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PRIME MINISTER

Interim Payments for Civil Legal Aid Work

BACKGROUND

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The Home Secretary minuted you on 15th December about the failure of H Committee to reach agreement on the Solicitor General's proposals for a scheme of interim payments to solicitors and barristers undertaking work under civil legal aid certificates. The matter is urgent because, if the scheme put to H Committee by the Solicitor General is to be adopted, it must be announced before Christmas; otherwise there will not be enough time for payments to be made in the financial year 1982-83.

2. In privately funded civil cases, lawyers can insist on staged payments. It is not clear how widespread this practice is, but it has been encouraged by the professional bodies as being in the interests of both lawyers and their clients. There is, however, no corresponding provision for payments on account in civil legal aid cases. Payment is made only when a case has been completed and the costs have been duly certified or "taxed". Some £250 million is at present owing to the profession from the Legal Aid Fund for work done between one and three years ago, while the average period between the issue of a legal aid certificate and payment is 2 to 2½ years. No interest is payable on outstanding fees, and no allowance is made for the effect of inflation.

3. The scheme put forward by the Solicitor General in response to increasing pressure from the Law Society and the Bar Council was designed to take advantage of the increased scope for public expenditure in 1982-83 to pay off a proportion of the outstanding debt and pave the way for a longer-term scheme of interim payments. In outline, it would work like this:

- (i) Barristers and solicitors would lodge claims by 1st February 1983 for work already done.
- (ii) Barristers would (by 31st March) be paid 60 per cent of the amount claimed.

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- (iii) Solicitors would be paid on a fixed scale.
- (iv) The total remuneration in each case would be adjusted as necessary after the costs had been taxed.
- (v) The savings in 1983-84 and later years from bringing payments forward into 1982-83 would be used to finance a longer term scheme. 4

There would be no net additional cost in the long term, but the extra expenditure falling in 1982-83 might be of the order of £80 million.

4. The arguments of the Lord Chancellor and the Law Officers for such a scheme are:

- (i) It is immoral for the Government deliberately to withhold payment for work done.
- (ii) The present system tempts a few lawyers to lodge dubious claims, thereby undermining the ethical standards of the whole profession.
- (iii) Young lawyers, in particular, have difficulty in making ends meet, so that there is a damaging effect on recruitment and retention (particularly in inner city areas).
- (iv) The Government would have no convincing defence if the professional bodies made their criticisms public.
- (v) The Legal Aid Scheme requires the goodwill of the profession.

5. The Chief Secretary's objections are:

- (i) Payment at the end of the case is a long standing custom of the profession; it is not for the Government to take the initiative in changing the situation, even if it is unsatisfactory.
- (ii) The additional expenditure in 1982-83 would have no economic benefits.
- (iii) The costs of legal aid are growing much too fast, and should be brought under tighter control before any concession is contemplated.



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- (iv) An apparent windfall of £80 million to the legal profession would give the wrong signal in current and forthcoming pay negotiations.
- (v) A more modest start to the proposed scheme in 1982-83 would mean correspondingly higher payments in later years.

6. The Lord Chancellor has indicated that he might not be too concerned if the precise scheme put forward by the Solicitor General was not proceeded with, provided that the Government accepted in principle that the present system needed to be changed and was prepared to make some move in 1983-84 towards changing it.

7. The immediate question for the Cabinet to decide is whether there is to be an interim scheme in 1982-83, either on the basis proposed by the Solicitor General or on a more modest scale. If the decision is that there should be no scheme in 1982-83, it may be possible to leave the matter on the basis that the Lord Chancellor and Solicitor General should prepare alternative proposals with a longer timescale and seek to reach agreement with the Chief Secretary on them, taking the matter back to H if necessary.

#### HANDLING

8. The Home Secretary can explain the position reached in H Committee, and the Lord Chancellor and Solicitor General, on the one hand, and the Chancellor of the Exchequer and the Chief Secretary on the other can enlarge on their views. The Secretary of State for Scotland can confirm that any scheme introduced in England and Wales would have to be reflected in Scotland (though not necessarily with the same timing).

9. You will then wish to take the views of other members of the Cabinet on the potentially repercussive nature of the Law Ministers' proposals. It was suggested at H that the impact on the National Health Service pay negotiations would be minimal; does the Secretary of State for Social Services agree? Can the



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the Secretary of State for Employment estimate the likely effect on other current negotiations? Could the Government credibly defend the additional expenditure in 1982-83 on the grounds that it represented the payment of arrears, not new money, or would it make it more difficult to resist pressures for increases (or earlier) expenditure in other areas?

10. If the Cabinet cannot agree to the scheme put to H by the Solicitor General, or to any more modest version of it (alternative schemes could be devised costing £40 million or £10 million, though they might create additional expenditure from 1983-84 onwards), you may wish them to consider (a) whether the Law Society and Bar Council should simply be told that no action can be taken for the present, or (b) whether the Lord Chancellor and Solicitor General should seek to reach agreement with the Treasury on alternative proposals with a longer timescale; such proposals might perhaps be linked with the achievement of savings in the overall cost of legal aid.

CONCLUSION

11. If the Cabinet support the original proposals as discussed at H, or some more modest version of them, they will wish to invite the Lord Chancellor to arrange for an early announcement, so that the payments can be made in the current financial year.

12. If the Cabinet do not rule out some other action to try to meet the professional bodies' case, they might invite the Lord Chancellor to work out detailed proposals with the Law Officers, Treasury Ministers and other Ministers concerned, and to bring the matter back to H if necessary.

13. If the decision is to take no further action at present, the Lord Chancellor might be invited to inform the Law Society and the Bar Council accordingly.

RCA

Robert Armstrong

15th December 1984

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Prime Minister

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PRIME MINISTER

INTERIM PAYMENTS FOR CIVIL LEGAL AID WORK

The Home and Social Affairs Committee discussed earlier today the Solicitor General's proposals for a scheme of interim payments to solicitors and barristers involved in civil legal aid cases (H(82)54). There was a fundamental difference of opinion between the Lord Chancellor and the Law Officers on the one hand and the Chief Secretary, Treasury, on the other. The Committee was unable to resolve the issue, and agreed that there was no alternative to submitting it to the Cabinet for decision.

Under the present arrangements for civil legal aid, payment from the Legal Aid Fund is made only when a case has been completed and the costs properly certified. On average, payment is received 2½ years after a legal aid certificate has been issued, and about £250 million is currently owed by the Government for work carried out between one and three years ago. These arrangements differ from those which apply in privately-funded cases where payments on account may be demanded by the lawyers concerned; but this practice, though apparently increasing, appears to be far from universal. The Law Society and the Bar Council have strongly represented in recent years that the civil legal aid system of payment is inequitable, and imposes real hardship on young members of the legal profession.

The Solicitor General, with very strong support from the Lord Chancellor, has argued that the room for manoeuvre which now exists on public expenditure for 1982-83 should be used to make a start on the introduction of a system of interim civil legal aid payments. Briefly, he proposes that barristers and solicitors who apply before 1 February 1983 would be eligible for payment before 31 March of a proportion of their fees for work already done, the balance to be paid when the case was completed and the final bill taxed. On the basis suggested by the Solicitor General, the addition to public expenditure in 1982-83 would be about £80 million, but there would be a corresponding saving in later years which could be used to finance a longer-term scheme. The cost could be reduced by having lower interim payments, or an earlier qualifying date. The Committee accepted that there would be no net addition to public expenditure taking one year with another.

The Chief Secretary, while not necessarily disputing in principle the case for a change in the present arrangements, thought that the addition of £80 million to public expenditure in 1982-83 in an area where there would be no clear economic benefit could not be justified. The public would not understand that there was no net increase in cost, and the wrong signal would be given, particularly to those involved in current public sector pay negotiations (though Health Ministers think that there

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would be no significant impact on the present NHS negotiations). Reducing the cost in 1982-83 would probably involve expenditure above planned provision in later years. He did not consider that the Government should take the lead in promoting a change in the long-standing custom of the profession, particularly in advance of the establishment of tighter control over the rapidly increasing cost of legal aid spending. He concluded that the Government should rest, at any rate for the time being, on the recent agreement to guarantee barristers payment within six months of the end of a case, at a cost of £3 million.

The Lord Chancellor considered that there were important wider implications for the administration of justice. He argued that the withholding of payment for work performed could have no moral justification, and that there was evidence that it could lead to laxer ethical standards which reflected on the integrity of the entire profession. He noted that solicitors were being deterred from practising in inner city areas where the majority of cases were financed from the Legal Aid Fund, and that some of the best new law graduates who would previously have been attracted by a career at the Bar were tending to take up salaried posts with firms of solicitors.

The Solicitor General's scheme could only be implemented in the current financial year if a favourable decision is taken before Christmas. A later start would mean that most of the initial "catching up" cost fell in 1983-84. This would be unacceptable to the Chief Secretary and I am afraid, therefore, that the only alternative to allowing the issue to go by default will be for it to be raised for decision at Cabinet next Thursday, 16 December.

I am copying this minute to other members of the Cabinet, to the Attorney General, the Solicitor General, the Lord Advocate and the Chief Whip, and to Sir Robert Armstrong.

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Home Affairs

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H Committee: Interim Payments for Civil Legal Aid Work

Attached are two H Committee papers. The first, by the Solicitor General, proposes a scheme for the interim payment of fees for civil legal aid work to avoid the very long delays which lawyers experience in receiving payment for their civil legal aid work. Delays were at present as much as a year or more; we owe lawyers about £250 million for civil legal aid work, i.e. about two-and-a-half times the total annual expenditure on such work. The Solicitor General's scheme would cost £80 million in the current financial year. The second paper, by the Chief Secretary, opposes the Solicitor General's case. Although he favours the principle of prompt payment, the Chief Secretary does not consider a payment of £80 million in the current financial year with no employment pay off would be politically possible. It would also make the position on pay more difficult: "new money for lawyers but not for nurses".

This point is likely to be raised with you at the Law Society dinner next week, by which time it will have met. I will report to you the outcome.

JF.

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8 December, 1982