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Prime Minister
This sets out fairly some of the risks involved in the Lord Chancellor's proposals on rights of audience
AT 16/6

MR TURNBULL

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cc. Professor Griffiths
Mr Gray

Thank you - the risks are clear

LEGAL REFORMS

At his meeting with the Prime Minister last week, the Lord Chancellor outlined a proposal on rights of audience designed to keep both the Law Officers and the judiciary on board. I have been discussing this with Derek Oulton.

The proposal is attractive as a way out of a political problem (the Attorney General's resignation). But it will be criticised as a major cave-in on the main plank of the Government's reforms. In the longer run (two to three years) it could present the Government with some nasty dilemmas.

The Proposal

(i) The Bill giving effect to the legal reforms would vest the ability to grant rights of audience in the Bar Council and the Law Society. Individuals belonging to either professional body could act as advocates in any court provided they had completed appropriate training and were bound by appropriate Codes of Conduct.

(ii) The proposed Advisory Committee - with a lay majority - would advise the professional bodies on the principles which should be reflected in training and Codes of Conduct. The Bar Council and the Law Society would be bound to have regard to such advice. This means that they would be free to reject it, but would have to give reasons for doing so.

(iii) The Bar Council and the Law Society would (separately) submit their proposals for training and Codes of Conduct to the Lord Chancellor and the other four Heads of Division (in effect, the most senior judges.) All five would need to concur in the professional bodies' proposals.

(iii) is the new element designed to appeal to the judges. It is crucial to keeping the Attorney General.

How (iii) would work

The Lord Chancellor does not envisage collective discussion with the four other Heads of Division. He would give his concurrence (or objection) independently, direct to the Bar Council and Law Society.

In theory the four other judges would also act independently. In practice, they will act together, and it is likely that the strong personality of the Lord Chief Justice (Lord Lane) will prevail over the others. Lord Lane is a bastion of conservatism.

There will be a time limit within which the Heads of Division must respond (senior judges are notorious for simply ignoring communications they do not like). It is quite possible that they could take a different view from the Lord Chancellor.

Implications

The Lord Chancellor is well aware of the risks in his proposal. It puts a great deal of power in the hands of the Heads of Division. For example, they could reject a Code of Conduct from the Law Society which allowed solicitors in partnerships to act as advocates in the higher courts. This would frustrate the main element in the Government's reforms.

One way of limiting this danger would be to specify in the Legal Reform Act that solicitors in partnership could practice in all courts provided they were qualified advocates. The Attorney General would not buy this; but possibly the judiciary would.

The Lord Chancellor's officials are seeking to persuade him to float this option at his meeting next Friday with the four Heads of Division. The Lord Chancellor may not agree. Even if he does, the judiciary may not. But if he did, and they did, the Attorney General could begin to look unreasonable in demanding more than the judiciary (whom the Bar regard as the leaders of their profession).

It is a long shot.

If the proposal at (iii) is not circumscribed in this way, the following could happen:

- Some two years hence the Lord Chancellor and the four Heads of Division disagree over whether solicitors in partnership can act as advocates in the higher courts.

- The Government wrings its hands while being roundly criticised by the Law Society and the media for allowing the judiciary to block reform; or

- The Government legislates to remove the ability of the Heads of Division to block reform, leading to cries of interference by the executive etc.

More immediately

- The Law Society and the legal correspondents in the media will quickly spot that the Government is giving the Heads of Division an effective veto on wider rights of audience.

- The Government will be criticised for caving into the Bar.

- Solicitors will be doubly enraged: they will be forced to accept the conveyancing proposals while the Bar get off lightly. This could make it more difficult to get the conveyancing proposals through the Commons (at least some solicitors see wider rights of audience as a new opportunity to balance the loss of work on conveyancing to building societies).

Interaction with the new Competition Authority

You asked whether, under the proposed arrangements, the Government might find itself at odds with the new Competition Authority over the rules governing lawyers.

The present restrictive trade practices legislation does not extend to the professions. But under new legislation which the Government is proposing to introduce in 1990-91, professional bodies will have to justify their rules to the Competition Authority unless particular rules are statutorily exempted from its scope.

David Young is proposing to exempt certain (not all) of the barristers' rules on the grounds that they are necessary to the continuation of the independent Bar. But he will want to keep such exemptions to a minimum.

A clash between the Heads of Divisions and the Competition Authority is a possibility. It is more likely than a direct clash between the Lord Chancellor and the Competition Authority. It is, for example, hard to conceive of the Lord Chancellor supporting a rule which prohibits solicitors in partnership from acting as advocates. But the Heads of Divisions could well do so.

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If, however, the Government took no action in such circumstances it would be implicated. It would be seen as acquiescing in a decision of the judiciary which was anti-competitive.

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