against this can be cited a number of disadvantages apparent in the USA. E(CP) on 5 October concluded that a system of contingency fees on US lines should not be introduced here. The most that should be contemplated was the introduction of speculative actions on Scottish lines.
17. The Green Paper is surprisingly open-minded given the tenor of discussion in E(CP). It argues that the disadvantages of the US system - litigiousness, high levels of damages and the high insurance costs for industry - are due to factors other than contingency fees per se, viz:

- 1) the general litigiousness of US society
- 2) the fact that damages are determined by juries (here they are mostly determined by judges)
- 3) the fact that unsuccessful claimants are not liable, as they are here, to pay the defendant's costs.

The paper goes on to conclude that a combination of contingency fees with our existing rules on damages and "costs following the event" could prevent us experiencing the US problems.

18. This is a pretty heroic assumption. If judges are aware that a particular case might be subject to a contingency fee (the proposal is that they should not know) would they not tend to raise the level of damages awarded, knowing that up to 50 per cent might go to the lawyers? And are Americans litigious because of the contingency fee system in many states?



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19. But the paper is tactically right to give a fair wind to contingency fees on a restricted basis (US jurisdictions are increasingly turning away from contingency fees on an unrestricted basis). The "Economist" and other commentators have long argued for the introduction of contingency fees here.

20. The paper demonstrates pretty convincingly that a variant of the Scottish speculative action is a much better bet. There is no link with the level of damages, and thus no addition to industry's costs. There needs, however, to be some incentive for lawyers to take the risk. The Green Paper suggests that the two parties should agree on an enhanced fee for the lawyer in the event of success.

Recommendation

21. Agree that the Green Paper on contingency fees should be published as it stands.

Overall


22. Lord Mackay proposes to allow three months for comments on these Green Papers, beginning at the end of January. He hopes for legislation in the 1989-90 session.

23. He and his officials are to be congratulated on a tour de force. They have worked fast and well on a complex set of issues, negotiating coherent texts with all the interested parties in Whitehall.



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24. The opening chapter of the main Green Paper (on the organisation of work in the legal profession) is worth reading as an excellent statement of the Government's approach to these issues. You will see that the interests of the consumer are set firmly in the foreground. These are not papers for the legal cognoscenti to squabble over, though controversy with the lawyers is inevitable.

A handwritten signature in blue ink, appearing to read 'Carolyn Sinclair', with a stylized flourish underneath.

CAROLYN SINCLAIR