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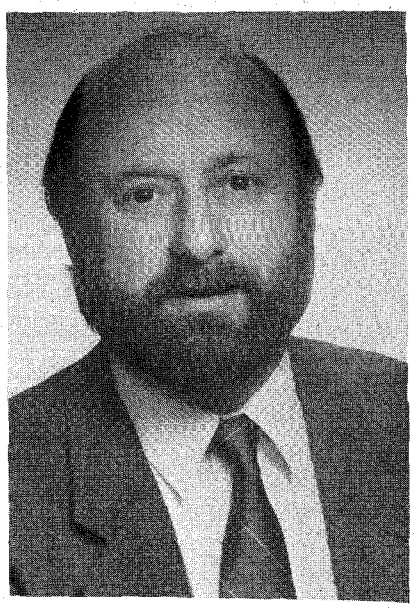
English White Paper Law Reforms: An Outline for Equal Access to Justice?



It is highly likely that by the end of 1989, legislation proposing the most dramatic changes in the English legal profession in this century will be introduced by the Lord Chancellor of Great Britain in the House of Lords.[1] If Lords approve the legislation, it will be sent to the House of Commons early in 1990 and will become effective by Royal Assent shortly thereafter.[2] The Lord Chancellor's reforms will abolish the barristers' monopoly of audience in higher courts,[3] partially limit the statutory bar on multidisciplinary and multinational partnerships,[4] introduce a modified contingency fee,[5] permit building societies and banks to do conveyancing work,[6] and allow solicitors to be appointed to the high courts.[7] Several of these sweeping changes, particularly those relating to multinational law practices and contingency fees, will affect the American bar and therefore should be of interest to many New York attorneys.

The English Legal System

"It is not surprising that strangers to the English legal system find it hard to visualise the precise functions of its component parts," one knowledgeable commentator

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1 Carlisle, *White Paper: An Outline For Improved Access To Justice.* N.Y.L.J., August 7, 1989, p. 2. See also The (London) Times, Nov. 22, 1989, p. 8.

2 *Id.*

3 See *Legal Services: A Framework For The Future* (Presented to Parliament by the Lord High Chancellor by Command of Her Majesty July 1989) p. 12-16.

4 Id. at p. 40 (Barristers will be able to continue to maintain the Rules of Conduct by which all partnerships are forbidden to them).

5 Id. at p. 41.

6 Id. at p. 17.

7 Id. at p. 42.

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has written.[8] The administration of justice in Great Britain is divided into two distinct legal systems.[9] The separate judicial systems of England and Wales were "fused" in 1830 and remain a single jurisdiction.[10] Scotland since 1603 has retained its own system of law and its own legal institutions.[11] Nonetheless, the highest court in the English and Scottish Civil system is the House of Lords.[12] Northern Ireland has a legal jurisdiction distinct from England, Wales and Scotland: however, appeals in civil and criminal matters are heard in the House of Lords.

In England and Wales there are two superior courts. The High Court and the Crown Court have general, and some appellate, jurisdiction over civil and criminal matters respectively. The secondary civil courts are referred to as "county courts." The "magistrate courts" constitute the lower level of the criminal system. All judges on the superior courts and courts of appeal, including the House of Lords, are barristers.[13] Although barristers and solicitors are both lawyers, in training and functions they are "two different sorts of animal."[14] The solicitor is a general practicioner who handles all aspects of representation, with the exception of trial work. The barrister's essential function is advocacy in the court. For that purpose, he or she can obtain work only through a solicitor and never directly from the client. When litigation is involved, the solicitor prepares the case up to the point of actual trial. Most civil trials are before non-jury fact finding judges.

Solicitors can, and usually do, practice in partnerships. Barristers practice as individuals in chambers. Solicitors are governed by a Law Society while the barristers organization is more complex. There are four Inns of Court — Grays Inn, Inner Temple, Middle Temple and Lincoln's Inn. They possess a monopoly of calling students to the Bar.[15] Each Inn is governed by a body of "benchers" who consist of senior judges and lawyers. The head of the bar is the current Attorney General of England. There is also a Bar Council ("General Council of the Bar") elected by the practising bar and directed by a Chairperson. The Bar Council is primarily responsible for training students called to the bar and for disciplinary matters and public relations.

The Lord High Chancellor of Great Britain is "the universal joint in the machinery of justice."[16] He is appointed by the Queen on the recommendations of the Prime Minister. The Lord Chancellor is a cabinet member, the head of the English judiciary, and the speaker of the House of Lords. As a cabinet member he is responsible, in part, for developing and introducing legislation for England and Wales. The current Lord Chancellor is James MacKay who is a former dean of the Scottish advocates. Lord MacKay is the first "non-English" advocate to be appointed to the highest judicial office in Great Britain.[17]

The Green Papers

On January 25, 1989, Lord Chancellor MacKay issued three "Green Papers" containing radical reforms for the work and structure of the legal profession in England and Wales.[18] A Green Paper is an official government consultation proposal which ultimately is merged into a "White Paper" for presentation to Parliament. The main document presented by Lord MacKay is entitled "The Work and Organization of the Legal Profession."[19] This paper proposes basic reforms in education, training and qualification procedures for solicitors and barristers. A second Paper, "Conveyancing by Authorised Practicioners,"[20] proposes that home owners be permitted to opt for a "one stop" conveyancing and mortgage package by the bank or building society responsible for the mortgage instead of by an independent solicitor or licensed conveyancer. The third Paper, "Contingency Fees,"[21] recommends that lawyers should be able to take fees on a limited contingency fee basis. This proposal suggests four possible ways in which a system of contigency fees might operate.

1. A no-win no-pay speculative scheme similar to that presently permitted in Scotland;
2. A speculative Scottish scheme but with the additional feature that the lawyer would be entitled to an uplift in fees to reflect the risk he or she undertook;
3. A restricted contingency fee basis;
4. An unrestricted contingency fee scheme similar to that followed in New York State.

Additional reforms proposed by the three Green Papers relate to legal education and specialization, maintenance of professional standards, the judiciary, multidisciplinary partnerships, probate and advertising.[22]

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[8] Cowper, *The Bonds of the Inns of Court*, N.Y.L.J., July ____, 1989, p. 2. ("The London Letter.") See also Gower § Price, *The Profession and Practice of Law in England and America*, 20 Modern Law Review 317 (1957).

[9] See Friesen and Scott, *English Criminal Justice*, at p. 10 (1977). See also Civil Justice Review (Report of the Review Body on Civil Justice), p. 16 (1988).

[10] Id. at p. 4.

[11] Id.

[12] Id. p. 13-28.

[13] Id.

[14] See Cowper, Note 8, supra.

[15] Id.

[16] See note 9, supra, at 5.

[17] See The London Times, July 20, 1989, p. 4.

[18] See Carlisle, *Radical Changes Proposed In English Legal Systems*, N.Y.L.J., February 3, 1989, p. 2.

[19] See Note 3, supra, at p. 6, n. 1.

[20] Id.

[21] Id.

[22] See "The Work and Organization of the Legal Profession" (referred to as the main Green Paper, Cm 570) at 12.1.

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Response to the Green Papers

The Lord Chancellor's Green Papers, which were consultive in nature,[23] received mixed reviews. Attorney General Sir Patrick Mayhew endorsed the proposals as did the Law Society, which represents the English solicitors, as well as a majority of the 64 barristers and 28 solicitors in the House of Commons.[24] The Lord Chancellor gave the bench, bar, solicitors and all other interested parties until May 2, 1989 to respond to his Green Paper proposals.

There were over 2,000 written responses to the Green Papers, of which 3% 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, which included groups representing consumer interests, educators and others.[25] Many of the responses criticized the Lord Chancellor's proposals for "not reflecting sufficiently fully the role of the judiciary;"[26] for "compromising" professional self-regulation; and for "not adequately recognizing the diversity of advocacy practice."[27]

The Law Society objected to excessive Government power embodied in the proposed Advisory Committee on Education[28] and to provisions for vocational training.[29] The Society also warned of the threat that multi-disciplinary practices presented presented to the public;[30] criticized the lack of discussion with respect to legal aid;[31] disfavored American - style contingency fees;[32] and attacked many of the conveyancing proposals.[33]

The Bar Council joined the Law Society in warning of the dangers to the independence of the bar and to the integrity of the legal profession posed by the proposals. The Council published a 275 - page report entitled "Quality of Justice: The Bar's Response," which severly criticized the Lord Chancellor's plan to merge the bar with solicitors and to create lay - dominated advisory committees on legal education and professional conduct. The Bar's response concluded with an elegant response from a retired county solicitor, who argued against fusion of barristers and solicitors by proclaiming:

> "The Inns of Court may seem mysterious places to most of us. But they produce the goods: a fearless judiciary and formidable advocates."[34]

Senior judges vigorously attacked the Green Papers.[35] They believed that the proposals constitute "a grave threat to the doctrine of separation of powers"[36] and argued that adoption would lead to a decline in professional standards of conduct and competence, thereby causing lengthy and expensive legal proceedings. The judges also strenuously objected to the idea of multi-disciplinary practice and to partnerships among barristers. Finally, they strongly opposed adoption of American - style contingency fees.[37]

Additional negative responses were heard in the historical House of Lords[38] debate. All but six of fifty-four peers, were hostile to the reforms.[39] Critics included two former Lord Chancellors, the Lord Chief Justice, the Master of the Rolls and majority of the Law Lords. They accused the Government of threatening the independence of the legal profession and of using dictatorial methods to undermine the independence of the judiciary.[40] Conservative Tory members of the House of Lords accused the Government of trying to destroy the best legal system in the free world.[41] Similarly, a report by the prestigious English Law Commission[42] argued against any relaxation of the rule prohibiting contingency fees on the grounds that "further analysis and study" is necessary to determine whether such speculative action would "significantly increase access to justice in England and Wales."[43]

The White Paper Revision

On July 20, 1989, Lord Chancellor MacKay's office issued a White Paper entitled "Legal Services: A Framework for the Future." Lord MacKay stated: "We have taken out the elements of executive interference as seen by the profession. I believe we now have an improved framework to achieve our objectives."[44]

Three principles objections to the Green Papers have been partially adopted in the new White Paper. First, instead of rights of audience being conditioned on whether solicitors or barristers earn a certificate of competence, both professional bodies will determine who is qualified to appear in the High Courts. Barristers will have to comply with the rules of conduct of the bar which can be changed subject to concurrence of the Lord Chancellor, Lord Chief Justice, Master of the Rolls, President of Family Court

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23 See Id. at p. 1.

24 See Note 18, supra.

25 See Note 3, supra, at 6.

26 Id. at 7.

27 Id. at 7.

28 See *Striking The Balance* (A Final Response of the Council of the Law Society on the Green Papers) (1989).

29 Id. at 1.

30 Id. at 23 (Nonetheless the Law Society recommended that statutory restriction preventing multi-national practices of lawyers should be lifted. See Id. 23-24.

31 Id. at 31.

32 Id. at (v).

33 Id. at 5.

34 See *Quality of Justice The Bar's Response* (1989) at 275.

35 See *The Green Papers The Judges Response* (1989).

36 Id. at 7.

37 Id. at 46. See also Carlisle *Senior English Judges Attack Legal Reforms* N.Y.L.J., May 30, 1989, at 2.

38 See Carlisle, *House of Lords Debates Drastic Legal Reforms*, N.Y.L.J., April 12, 1989, at 2.

39 See Note 38, supra.

40 Id.

41 Id.

42 See Contingency Fees Law Commission Response to the Green Paper (1989).

43 See Note 39, supra.

44 See Note 1, supra.

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and the Vice Chancellor. Similarly, the Law Society can recognize a solicitor as qualified to practice in all courts if he complies with the society's applicable rules which must be approved by the same five senior judges. Also, while all barristers called to the bar will have an automatic right of audience at all levels, solicitors will be required to complete a subsequent period of practical advocacy training and a skills test.[45]

Second, the judges' concern with the Green Paper threats to the independence of the judiciary have been mollified. Judges objected to the proposal requiring that oversight of professional standards should be controlled by a government-appointed Committee on Legal Education and Conduct. Under the White Paper, the Committee will be purely advisory with the emphasis on assisting professional bodies to develop and maintain their own standards.[46]

Third, the strong opposition to American-style contingency fees has resulted in a White Paper adoption of the Scottish conditional fee payment.[47] Thus, existing prohibitions will be removed to allow clients to agree to accept payment for services on a no-win, no-pay basis. This proposal will not extend to criminal and family proceedings. The White Paper also permits a lawyer representing clients on a speculative basis to balance the risk of losing by charging a higher rate than normal. The Lord Chancellor will have power to legislate maximum limits for different classes of cases subject to the no-win, no-pay scheme.

The White Paper also eliminates the proposal that barristers can practice in partnership with solicitors. However, barriers currently preventing barristers and solicitors from entering into multinational partnership with non-UK lawyers will be eliminated subject to the barristers right to maintain the Rules of Conduct by which all partnerships are forbidden for them. Similarly, the statutory bar of the Solicitor's Act will be removed to permit partnerships between solicitors and members of other professions. Finally, the White Paper permits solicitors to become senior judges if they have earned rights of audience in the various levels of courts for specified periods.

Conclusion

Lord MacKay's White Paper compromise is a welcome change. It will improve access to high quality legal services, to the courts, and ultimately to justice. It is responsive to market forces and to consumer needs. The White Paper revisions recognize the independence of the bar and judiciary and limit governmental interference with the legal profession. Nonetheless, several judges remain skeptical. Lord Hailsham, the former Lord Chancellor, has indicated he is not satisfied with the revisions. Also, the Bar Council has formally asked the government not to introduce the White Paper as legislation. Mr. Desmond Fennell, Q.C., Chairman of the Bar Council, recommended that the Paper should be subject to further consultation and debate.[48] However, it is unlikely that Lord MacKay will agree to defer presenting his package of legal reforms to Parliament for a vote. Whatever the final outcome of the proposals, they have prompted intense debate by barristers, solicitors, lawyers, elected representatives, consumer groups and the public.

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[45] See *Legal Services: A Framework For The Future* (referred to as the White Paper) at 12-15.

[46] Id.

[47] Id. at 41.

[48] See The (London) Times, Nov. 22, 1989, p. 9 (Mr. Fennell argues that judges should have the final say on advocacy rights in higher courts).

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