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PRIME MINISTER

17 February 1989

GREEN PAPER ON THE LEGAL PROFESSION IN SCOTLAND

Malcolm Rifkind has circulated a draft Green Paper on the Legal Profession in Scotland. This covers the same ground as the Lord Chancellor's papers on conveyancing, and the future organisation of the legal profession in England and Wales.

E(CP) took the view that the Scottish consultation document should adopt the same general approach as the English ones, and should follow the same timetable. While it covers the ground, the Scottish paper is altogether more mealy-mouthed. James Mackay has been pressing Malcolm Rifkind to sound more robust (hence the slippage in the Scottish timetable). But his draft is still oddly tentative.

Argument

The Scottish paper opens by stressing that the Scottish legal system is being examined in its own right. The consultation exercise is not an extension of the English one. The separate character of the Scottish legal system is stressed. There is a clear suggestion that it does not have much wrong with it.

It is true that the Scottish system already has some of the features - such as wider rights of audience for solicitors - which the Mackay reforms are seeking to bring about in England. It is certainly politically wise to stress the separate nature of Scottish law and legal arrangements.

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But this is not incompatible with emphasis on the need to allow competition and market forces to work in favour of the consumer. This is a key feature of the main English Green Paper. It only rates a paragraph in the Scottish one (para 1.7). This says that

"[The Government] has encouraged a preference for the market mechanism as a means of allocating resources".

This is oddly convoluted. Contrast it with the introduction to the parallel English Green Paper:

"The Government believes that free competition between the providers of legal services will, through the discipline of the market, ensure that the public is provided with the most efficient and effective network of legal services at the most economical price."

Overall, it does not sound as though the Government in Scotland is convinced of the need for change in the organisation and work of the legal profession. Without a clear and determined steer, the proposals are likely to wallow in a sea of special pleading. The voice of the consumer will hardly be heard.

A tentative approach north of the border will also make it more difficult for the Government to achieve legal reform in England and Wales. James Mackay's proposals are widely seen as reflecting his own Scottish legal background. It will look very odd if the Scots themselves appear to have no stomach for change.

#### Multi-disciplinary practices

Malcolm Rifkind has already consulted on the proposal to allow solicitors to work in multi-disciplinary practices with people from other professions. His latest Green Paper suggests that this could be widened to include advocates as well as solicitors.

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His reaction to the first round of consultations is robust. Although the Law Society of Scotland are strongly opposed to the principle of multi-disciplinary practices (they fear being taken over by London firms of chartered accountants), he believes it would be right to abolish the legal bar to such practices.

### Conveyancing

In England and Wales the principle of allowing banks and building societies to provide conveyancing services has already been enshrined in law (the Building Societies Act 1986). James Mackay's Green Paper on conveyancing is about the way in which the principle should be put into practice.

In Scotland the principle is not yet accepted. The Building Societies Act does not apply. This section of Malcolm Rifkind's Green Paper is cautious, and simply invites views. It rightly draws attention to the fact that conveyancing law in Scotland is different. It wrongly says nothing about the convenience to the consumer of a "one-step shop" for house purchase - subject, of course, to certain safeguards.

### Contingency fees

Nothing is said about this in the Scottish paper. The English one favours an adaptation of the Scottish "speculative" action over the American version of contingency fees. If followed in Scotland, this would involve a change in lawyers' fees, but would not raise the same issue of principle as in England.

Reaction to the English Green Papers suggests that there are a good many reservations about American-style contingency fees. Few commentators have focussed on the much less contentious Scottish option.

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It is probably right to say nothing in Scotland about this. Scottish consumers are already-in theory at least - able to engage a lawyer on a "no win, no fee" basis. If the Government decides to adopt a variant on the Scottish model in England and Wales, it will be open to Malcolm Rifkind to make a minor change to follow suit.

## CONCLUSION

James Mackay remains disappointed with the tone of the Scottish paper. It is unlikely to satisfy Nigel Lawson or David Young. There is hardly a mention of the consumer. It is as though market forces ceased to exist north of the Tweed.

Reaction to the English Green Paper shows how firm and clear the Government needs to be if it is to tackle restrictive practices in the legal profession. Limp "on the one hand" "on the other" will not do. All that has been rehearsed before (eg in the Hughes Report on the Scottish Legal Profession in 1980).

## Recommendation

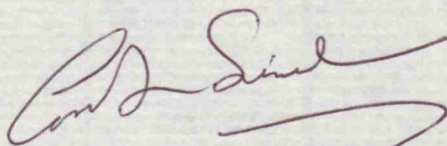
It would be worth putting the following points to Malcolm Rifkind:

1. It is right for his Green Paper to recognise the separate character of Scottish law, and the ways in which it already offers the consumer an efficient and effective service;
2. But it should also point out the areas where change could give market forces greater scope. The interests of the consumer need to be brought out. The Government is not examining the Scottish legal profession for the sake of the legal profession.

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3. Changes on these lines would give the paper a clear sense of direction. There is no point in simply warming up the arguments discussed at length in the Hughes Report. ✓
4. A tentative approach to legal reform in Scotland will undermine attempts to reform the English legal system. This will be difficult enough as it is. ✓
5. The revision needs to be made quickly if the timetable of consultations in England and Scotland are to remain in line. ✓



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