

# The Green Papers – ‘The Next Instalment’

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On 19 July 1989 the Lord Chancellor published a White Paper dealing with the three Green Papers which had been published in January of this year, namely, the paper entitled ‘The Work and Organisation of the Legal Profession’ (referred to as the Main Green Paper and discussed in **Consultus** of April 1989) the paper entitled ‘Contingency Fees’ and the one entitled ‘Conveyancing by Authorised Practitioners’.

## Responses to Green Papers

A great deal of interest was shown in the Green Papers and a total of some 2 000 official responses were received by the Lord Chancellor’s office. 3% of the responses came from the judiciary, 13% from barristers, 53% from solicitors, 2% from others involved in the provision of legal services and 29% from members of the public, groups representing consumer interests, educators and others. The response of the General Council of the Bar was in the form, *inter alia*, of a booklet entitled ‘Quality of Justice — The Bar’s response’ running to some 275 closely typed pages and divided into some 27 chapters. The solicitors’ profession also published a response running to some 57 closely typed pages entitled ‘Striking the Balance — The final response of the Council of the Law Society on the Green Papers’. Not to be left out of the debate the judges submitted a detailed document running to some 136 pages entitled ‘The Green Papers — The Judges’ Response’. In the introduction to the latter document the point is made that:—

‘The Green Paper proposals have grave implications for the future administration of justice in this country. The judges are greatly concerned about the long term impact of these proposals on two matters, with which the response deals in turn.’

The two matters in question are the independence of the judiciary and of the profession of advocacy and the quality of advocacy and hence the

quality of justice. So strong was the response of the judges to the main Green Paper that there was some talk at one time that they were going to go on strike.

## Debate in House of Lords

On 7 April 1989 a full debate of the proposals contained in the Green Papers took place in the House of Lords. The official report of the debate makes most interesting reading (Parliamentary Debates (Hansard) — volume 505 No 62, columns 1307/1479). Amongst those who participated in the debate, in addition to the Lord Chancellor (Lord MacKay of Clashfern) were Lord Elwyn-Jones, Lord Hailsham of Saint Marylebone, Lord Hooson, Lord Rees Mogg, Baroness Oppenheim-Barnes, Lord Lane, Lord Murray of Epping Forest, Lord Templeman, Lord Havers, Lord Wigoder, Lord Donaldson of Lymington, Lord Goodman, Viscount Dilhorne, Lord Wilberforce, Lord Ackner, Lord Griffiths, Lord Alexander of Weedon (Robert Alexander), Lord Morris, Lord Mishcon and Lord Benson, who it will be recalled was the chairman of the Royal Commission on Legal Services from 1976 — 1979. Lord Benson was critical of the Green Papers, expressing the view that:—

‘... if they are followed in their present form the Green Papers will debase quality, reduce competition, and impair the public interest in many different ways.’

## South African visit

Referring to his visit to South Africa in 1987 when he was the keynote speaker at the First National Bar Conference, Lord Benson had this to say:—

‘The meeting was attended by the Chief Justice and the Minister of Justice of South Africa. It emerged from that conference that in the government that is almost wholly ‘dirigiste’, the only thin channel from that government to justice was the independent Bar. I threw the whole weight of the Royal Commission behind support for an independent Bar believing then that it was supported by the present Prime Minister and the last Lord Chancellor but one. I would have blushed with shame if I had known that in a few months these Green Papers would be presented before us. (Parliamentary Debates (*supra*) column 1425.)

## Government’s reaction

Notwithstanding the stringent criticisms levelled against the Green Papers, not only by the organised Bar in England, but also by the judiciary, the White Paper makes it plain that the Government intends to proceed with legislation to implement most of the essential proposals contained in the Green Papers at an early opportunity. Paragraph 1.5 of the White Paper puts the matter in these terms:—

‘... The overall aims are to give the public as wide a choice as possible in the providers of legal services available to them, whilst at the same time maintaining the high standards of integrity and competence which are necessary for protecting the interests of the client and for the more general public interest in the administration of justice. The Government seeks to remove any restrictions which are not necessary for the protection of those interests. These aims will be met by creating a framework which encourages flex-

ibility and diversity in meeting the client's needs, yet maintains the necessary standards.' (page 7)

## White Paper

The White Paper is divided into four parts consisting of some 15 chapters. Part 1 is entitled 'Wide Choice in Legal Services', Part 2 'The Maintenance of Quality', Part 3 'New Ways Of Working' and Part 4 'Judicial Appointments'.

In an editorial comment in *The Independent* newspaper the view is expressed that:—

'The Lord Chancellor has devised an extraordinarily skilful White Paper. The Bar will now be hard put to oppose him on grounds other than self-interest.'

## Rights of audience

As regards rights of audience in courts, the proposals is to replace what is described as 'The current complex arrangements for rights of audience' with 'a single statutory framework'. This framework will recognise 'the widely different needs of the practice of advocacy in the various courts and tribunals and the different working practices of the many kinds of legal practitioners. It must ensure that the interests of all those who have a part to play in the court system — the client, the practitioner, the courts, and the Government — are represented in a full and balanced way.' (Para 1.8 p 7)

The principal features of the new proposals are that:—

'Barristers who are qualified in terms of the Bar's rules on education and training will have rights of audience before all courts and tribunals;

the Law Society will continue as before to decide which persons are qualified to be solicitors, but it will have power to declare solicitors qualified in terms of regulations for education and training to appear for any clients in any specified level of court. A person declared by the Law Society to be qualified for particular courts or tribunals will then have rights of audience;

in both cases the professional body will need to satisfy the Lord Chancellor and the judiciary acting on advice from the proposed Lord Chancellor's Advisory Committee on Legal Education and Conduct that its members can uphold ap-

propriate standards of competence and conduct.' (Paras 1.10 and 1.11 pp 7/8)

## Advisory Committee

In Chapter 7 of the White Paper a proposal set out in the main Green Paper for a reconstituted Lord Chancellor's Advisory Committee on Legal Education and Conduct is thoroughly revised. The proposal in the White Paper is that there should be:—

'A reconstituted and vigorous Advisory Committee but its functions will be purely advisory. Its prime role will be to give advice to all bodies authorised to grant to their members rights of audience, the right to conduct litigation or the right to prepare probate documents. It will also advise the Lord Chancellor and the judiciary on the arrangements for ensuring appropriate standards, of competence and conduct in the provision of legal services. The professional bodies and other organisations, the Lord Chancellor, and the judges will all be required by statute to have regard to advice from the Advisory Committee on the discharge of their statutory functions. All the Advisory Committee's advice will be public; it will report to Parliament on all aspects of its work annually, and on specific issues as appropriate. The Advisory Committee will be financed from money provided by Parliament, and will be wholly independent, running from its own procedure and appointing its own staff, who will be expected to come from a variety of backgrounds.' (Para 1.16 pp 8/9)

## Litigation

The provision for entitlement to do the work which is necessary to start and conduct litigation will be given a 'simplified statutory basis, on the same approach as for advocacy work'. The Law Society will be entitled by statute to grant its members the right to conduct litigation. Arrangements will be made to enable other professions to do so, to an appropriate degree. In each case, this will be subject to the professional body or other organisation being able to satisfy the Lord Chancellor and the judiciary, in the light of advice from the Advisory Committee, that it can set and maintain appropriate standards of competence and conduct.

## Professional self-regulation

Chapter 5 of the White Paper deals with matters relating to conveyancing and Chapter 6 deals with the question of probate. In Chapter 8 the importance of professional self-regulation is recognised and it is proposed to reinforce this by leaving it to the professional bodies to prepare the regulations and codes which will set qualification standards and practice requirements for advocacy and the conduct of litigation. Any new rules proposed will require the concurrence of the Lord Chancellor. The point is made that:—

'Under the adversarial system operated in this country the courts depend on the competence and probity of advocates and litigators. The proposals have been amended to reflect this, and the concurrence of senior members of the judiciary will be required for new regulations or codes to become effective. Both the Lord Chancellor and the judges will be advised by the Advisory Committee.' (Para 1.17 p 9)

## Legal Education

Chapter 9 deals with matters of Legal Education aimed at ensuring that the existence of various schemes and selection procedures for practitioners will not create unnecessary barriers either to new practitioners, where the lawyers are suitably qualified non-lawyers, entering the area of work concerned, or general practitioners continuing to work in the area.

## Complaints from public

Chapter 10 proposed a wide range of measures to ensure that complaints from members of the public about legal services provided to them can be simply and effectively met. Mention is made of consideration being given to arrangements for a joint disciplinary body of the Bar and the Law Society, involving members of the judiciary where appropriate, to provide a common mechanism and common standards dealing with complaints about court work. A new office of legal services Ombudsman is to be created. The Ombudsman will have wide powers to examine the way in which complaints against legal practitioners have been investigated by the professional bodies, and will also have power to investigate such complaints himself, where that is ap-

appropriate. He will have power to recommend the payment of compensation in most cases. The question of competition in the provision of legal services is addressed in Chapter 11. The White Paper states that aspects of the work and organisation of the Legal Profession which do not need to be regulated in the interests of justice, may, however, need to be scrutinised to ensure that there are no unnecessary restrictions on competition. The professional body rules and practices therefore will in general be subject to consideration under the proposed legislation on restricted trade practices. Under that legislation, however, rules approved by the Lord Chancellor will be exempt from prohibition.

### Partnerships

As regards multi-disciplinary partnerships, a matter much debated in representations made to the Lord Chancellor after the Green Papers were published, the point is made in the White Paper that:—

‘The Government is concerned to ensure that clients have ready access to independent legal advice, and in particular an adequate choice of specialist practitioners, both barristers and solicitors. It believes it is for the professions to decide how they should best organise themselves to meet the needs of their clients. The statutory prohibition on the formation of partnerships between solicitors and other professionals will be removed and the matter left to professional rules. The Bar Council and the Law Society will continue to be able to make rules preventing such partnerships if they so wish, to the extent that it is justified by the needs of advocacy or the conduct of litigation.’ (Para 1.21 pp 9/10)

The Main Green Paper proposed the removal of both statutory and any other barriers to the formation of partnerships between barristers or solicitors and lawyers from another jurisdiction. In comments received by the Lord Chancellor most were generally in favour of such a proposal. The proposal is made in the White Paper that the statutory prohibition on the formation of such partnerships be removed and the hope expressed that ‘professional bodies will speedily review their own rules to enable multi-national partnerships subject to ap-

propriate professional safeguards to be formed with lawyers from the European Community and from other jurisdictions as quickly as possible.’ (Para 13.3 p 40)

### Contingency fees

Most persons who responded to the Green Paper on Contingency Fees were generally opposed to the introduction of a system of contingency fees which would permit clients to offer their lawyers a percentage of any damages if successful. There was however, little objection in principle, or in practice, to clients being able to agree with their lawyers’ conditional fees on a speculative basis already permitted in Scotland, or ‘to permitting a specified moderate percentage uplift on the normal bill which the parties to such agreements could contract to pay’. (Para 1.23 p 10)

### Judicial appointments

The proposal is made in chapter 15 of the White Paper that qualifications for judicial appointments should be revised so as to make ‘all suitably qualified lawyers eligible for judicial appointments’. More particularly the following transitional arrangements are proposed:—

#### (a) Barristers

All barristers who have been called when the new arrangements come into force will be eligible for all appointments for which they are at present eligible, provided they are of, or achieve the standing required by the present law. In addition they will become eligible for appointment as County Court Registrars, again provided they are, or achieve the required number of years’ standing.

#### (b) Solicitors

All solicitors who are on the roll when the new arrangements come into force will be eligible for all appointments provided:—

- (i) in the case of appointments to the House of Lords or the Supreme Court Bench they are, or achieve the standing now required for barristers and require rights of audience in the appropriate courts;
- (ii) in the case of appointments to the Circuit Bench, they

are of, or achieve the standing now required for barristers; and

- (iii) in the case of appointments of Masters, Registrars and Stipendiary Magistrates they are of, or achieve seven years’ standing.’ (page 43 para 15.9)

### Solicitors’ reaction

The solicitors profession reacted to the White Paper by indicating that the Government has ‘moved substantially in our direction’. Sir Richard Gaskell, the Law Society’s President, while expressing concern on matters relating to conveyancing, indicated that he ‘was delighted with the proposal to put rights of audiences for solicitors on a wider footing’.

### Bar Council’s reaction

The initial response of Mr Desmond Fennell QC, the chairman of the Bar Council, according to *The Independent* of 20 July 1989, was to the following effect:—

‘We believe the judges have always been the right people to decide on rights of audience. We would greatly regret any position where the judges were considered as a long-stop. That would put them into the cockpit of political controversy.’

### Concessions welcomed

It would seem, according to press reports, that members of Parliament generally were quick to welcome certain of the concessions made by Lord MacKay and generally praised the White Paper. Labour spokesmen welcomed the revision of the original ‘hasty’ proposals, while condemning the absence of provisions to widen access to legal aid.

### Press reaction

In an article in *New Law Journal* of 28 July 1989, Mr Nicolas Stuart QC expresses the opinion that:—

‘The most glaring flaw is that the White Paper does nothing to deal with deficiencies in the legal aid system; reduce eligibility, non-availability in tribunals, poor administration, scandalously low fees, late payment. There are serious problems here which the White Paper simply does not address.’

He believes that: —

'... we face a dilution of expertise in higher court advocacy, elaborate proposals for conveyancing which jeopardise the service given by the many smaller firms of solicitors and the prospect of effective legal services becoming more and more something provided for big clients by big organisations. Perhaps those organisations should be eligible for Silk. What price Clifford Chance QC?'

Richard Hudson in an article in the same Journal puts the matter more simply: —

'Green Paper panic has given way to White Paper relief.'

According to Mr Hudson: —

'On any interpretation, the cutting edge of most of the original proposals has been considerably blunted, with many restricted practices only being removed in principle where it was originally proposed to remove them in fact. If it were necessary to single out the most radical departure from the Green Paper, it would be the transformation of the Lord Chancellor's Committee into an Advisory rather than a Regulatory body, although the Law Society, the Bar, the judges and the Lord Chancellor himself will all be required by statute to have regard to its advice.'

### Pass law

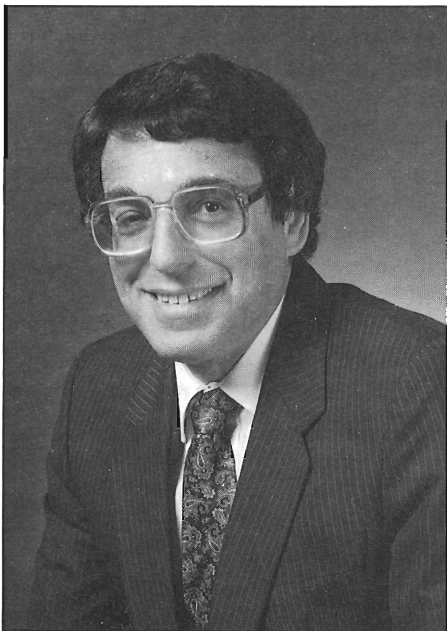
To end on a lighter note, reference to the following report which appeared in *The Independent*, might not be inappropriate: —

'The Lord Chancellor has been paying informal and unannounced visits to Crown Courts around the country.

On presenting himself at the judges' entrance to Wood Green Crown Court, North London recently, he was refused entry by the security-conscious court official.

The Lord Chancellor felt obliged to point out to him that he was Lord MacKay of Clashfern. "I don't care which firm you are from," the doorman replied, "you can't come in here without a pass." ■

## Ex-South African elevated to Bench



*The Honourable David Ipp (photo) was appointed a Judge of the Supreme Court of Western Australia with effect from 31 July 1989 — the first ex-South African ever to be appointed to this position in that State.*

*David, who obtained his B Comm LLB-degrees at Stellenbosch University, was admitted as an advocate of the Cape Provincial Division on 4 April 1973 and joined the Cape Bar on that date, where he remained until 1981 when he left South Africa for Western Australia. He practised there as a barrister and solicitor and later joined the Independent Bar of Western Australia. He was appointed Queen's Counsel in December 1985.*

### Ceremonial matters

I have had access to a transcript of proceedings entitled 'Welcome to his Honour, Mr Justice Ipp.'

It appears that a special ceremony is held in Western Australia to welcome a newly appointed judge to the bench. During the proceedings Ipp J sat on the bench together with the Chief Justice (and perhaps also other judges). The Chief Justice, the Solicitor General, a representative of the Law Society and a representative of the Western Australian Bar Association made speeches and in conclusion Ipp J replied fittingly.

The reason for appending these remarks is that I wish to pose a few questions: haven't we in South Africa become rather too informal about these matters? Should a bit of pomp and ceremony not be built into our system? Haven't we become a rather dreary lot — worrying only about constitutional matters, labour laws, inflation, and so forth? I suggest that at the next meeting of the Ministry of Justice and the Judiciary (Chief Justice and Judges-President) the following should *inter alia* appear on the agenda:

- Ceremonial matters concerning the judiciary.

Editor