



29 January 1986

THE PRIME MINISTER

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*No - no outside supply
extra days
needed under
your direction*

On the 24 January the Lord Chancellor and I wrote to you about the remuneration of the legal profession and proposed a joint meeting with us, the Solicitor General, John MacGregor, with yourself.

We are on the brink of a crisis. The Bar has an emergency General Meeting on the 8 February and if we have not put ourselves in a position to make a convincing offer by that date I fear grave damage will follow.

I shall not repeat all the facts which are set out in that long letter of 24 January, but I understand one of your Private Secretaries, Mr Norgrove, to whom I spoke yesterday to emphasise the very serious position we are in, has just telephoned the Lord Chancellor's Department to say that you are not prepared to have this meeting and it must go through EA on 5 February. I am very gloomy about the outcome of that meeting and it will obviously end up in Cabinet.

No negotiations have taken place because we have not been in a position to make any offer and the Bar resent this fact bitterly. We have a very good team in command at the moment but they are likely to be blown away if nothing is done.

I am writing this letter with the full approval of the Lord Chancellor and we are seeking, even at this late stage, a meeting which we believe it is essential should be arranged quickly.

M.H.

I am sending copies of this memorandum to Douglas Hurd, Tom King, Malcolm Rifkind, John MacGregor and Robert Armstrong.

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FROM:

THE RT. HON. LORD HAILSHAM OF ST. MARYLEBONE, C.H., F.R.S., D.C.L. *DRW*



HOUSE OF LORDS,
LONDON SW1A 0PW

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24th January, 1986

The Right Honourable
Nigel Lawson, MP
Chancellor of the Exchequer,
HM Treasury,
Parliament Street,
London,
SW1.

Dear Nigel:

WILL REQUEST IF REQUIRED

1. We have had a number of exchanges with John MacGregor about the remuneration of the legal profession. John MacGregor's letter of 30th November suggested that our officials should undertake a joint appraisal of the profession's claims for increased fees. We would welcome that, but it has now become clear that we have to make a substantial interim offer immediately if we are not to face greater damage.
2. Lord Roskill's report refers to the need to reward prosecution and defence counsel adequately in fraud cases, to provide incentives for the work to be done well and to ensure that counsel of the necessary calibre and expertise are attracted to and remain available for this type of work. This is only one aspect of a wider problem - our ability to attract counsel of the right quality to undertake publicly funded work - which is now causing us intense concern. In a nutshell, we are presently paying them far too little. The effect in the prosecuting field can only be to give guilty defendants yet another advantage in court. Unless we take steps now to remedy this, the ability of the new Crown Prosecution Service (CPS) to discharge its functions effectively will be seriously impaired. The remainder of this letter describes the background and sets out the proposal for which we seek your authority.
3. We are committed to introducing the CPS on 1st April in the metropolitan counties (excluding London) and on 1st October elsewhere. From those dates, the CPS will take over all prosecutions currently conducted by the police in those areas as well as those which fall to the DPP. There is no prospect of the CPS being able from the outset to deal with the entire volume of magistrates' courts work (which has previously been done by police) from within its own resources. For a considerable time it will have to rely on the services of private practitioners (in reality the Bar because solicitors would cost more) to supplement its own resources. The alternative would be to leave cases unprosecuted.
4. These problems come at a time when the profession's dissatisfaction about the level of fees allowed for criminal

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legal aid, which has been building up over the last few years, has come to an angry head. The Bar have made it clear that they will use the bargaining power the situation affords them to secure what they regard as adequate fees. The consequences for the Crown Prosecution Service are plain. The Bar have a number of options open to them any of which would be a powerful lever. The current rules of conduct prevent barristers from accepting sessional fees - for example, a lump sum for prosecuting all the cases before a court on a particular day. The efficient management of the CPS depends on this being altered. More important, if there is no settlement on fees, the leaders of the Bar will find it impossible to resist pressure from the rank and file to suspend the "cab rank" principle and allow barristers to refuse work. The obligation to accept a brief only arises when the fee offered is reasonable. The aim, of course, would be to allow barristers to boycott the CPS.

5. It is now impossible to postpone the introduction of the CPS. The commencement order bringing the relevant provisions into effect on 1st April in the Metropolitan counties has been made. The Act does not allow the police to continue to prosecute once the responsibility has passed to the Director.

6. A few years ago we could perhaps have sat this out on the basis that such action would not attract sufficient support from individual barristers to be effective. Our judgment is that there are now three factors militating against this. The first is the great strength of feeling amongst the ordinary members of the Bar. Second, those who might break ranks and take the work would be those who can least easily switch to other work, namely the least able. The result is that cases will take longer and cost more. That will increase the backlog in the courts. Third, with the establishment of the CPS, fees for prosecutions will no longer be payable out of central funds on an individual case basis and assessed by taxing officers. Instead, they will be paid by the CPS out of its own vote. There is an urgent need for the DPP to establish an agreed machinery for the assessment and payment of such fees, but the Bar have declined to discuss this separately from the question of the level of fees.

7. Prosecution fee levels broadly follow those for defence lawyers on criminal legal aid. These since 1982 have been set by regulation. It is desirable that this should remain, whatever system is adopted by the CPS as the result of the change mentioned in the previous paragraph. In making those regulations, the Lord Chancellor has to have regard to the principle of allowing "fair and reasonable remuneration" for work done. The Bar and the Law Society have both argued for some time that the rates are much too low, and that the quality of the service which is being provided is suffering accordingly. Both sides of the profession commissioned independent consultants last year to look at the remuneration of lawyers doing criminal legal aid. The consultants estimated that at current fee levels a London criminal specialist of 10-15 years would earn only about £16,000, net of practice expenses but gross of tax (and their surveys showed that actual earnings were much less than this).

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This compares with just over £21,000 for a senior legal assistant in the Civil Service. They conclude that present scales do not provide fair and reasonable remuneration.

8. The report to the Law Society - from Peat Marwick Mitchell - found that overheads for firms carrying out criminal legal aid work have increased much faster than criminal legal aid rates in the period since the original regulations were made in 1982; that criminal legal aid work is far less profitable than other work undertaken by solicitors; and that partners in specialist criminal legal aid firms are poorly remunerated compared with their counterparts in the Government Legal Service.

26% 9. While further work needs to be done to analyse these reports, we are in no position to contest that they are at least consistent with our own opinion (based on our knowledge in this field) that we need to announce substantial increases immediately. We can hold off a final response to the Bar's claim for increases of 35%-40%, and that of the Law Society for 34% in London and ~~20%~~ elsewhere: but we must decide urgently what to do now, for the Bar are holding an extraordinary general meeting on 8th February. Their Bar Committee will need to know, at its meeting on Thursday 30th January, what to recommend to the extraordinary general meeting.

10. If we do nothing, or offer an increase only sufficient to reflect inflation, there will be a serious and damaging dispute with the profession. We have already described ways in which the CPS is dependent upon the co-operation of the Bar. But its present - moderate and sensible - leadership would almost certainly lose office if they fail to secure a substantial increase in fees, and other more difficult leaders would succeed them. This would greatly damage the profession. We should face a public row with the Bar over fee levels each year. We have so far managed to avoid Parliamentary debate on the remuneration regulations, but that would become impossible with no certainty that we should carry the day.

11. Our view is that in our own interests as a law enforcing Government we must now offer a substantial interim increase in fees. It is no use boosting the manpower and equipment of the police if we cannot secure the efficient conviction of the villains they catch. The minimum figure that will achieve our purpose is 20%. We should say that we will consider what the final settlement should be, and how fee levels should in future be assessed, in slower time. We cannot seriously maintain that fees are at a level where we can expect that good people can be attracted to the Criminal Bar if counsel at perhaps the peak of their career can earn only £16,000. A 20% increase would bring them up to only £19,200, considerably less than many Civil Servants of equivalent seniority. The profession will feel that at that figure we are doing them less than justice: but an increase of this order now should be enough to persuade the majority that we are serious in our objectives - of getting the CPS off the ground, and in the longer term of maintaining the viable independent profession to which we are committed.

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12. The provision for legal aid in the public expenditure white paper published on 15th January totals £356 million (£164 million criminal) in 1986/87 rising to £440 million (£192 million criminal) in 1988/89. This assumes a routine increase in criminal legal aid remuneration in line with inflation of around 5% from 1st April 1986. A 20% increase would add about £53 million to gross costs in a full year to the Lord Chancellor's programme, if it could be confined to criminal legal aid and related schemes, and a further £7 million in respect of prosecution costs to the CPS programme. But it would not be possible in practice to exclude civil legal aid from similar remuneration increase, and the additional cost of these would be of the order of £34 million.

13. So the additional cost of this will be around £95 million. There is recognition on the part of the profession that they will have to make changes which would improve efficiency, and that neither the state nor the private litigant can be expected to pay for what amounts to the restrictive practices. The Law Officers have had informal discussions with the Chairman of the Bar about this. He has indicated a number of items, including abolishing the requirement that a barrister must normally be accompanied by a solicitor when he appears in court. These changes would tend to reduce the cost, but it would remain substantial. We cannot pretend that we can absorb anything like the net addition on our existing programmes. The only way of doing so would be to make substantial cuts, which would be politically deeply damaging. The additional sum of £95 million would therefore constitute a claim on the reserve. We had warned the Chief Secretary of this in our bilateral last September, though the magnitude of the claim could not then be foreseen.

14. We are under no illusions about the popularity of lawyers. The popular press will criticise us for any increase in their fees. But the fact is that the people concerned are not those who are earning substantial sums, who do so by taking the more lucrative private work, and we shall have to say so. There is already recognition that lawyers dependant on legal aid are comparatively poorly paid. An editorial in last Friday's Daily Telegraph argued that without substantial increases there was a danger of legal aid degenerating into a second rate service manned by second rate lawyers.

15. There is never a good time to make increases in fees. Our judgment is that we must do so now. We recognise that this will be deeply unwelcome to you in view of the public expenditure consequences. But in view of the urgent need to reach an accord with the profession if the implementation of the CPS is not to be prejudiced, we see no alternative. We suggest that the best way to take this forward is for us to have an early discussion under the chairmanship of the Prime Minister.

But why not
abolish the
requirement
that a barrister
must be
accompanied
by a solicitor?

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16. We are copying this letter to the Prime Minister, Douglas Hurd, Tom King, Malcolm Rifkind, John MacGregor and to Sir Robert Armstrong.

Q: H of S: M.

Lord Chancellor

P.M. (fn M.H.)

Attorney-General

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