Review of U.K. Green Papers

Brett Walter analyses the Green Papers which are to provide the basis for reform of the English legal system.

The proposals by Lord Mackay, the Scotch Lord Chancellor, to restructure the legal profession and introduce contingency fees have apparently stirred up the English and Welsh Bar. In January 1989, the Lord Chancellor's Department released two Green Papers on "The Work and Organisation of the Legal Profession" (Cm.570) and "Contingency Fees" (Cm.571). The proposals contained in these blandly written documents have caused consternation in some quarters, principally amongst barristers, and some perplexity in political and commercial circles acquainted with the workings of the legal profession. It has been said that the main Green Paper on the legal profession is the latest example of Thatcherism meddling rather than muddling through. It is easy to agree that these Green Papers represent the triumph of abstract ideology over pragmatic common sense.

The favoured ideology is announced in vague terms: "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, although the Government believes that the public must also be assured of the competence of the providers of those services". The Green Papers implicitly state that the present system in England and Wales fails to live up to these supposedly Conservative articles of faith. Mention is made of relaxation of control of advertising by solicitors in recent years and the advent of licensed conveyancers competing with solicitors in recent years and the advent of licensed as examples of progress in the right direction, but it is difficult to identify specific criticisms of supposedly anti-competitive practices allegedly working to the detriment of consumers.

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Many of the observations in the main Green Paper are banal or naive both as to the present state of affairs and the desired end of the mooted reforms. For example, the Government is said to consider that the best way to ensure that the expertise of practitioners is matched to the demands of particular work so as to give the public the best choice of competent practitioners "is for areas of specialist expertise to be developed". One practical implication of "specialisms", as they are called in the main Green Paper, is to permit advertising by so-called accredited specialists. Ironically, the free-market argument involves the imposition of further regulation, by means of "The Lord Chancellor's Advisory Committee on Legal Education and Conduct" being reconstituted "as a vigorous and active standing committee" to advise on matters including the accreditation of specialists.

Advocacy is proposed as an exception to a general rule that no so-called specialism should be restricted to specialist practitioners alone. It is simply said that the Government believes "that the needs of the administration of justice requires special arrangements to be made" in the case of advocacy. What is not explained is why anything needs to be done to alter the present position in that regard.

A veiled criticism is that the Bar regulates itself, by and large, under the supervision of the Court. Not one specific criticism is made of any supposed shortcoming in this system. However, the proposal is for this to be overridden by a new system administered by bureaucrats in the Lord Chancellor's Department, and including the innovation of a Legal Services Ombudsman, with power to investigate particular cases and to control and recommend changes to general procedures. As well, it is proposed "that there should in future be written codes which specifically set professional standards". It is nowhere demonstrated in the Green Paper that the absence of "standards of this kind" in relation to barristers has led to any misunderstanding by barristers of their duties to clients and the Court, and in particular no example is given of the kind of written code which could be drawn so as to provide specific rules (as opposed to "guidelines", which are criticised for being such) for professional conduct, without narrowing the properly comprehensive nature of the profession's duties.

The proposal most resented by the English and Welsh Bar is for the expansion of rights of audience beyond barristers and the establishment of a certification process to identify persons entitled to practise as an advocate. Some of the concerns which have been expressed by the English and Welsh Bar lose their force in New South Wales, where we have competed with solicitor-advocates and a much smaller number of lay advocates in specified tribunals for a very long time. During that time, it would be fair to say, the New South Wales Bar has thrived, and so it is difficult for us to sympathise entirely with English and Welsh fears of their Bar's annihilation if it is exposed to competition from solicitors and laymen as advocates. In a sense, these concerns probably reflect less confidence than barristers are entitled to feel in their ability still to attract most of the quality advocacy work even after losing their monopoly.

The unspoken and almost insulting premise of this part of the main Green Paper is that the English and Welsh Bar does not provide an adequate advocacy service. Even accepting that no profession or institution is perfect, the reader is left to wonder whether a chapter is missing from the main Green Paper which catalogues the shortcomings of the present system. In fact, it is clear that change is proposed for its own sake and because so-called competition is said to be good in itself. The Green Paper announces that the Government considers that "rights of audience in the courts should be restricted to those who are properly trained, suitably experienced and subject to codes of conduct which maintains standards" except in the case of persons representing themselves. The Government's aim is "to ensure the widest possible choice of advocate for the client while at the same time ensuring that adequate standards of competence and probity are maintained".

The practical proposals to give effect to these sentiments include the Lord Chancellor's bureaucrats overseeing the education, qualifications and training of advocates "appropriate for each of the various courts", controlled by subordinate legislation. After the transitional period (during which all practising barristers out of pupillage are to receive "a full general certificate"), a progression is proposed from an academic course, through a vocational course, practical training in advocacy to the holding of a limited certificate for a certain period. Progression from stage to stage is to depend on satisfactory completion of the previous one. A "variety of professional bodies" apparently extending beyond the present Bar Council and Law Society is proposed as the monitoring authorities for the progress and certification of advocates. This covers the eventuality of lay advocates (if the word "lay" would continue to have any meaning after these reforms) such as accountants, surveyors, medical practitioners, architects and the like being certified to practice alongside barristers and solicitors. The Green Paper says that the "whole area of lay representation should be considered by the Advisory Committee"; presumably, more details of this alarming proposal are yet to emerge from the Lord Chancellor's Department.

As the Green Paper also proposes that judges be drawn from the class of "all advocates", in effect it proposes the eligibility of non-lawyers for elevation to the bench, and promotion from lower courts to the highest.

Fortunately, at least from the view of those who respectfully admire the wisdom of the majority judgments in Giannarelli, the Green Paper notes that the Government accepts the cogency of arguments in favour advocates' immunity from actions for negligence.

The main Green Paper deals with a number of other matters affecting barristers directly or indirectly. For example, the requirement for counsel to be instructed, usually, by solicitors, is to be scrapped in favour of a free market in which advocates including barristers can enter into direct relations, contractual in nature, with clients. The rules of any voluntary association which sought to prohibit its members from accepting instructions directly would have to be shown to the proposed competition authority not to operate "in an anti-competitive way". The Inns of Court are said to be the "prime examples of such bodies". The argument that the widest possible choice of advocate for the clients of many solicitors including small firms is provided by the independent Bar in its present form, and would be threatened by advocates setting up in large firms to accept instructions directly from clients, is rejected by the Green Paper by its simple expression of the Government's hope and expectation "that a free market for the provision of independent advocacy services will flourish", and a reliance on unspecified empirical evidence to suggest that traditional barristers will survive such competition.

The system of appointment of Queen's Counsel escapes relatively unscathed, although, ominously, it is said to be "a matter for the proposed new competition authority" to look into any rules about "the relative size of payments to Silks and other lawyers", which "appear to be difficult to justify".

Some of the practices of the English and Welsh Bar which are much more restrictive than apply in New South Wales are criticised in the main Green Paper, such as the requirement for the barristers to practise from approved chambers ultimately controlled by the Inns of Court and with the services of a clerk. According to the Green Paper, pupillages are much more haphazard there than in New South Wales, where the Bar Association provides centralised control.

More radically from the New South Wales view, the Green Paper suggests that barristers should be able to practise in partnership, incorporate and employ other barristers. In answer to the obvious argument that these developments would in fact restrict the number of advocates available to take a particular case, chiefly by reason of conflict of interest, the Green Paper simply recites the Government's belief that this risk "is outweighed by the advantages of greater efficiency and of easing the entry of new barristers into the profession", and would "be met by the fact that the forces of competition can be expected to fill naturally any gaps in the provision of advocacy services". No explanation is ventured as to any of these matters, particularly the appeal to supposed "efficiency".

The Green Paper effectively issues a challenge to English and Welsh Bar to prepare its defense to a more detailed attack, described in the Green Paper as "closer scrutiny" of areas such as rules dictating the location of conferences and other rules which may "impose unnecessary or unhelpful restrictions".

Another radical suggestion for the whole of the legal profession, and the Bar in particular, is that so-called multi-disciplinary practices including legal and other professions should be permitted. Combined with the proposed new regime as to advocates, the proposals are clearly intended to permit one-stop shopping to the detriment of, for example, an independent Bar. The Green Paper suggests that barristers should be able to join such practices. The problem of enforcing proper professional standards when there is a mixture of professions is scarcely addressed, except for the proposal that other professions may need to improve their standards up to the standard of "the highest common factor" such as that of the legal profession.

Otherwise, the Green Paper merely suggests that "each member of a multi-disciplinary practice should remain individually subject to the rules of his or her professional body", while at the same time remaining "personally responsible for the activities of the practice within their own professional field" and personally controlling the work involved. Conflicts of interest, the Green Paper blithely asserts, must be resolved by professional personal responsibility overriding responsibility to the whole practice and other members of it.

Advertising is proposed to be uniformly regulated for solicitors and barristers, so that a general liberty to advertise should be controlled only by a prohibition on misleading statements and on forms of advertising thought by some authority to bring the profession into disrepute. According to the Green Paper's reasoning, matters such as fees and desired areas of practice (as opposed to accredited specialisms) will therefore be proper to be advertised by barristers.

The Green Paper on contingency fees deserves full treatment on its own, and the subject matter is under consideration by the our Council's Rules Committee. However, it is notewor-

thy that the Government's conclusion is that "speculative actions on the Scottish model" should be legal in England and Wales. This would bring England and Wales into line with New South Wales, where counsel may appear on the basis that a proper fee (not affected in size by the amount of the verdict) will be charged only in the event of success. The Green Paper also suggests that some variants, under presently unspecified tight control, of the USA contingency system should be considered. Generally, this question appears to be at a much more rudimentary stage than those tackled in the main Green Paper, and much more work is likely to be done in England before any real proposals emerge for a contingent fee basis other than that to which we are used in New South Wales.

Two general impressions are striking for a New South Wales reader of these Green Papers. Firstly, there are differences between our Bar and the English and Welsh Bar which are more profound than has usually been thought - the monopoly on advocacy in the higher courts is the most important of these. These differences reduce somewhat the fellow-feeling we may otherwise have for our beleaguered counterparts in England and Wales. Secondly, the ways of professional reformers are apparently universal in several important respects, most notably in their fondness for a priori reasoning and the publication of bland generalisations simultaneously with the development of detailed plans for radical change. ❑

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So, Mr. Norman, Do I understand you to say that for you to earn as much as Mr. Hughes you would have to come at least second in the Tasmanian Open?