

*bill*  
CONFIDENTIAL



*VC*  
*bc BG*

10 DOWNING STREET  
LONDON SW1A 2AA

*From the Private Secretary*

10 November 1986

*Dear Peter,*

Review of Law Affecting  
Banking Services

The Prime Minister is content that the Review of Law affecting Banking Services described in your letter to me of 6 November should go ahead, subject to the views of colleagues.

I am copying this letter to the Private Secretaries to the Lord Chancellor, the Lord Advocate, the Home Secretary, the Secretaries of State for Trade and Industry, Employment, Scotland, and Northern Ireland, the Lord President, the Lord Privy Seal, the Governor of the Bank of England, the Director of Fair Trading and Sir Robert Armstrong.

*Yours sincerely,*  
*David Norgrove*

(DAVID NORGROVE)

P.D.P. Barnes, Esq.,  
HM Treasury.

*BM*



CONFIDENTIAL



Treasury Chambers, Parliament Street, SW1P 3AG

David Norgrove Esq  
No. 10 Downing Street  
LONDON  
SW1

6 November 1986

Pamie Pinter!

Agree to this quite  
narrowly focussed review?

Dear David,

DF  
CF  
Any PU comments  
by tomorrow night  
please.  
DHS  
6/11

## REVIEW OF LAW AFFECTING BANKING SERVICES

DHS  
7/4

Officials from a number of Departments and the Bank of England have discussed proposals for a review of the non-supervisory aspects of banking law. The Economic Secretary now seeks agreement to the announcement of such a review shortly after the introduction of the Banking Bill in the Commons (on present plans 13 November), in the terms at Annex 1. No names would be announced at this stage.

The review would not be concerned with the prudential supervision of banks, which is the subject of the Banking Bill. Nor - as the draft announcement makes clear - would it stray into the Financial Services or Building Societies Acts, company law, taxation or matters determined in the market place such as the amount or cost of credit, or the level of other bank charges. The purpose of the review will be to examine how well the law relating to banking transactions has stood up to the test of time - in particular the introduction of new services and new technology. From time to time there is pressure for piecemeal reform, whether from the banks, consumers or (increasingly) the European Commission. A coherent review is now necessary. The announcement of the review will greatly strengthen the Government's position in resisting extraneous and potentially controversial amendments to the Banking Bill.

The proposed terms of reference make clear that the review should not automatically reach for legislative solutions to problems but should instead, for instance, recommend codes of good practice where appropriate. The terms of reference also require the review to have regard to:-



CONFIDENTIAL

- (a) differences in law and practice in different parts of the UK;
- (b) other relevant reviews of UK law (for example work of the Law Commission or DTI's review of the Consumer Credit Act).

The review has the Bank of England's support and will need to consult very widely on its work. The Economic Secretary hopes to say something more about the review in the course of Second Reading of the Banking Bill and this is one of the points which he would emphasise. We need to bear in mind that banks' customers are not a single group but include individuals, small firms and large firms, each with a different pattern of needs. It is also important that the review should put forward proposals which are practical and carry credibility with the banks. The Economic Secretary envisages that the review should keep in touch with the liaison group of officials on the organisation of its work programme, timetable and consultation with outside interests.

A more detailed list of points for the review is attached at Annex 2. This list is purely for illustrative purposes. It would not be published but would be given to the review team informally and also used in sounding out potential members of the team.

To cope with the subject and its technicalities in a coherent and effective way, the Economic Secretary considers it important that the review team itself should not become unwieldy. Discussions between officials suggested that a team of three - a lawyer, a generalist and a banker - would be right. The secretariat would be provided by the Treasury and the Bank of England. Either the lawyer or the generalist could be candidates for the chairmanship and the final structure of the triad need not be settled yet. But the Economic Secretary's clear preference, given the legal and technical nature of the subject, would be a lawyer with commercial experience (though not gained working exclusively or mainly for banks).

The Economic Secretary would be grateful for colleagues' agreement that, subject to reconsideration in the light of the individuals identified as available, officials' informal consultations with possible names should be on the basis of a single lawyer with suitable commercial experience taking the chair. The Economic Secretary would also be grateful to know of candidates (for any of the three positions) whom colleagues wish to recommend : officials will then be in touch to co-ordinate the informal consultations.

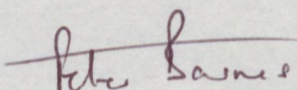
Because of the Parliamentary timetable, I need to ask for replies by Tuesday 11 November at the latest. If the Prime Minister or others see serious difficulties, it would be helpful to know as soon as possible.

I am copying this letter to the Private Secretaries to the Lord Chancellor, the Lord Advocate, the Home Secretary, the Secretaries of State for Trade and Industry, Employment, Scotland and Northern Ireland, and to the Lord President, the Lord Privy



CONFIDENTIAL

Seal and Sir Robert Armstrong. Copies also go to the Governor's  
Private Secretary and to Sir Gordon Borrie.

Yours sincerely, 

P D P BARNES  
Private Secretary



REVIEW OF LAW AFFECTING BANKING SERVICES: ANNOUNCEMENT/  
TERMS OF REFERENCE

To ask Mr Chancellor of the Exchequer if, in addition to legislating on banking supervision, the Government has plans to review the body of law affecting banking services.

DRAFT REPLY

The Banking Bill is designed to provide the statutory basis for the important regulatory improvements which were identified in the White Paper "Banking Supervision" in December 1985 (Cmnd 9695). It overhauls and reinforces the system of banking supervision enacted in the Banking Act 1979. The Government has also this year modernised the regulatory framework of building societies (the Building Societies Act 1986) and fundamentally recast the law relating to securities and investments (the Financial Services Act 1986). Together these measures represent a comprehensive reform of the law relating to the protection of depositors and investors.

Banks and their customers are also affected by the body of statute law and precedent which is not concerned with prudential supervision but which governs the mechanics of banking, such as the Bankers' Books Evidence Act 1879, the Bills of Exchange Act 1882 and the Cheques Act 1957. The law should provide the necessary legal framework for the provision of banking services on fair and efficient terms. Generally UK banking law has stood up well to the test of time. But the nature of banking has changed beyond recognition since the main statutes were drafted and in its White Paper the Government accepted the case for one amendment to remove a possible constraint on EFT-POS transactions by debit card. However, it would be valuable to have a coherent review of law relating to banking mechanisms and practices, taking into account technological



CONFIDENTIAL

and other developments and drawing on the experience of bankers, their personal and business customers and other interested parties. The amendment referred to in the White Paper is therefore not included in the Bill which has been introduced.

The Government has ~~decided~~ decided to set up, in co-operation with the Bank of England, an independent review for this purpose. Further details of the review, whose proposed terms of reference are set out below, will be announced later. The review is flexibly defined to include banking services in the broadest sense, but it will not include the law protecting depositors and investors to which I have already referred. Nor will it be concerned with questions of taxation, or with market-related matters such as the granting or cost of credit or the competitive pricing of other banking services.

Terms of reference

"The purpose of the review is to examine the statute and common law on the provision of banking services within the UK to personal and business customers, including payment and remittance services; but excluding taxation, company law and parts of the law whose relevance is to trading or to the provision of services in general, rather than particular to banking. The objectives of the review will be:

(1) to examine the law and its practical implications from the points of view of banker, customer and the general public interest in the availability, reliability, security and efficient and effective operation of payment, remittance and other banking services;

(2) to have regard to:

(a) differences in the law and practice of different parts of the UK and, where relevant, other studies and reviews of UK law;



CONFIDENTIAL

(b) current and prospective developments in banking and payment systems, including developments in electronic data processing and electronic funds transfer technology;

(c) areas of particular difficulty in or confusion about existing law and practice and the rights and obligations of banks and their customers respectively;

(d) developments in the law of the European Community and in other relevant international laws and conventions;

(e) developments and trends in international payment systems and reviews by international bodies;

(3) to prepare a final report, and if necessary interim reports also;

(4) if appropriate and after consultation to recommend the introduction of codes of good practice (on such matters as model contract terms, information for customers or new banking procedures);

(5) if necessary and after consultation to make proposals for legislation."



**BANKING LAW REVIEW: SUGGESTED TOPICS****A. ATMs**

1. Liability of bank/cardholder in event of disputed or unauthorised use of a card or PIN number.
2. Case for a written record of each transaction to be provided through ATMs.
3. Case for a duty of care to be imposed on cardholder.

**B. BANK-CUSTOMER RELATIONS**

1. Case for customer to have to examine statement and inform bank of irregularities within a specified period.
2. Case for bank to be able to allege contributory negligence by customer (Tai Hing judgement).
3. Case for general duty of care on banks.
4. Steps to be taken by bank to verify the identity of a person opening an account.
5. Banking services for minors.
6. Bankers' references - legal validity of customers' implied consent.
7. Case for customers to have access to bank records (particularly manual records).
8. Right of set-off between accounts held by same customer.
9. Case for customer to be notified in advance of, and/or to have to consent to, the deduction of charges from his account.
10. Death of a customer - nomination  
- items in safe custody

**C. BANKING AND PAYMENT MECHANISMS AND INSTRUMENTS**

Legal basis (including such aspects as finality of payment) of such modern developments as:

- 1 Bank Giro Credits
- 2 Pre-authorized payments
- 3 Cheque guarantee cards
- 4 Credit cards
- 5 Debit cards
- 6 ATMs
- 7 BACS
- 8 CHAPS



- 9 EFT-POS
- 10 Memory cards
- 11 Automated corporate cash management/balance reporting systems
- 12 SWIFT
- 13 Trade documentation in electronic form
- 14 Uniform Eurocheque Scheme
- 15 Sale-repurchase transactions in financial instruments

#### D. BANKING OMBUDSMAN

- 1 Case for Code of Good Banking practice
- 2 Case for compulsory membership of Ombudsman scheme (like building societies).
- 3 Case for duty on banks to have adequate internal procedures for handling complaints.

#### E. BILLS OF EXCHANGE ACT 1882

- 1 Status of avals.
- 2 Attachment of funds in Scotland (section 53(2)).
- 3 Status of payable orders/warrants issued by PGO, Inland Revenue, DNS, etc.
- 4 Definition of "sum certain"
- 5 Case for presentation at a Clearing House to be valid under section 45(4).

#### F. CHEQUES

- 1 Amount - words and figures differ: question of priority
- 2 Case for definition/extension of protection of true owner in respect of:
  - (a) crossings
  - (b) "not negotiable"
  - (c) "Account Payee"
  - (d) Payment "in due course"
- 3 Paid cheques - retention period
- 4 Application of Theft Act 1968 to use of cheque guarantee card.
- 5 Foreign drafts - validity and time limit

#### G. CHEQUE TRUNCATION

Relevance of Section 46(2)(e) of Bills of Exchange Act 1882 to proposals for truncation



#### H. COMPUTER-RELATED FRAUD

Adequacy of current law in specific regard to banking to deal with unauthorised activities involving:-

- 1 Breach of telecommunications network
- 2 Alteration, addition or destruction of data
- 3 Writing code against the interests of user
- 4 Misuse of equipment
- 5 Extraction of information
- 6 Copying of programs etc
- 7 Use of magnetic stripe card

#### I. CONFIDENTIALITY (BANKERS' DUTY OF)

- 1 Case for express statement of the common law duty.
- 2 Case for banks to be able to inform the authorities where they suspect a customer is engaged in fraud.
- 3 Case for the disclosure requirements of the Drug Trafficking Offences Act 1986 to be extended to cover money laundering and the proceeds of terrorism and other criminal activity.
- 4 Case for duty to apply to staff moving between institutions.
- 5 Case for duty to apply to different services provided by the same bank.
- 6 Case for repeal of Statute of Frauds Amendment Act 1828 (section 6).

#### J. ELECTRONIC FUNDS TRANSFER

- 1 Responsibility and liability of various parties in event of error, delay, system failure, fraud.
- 2 Evidence of receipt of message
- 3 Authentication rules
- 4 Status of inter-bank agreements covering settlement, time of payment etc. (Scottish Bank Holidays).
- 5 Acceptability of mandated dividends in electronic form



**K. EFT-POS**

The case for a code of conduct or legislation to provide for:-

- 1 Consumer protection
- 2 The definition of the rights, liability and responsibility of the various parties
- 3 An appropriate level of competition

**L EVIDENCE**

- 1 Case for bringing the Bank of England within the Bankers' Books Evidence Act 1879.
- 2 General question of admissability of EDP data as evidence.
- 3 Paid cheques
- 4 Case for images of cheques to be acceptable for the evidence requirements of the Cheques Act 1957.

**M INTERNATIONAL ASPECTS**

Need to take account of a number of developments, including:

- 1 UNCITRAL Convention on International Bills of Exchange and International Promissory Notes (draft A/CN.9/274).
- 2 UNCITRAL draft Legal Guide on Electronic Funds Transfer (A/CN.9/250 Add. 1-4 and A/CN.9/266 Add 1 and 2).
- 3 UNCITRAL work on legal value of computer records
- 4 International Chamber of Commerce work on telecommunications and transborder data flows, documentary credits, inter-bank rules on late funds transfer, foreign exchange contracts.
- 5 CLSB Code of Practice for Demand Guarantees and Bonds.
- 6 SWIFT rules and standards.
- 7 International Law Association work on time of payment
- 8 OECD work on EFT and consumers
- 9 Various EEC initiatives relating to EFT
- 10 Uniform Eurocheque Scheme rules

**N REGULATION**

- 1 Case for the statutory recognition of the rules of the various clearings



- 2 Case for statutory regulation of the clearings/payments system
- 3 Case for regulation of individual providers of remittance services, where no deposit-taking is involved
- 4 Application of postal privilege, under British Telecommunications Act 1981, to institutions providing payment and clearing services.

**SAMPLE OF STATUTES REFERRED TO (IMPLICITLY OR EXPLICITLY) IN THE LIST OF TOPICS FOR THE BANKING LAW REVIEW**

Bankers' Books Evidence Act 1879 -  
Bills of Exchange Act 1882 -  
British Telecommunications Act 1981  
Cheques Act 1957  
Civil Evidence Act 1968  
Data Protection Act 1984  
Drug Trafficking Offences Act 1986  
Police and Criminal Evidence Act 1984  
Restrictive Trade Practices Act 1976  
Statute of Frauds Amendment Act 1828  
Theft Act 1968