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PREM 19/2295

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PART 1

Confidential Filing

Legal Powers : Challenges against DHSS and other Departments.

JUDICIAL REVIEW

LEGAL PROCEDURE

PART 1:

December 1985

PREM 19/2295

Referred to	Date	Referred to	Date	Referred to	Date	Referred to	Date
~~11.12.85~~							
6.1.86.							
~~9.1.86~~							
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~~24.7.87~~							
~~7.8.87~~							
19.10.87							
PART ENDS							

PART 1 ends:-

AG TO RTA 19.10.47

PART 2 begins:-

RTA TO NLW 2.11.47

TO BE RETAINED AS TOP ENCLOSURE

Cabinet / Cabinet Committee Documents

Reference	Date
MISC 125(86) 15	10 July 1986

The documents listed above, which were enclosed on this file, have been removed and destroyed. Such documents are the responsibility of the Cabinet Office. When released they are available in the appropriate **CAB** (CABINET OFFICE) CLASSES

Signed J. Gray Date 5/3/2016

PREM Records Team

CONFIDENTIAL

10 DOWNING STREET
LONDON SW1A 2AA

From the Private Secretary

SIR ROBERT ARMSTRONG

JUDICIAL REVIEW

The Prime Minister has seen your minute of 12 October to Nigel Wicks on the above subject. She has asked that DHSS be included as a member of the group, in view of the number of difficult cases they are involved with. Other than that she has not commented on the detailed arrangements, and you may therefore assume that she is content with these.

P. A. BEARPARK
19 October 1987

CONFIDENTIAL

CONFIDENTIAL

Prime Minister

Content?

MP 14/10

Ref. A087/2890

MR WICKS

DHSS has some difficult cases - Add DHSS

Judicial Review

Your letter to Mr Saunders of 7 August records the Prime Minister's agreement in principle with the Law Officers' proposal for a small committee to consider issues in respect of which decisions in judicial review cases would pose significant difficulties for the Government. I have now discussed the details of this piece of machinery with the English and Scottish Law Officers, and the following proposals have their support.

2. I propose that there should be established a group of officials in the MISC series under a Chairman provided by the Cabinet Office and including members from:

Home Office
Department of the Environment
Law Officers' Department
Lord Advocate's Department
Treasury Solicitor's Department

? DHSS?

Other Departments would attend as required. The departmental representatives would normally be lawyers, but they would be accompanied by policy advisers as necessary.

3. Cases would be referred to the group either by Departments or by the Treasury Solicitor (or, for Scottish cases, the Solicitor to the Secretary of State for Scotland). The issues that should be referred would include both actual cases before the courts and situations where there was a threat or strong likelihood of a legal challenge being made. Guidance would be

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issued to Departments to make clear that the group would be concerned only with the most important cases, which might be described as those that:

1. are of potential political sensitivity;

2. might have important implications affecting Departments other than that which is directly challenged;

3. might be legally innovatory; and

4. could involve considerable expense if they were lost.

4. In many instances the group might wish simply to pass their comments to the Law Officers (in England or Scotland) so that they could be among the matters that the Law Officers took into account in considering the handling of the case. But there might be circumstances in which the group would wish to take other action, and I believe that they should be given freedom to develop whatever working arrangements are found most useful in practice. Accordingly I recommend that the group should be given the following terms of reference:

"To consider, at an early stage, the implications of potential or actual judicial review cases or similar litigation involving the Government and raising significant issues, other than cases within the terms of reference of other Committees; and to report to the Law Officers or other Ministers as appropriate."

5. I should be grateful for the Prime Minister's agreement to the establishment of a group of officials with the composition and terms of reference set out in this minute, and to the broad working arrangements that I have described.

RTA

12 October 1987

ROBERT ARMSTRONG

LEGAL PROC. Negs Powers Dec 85

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10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

7 August 1987

Dear Richard,

JUDICIAL REVIEW

The Prime Minister was grateful for the Law Officers' minute of 22 July, and is in general agreement with the conclusions and recommendations.

She understands that Departments are making good progress in implementing the recommendations of MISC 125. She agrees with the Law Officers that Ministers and their policy advisers should alert their legal advisers and Parliamentary Counsel to aspects of policies which are likely to be especially liable to challenge, so that special care can be taken on those aspects, and she is content with the procedure proposed by the Law Officers in this regard. She also agrees in principle with the Law Officers' proposals for a small committee to consider issues in respect of which decisions in judicial review cases would pose significant difficulties for the Government, and she is asking the Secretary of the Cabinet to discuss this in detail with the Law Officers, with a view to his putting forward proposals for the establishment, composition and terms of reference of such a committee.

I am sending copies of this letter to the Private Secretaries to members of the Cabinet, other Ministers in charge of Departments, the Scottish Law Officers and to Sir Robert Armstrong.

Yours sincerely,

Nigel Wicks

N L WICKS

M. L. Saunders, Esq.
Law Officers' Department

CONFIDENTIAL

Prime Minister
Content for me
to write to the Law
Officers' Dept as
in the draft attached?
N.L.W.
6.8

Ref. A087/2386

MR WICKS

Judicial Review

Flag A

The Law Officers sent me a copy of their minute of 22 July.

2. The Law Officers discuss in an annex the specific changes in procedures suggested by the Secretary of State for the Environment. I doubt whether there is any mileage to be gained in pursuing the suggestions further in face of the Law Officers' comments.

3. The first of the Law Officers' own suggestions - that it is for Ministers and the policy advisers to alert legal advisers and Parliamentary Counsel to aspects of policy which are especially liable to be challenged - is clearly unobjectionable and can be endorsed. Indeed I am surprised that the Law Officers have reason to think that it does not happen already.

4. Their second suggestion - for a committee of departmental legal advisers under Cabinet Office chairmanship to analyse the implications of judicial review decisions and report to the Law Officers - is modelled on the OD(DIS) machinery which has been set up to deal with problems of unauthorised publication of sensitive defence, intelligence and security material. Legal advisers have been much involved in that machinery, and have come to see considerable value in the machinery and considerable merit in the performance of Mr Mallaby in chairing the official committee. I think that this is a useful idea, though I wonder whether a new committee should report only to the Law Officers or more generally to Ministers - perhaps in the Ministerial

Committee on Home Affairs. I should like to discuss this further with the Law Officers, with a view to submitting formal proposals to the Prime Minister for the composition and terms of reference of such a committee.

--- 5. I attach a draft reply to the Law Officers' minute.

RA

ROBERT ARMSTRONG

6 August 1987

RTAADB

G.R.
Pl type N.

DRAFT LETTER TO M L SAUNDERS ESQ, LAW OFFICERS' DEPARTMENT

DASALV

Judicial Review

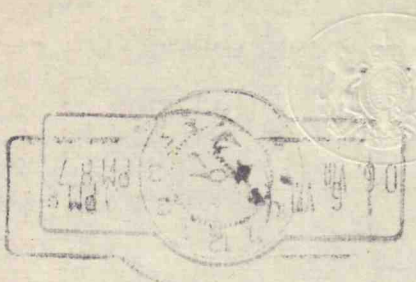
The Prime Minister was grateful for the Law Officers' minute of 22 July, and is in general agreement with the conclusions and recommendations.

She understands that Departments are making good progress in implementing the recommendations of MISC 125. She agrees with the Law Officers that Ministers and their policy advisers should alert their legal advisers and Parliamentary Counsel to aspects of policies which are likely to be especially liable to challenge, so that special care can be taken on those aspects, and she is content with the procedure proposed by the Law Officers in this regard. She also agrees in principle with the Law Officers' proposals for a small committee to consider issues in respect of which decisions in judicial review cases would pose significant difficulties for the Government, and she is asking the Secretary of the Cabinet to discuss this in detail with the Law Officers, with

a view to his putting forward proposals for the establishment, composition and terms of reference of such a committee.

I am sending copies of this letter to the Private Secretaries to those who received copies of the Law Officers' minute of 22 July.

Agreed MS



LEGAL PROCEDURE

JUDICIAL

REVIEW

12/15

MANAGEMENT IN CONFIDENCE

SUBJECT cc MASTER

File

DSG

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

SIR ROBERT ARMSTRONG

GOVERNMENT LEGAL SERVICE

The Prime Minister discussed with you this morning the proposed review of the Government Legal Service on which you minuted her on 20 July.

The Prime Minister said that she was not convinced that the review, chaired by an outsider and with considerable outside representation, was the right way of dealing with this matter. The better approach was for your senior colleagues and yourself to come to a view on the needs and development of the Government Legal Service, taking account of outside advice as necessary. One possibility would be to commission a Permanent Secretary, like Sir Kenneth Stowe or Sir Angus Fraser, to carry out a review and to produce a report.

You undertook to consider the approach suggested by the Prime Minister.

N.L.W.

N. L. Wicks

24 July 1987

MANAGEMENT IN CONFIDENCE

DSG

PRIME MINISTER

JUDICIAL REVIEW

1. You asked for our views on the various proposals which were canvassed in colleagues' responses to our minute of 17 March. We asked Departmental legal advisers to consider these proposals and we have been greatly assisted by their reflections based on their Departments' experience of judicial review proceedings. Our consideration of the rules of procedure has, of course, been restricted to those of the English Courts. Procedures in Scotland are very different and have only been in operation since 1985. The Lord Advocate and the Solicitor General for Scotland concur with our views in this minute. They do not consider that experience of the first full year of the operation of the new Scottish procedures suggests any changes in the very different English procedures.

2. We appreciate the concern expressed by colleagues at the still expanding scope of judicial review and the difficulties facing decision makers in some areas in predicting how the Courts will react. We recognise also that in some cases, particularly where the concept of "Wednesbury unreasonableness" is applied, the distinction between procedures and merits can become thin. We believe, however, that colleagues accept that these are matters with which, during a phase of judicial activism, we must cope. The recommendations of the Official Group (MISC 125) are in the course of implementation. We note that a number of colleagues have summarised the work currently being undertaken in their own Departments in this respect.

3. Colleagues rightly identified the danger that defensive decision-making might emerge as a reaction to the perceived risk of judicial review. This must be guarded against. There is a large difference between excessive caution and the increased care, both in the preparation of legislation (including the formulation of instructions) and in the

J

execution of Government policy, that is necessary. The present discipline of judicial review will not lead to excessive caution, however, so long as a proper understanding exists of the Courts' functions and approach. We certainly endorse the view that Departments should defend appropriate cases vigorously, and appeal adverse decisions where there are reasonable prospects of success. For example, we shall recommend that the first propitious opportunity be taken to challenge in the Court of Appeal the dictum of Hodgson J. in Herbage No. (2) that a stay amounting to an interim injunction could be obtained against the Crown, contrary to our view of the true construction of the Crown Proceedings Act. We welcome the suggestion that Departments should share their experience of litigation in this area, and their experience of new approaches to legislation and decision-making; we comment on this below.

4. We endorse Nicholas Ridley's comments, citing the fact that the Rates Act 1984 has so far stood up well in an area of high sensitivity, as to the need to keep legislation simple, clear and unambiguous, even at the risk of some presentational disadvantage. He has also suggested for consideration a number of changes in the law relating to judicial review proceedings, with which we deal separately in the Annex to this minute. We conclude that such changes could not be recommended.

5. We would, however, propose two further changes in Government procedures (in addition to the recommendations of the Official Group) to minimise the risk of adverse judicial review proceedings.

(a) Departments are already acting on the recommendation of the Official Group that, in areas of legislation (such as local government finance) involving complex technical provisions and high probability of challenge, the advice of expert Counsel should be obtained. But legislation generally must also be scrutinised for likely subjects of challenge. Since the source of the challenge with which colleagues are principally concerned generally lies in opposition to a legislative provision on policy

grounds, which then prompts a minute examination of the drafting of the legislation, the lead in departmental scrutiny of draft Bills must come from Ministers and their policy advisers. It is for them to alert their legal advisers and Parliamentary Counsel to those aspects of the policy which are likely to be principally opposed, so that the draftsman can focus on the likely areas of technical challenge. In case of difficulty, legal advisers should (following the usual principles concerning the reference of questions to the Law Officers) seek the Law Officers' advice and should do so as early as possible in the drafting process. We believe that this procedure for scrutiny should assist in avoiding subsequent applications to the Court.

(b) As we mentioned in our minute concerning the resources available to the Law Officers (paragraph 3), the Treasury Solicitor is considering with the Legal Group Management Committee whether the organisation and structure of the Government Legal Service is appropriate for the handling of judicial review cases. We understand that he is likely to recommend the establishment of a small committee of senior Departmental lawyers under Cabinet Office chairmanship to be available, at the earliest stage, to consider issues in respect of which decisions in judicial review cases could pose significant difficulties for the Government. Cases could be referred by the Treasury Solicitor to the committee, which would report to the Law Officers. It would be for us to alert colleagues to any case likely to affect the interests of the Government as a whole. We believe that such a procedure would be a useful addition to the Official Group's recommendations, bringing about a greater degree of co-ordination in the Government's handling of judicial review proceedings.

6. Finally, we endorse most strongly the importance attached by Geoffrey Howe and Douglas Hurd and other colleagues to the strength and calibre of the Government Legal Service. It is essential that Departments are able both to recruit and retain lawyers of proper calibre. While we fully recognise the need to keep costs under strict control, a lack of adequate legal expertise which results in legislative error or adverse litigation not only impedes good government but can be profoundly expensive.

7. Copies of this minute go to Cabinet Ministers, other Ministers in charge of departments, the Scottish Law Officers and to Sir Robert Armstrong.

P.M.

M.

22 July 1987

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ANNEX

COMMENTARY ON CHANGES IN THE RULES RELATING TO JUDICIAL REVIEW PROCEEDINGS, SUGGESTED BY THE SECRETARY OF STATE FOR THE ENVIRONMENT

A. Applications for leave should be heard inter partes, rather than ex parte

1. The purpose of the leave procedure is to prevent the courts' time being wasted on misguided, trivial or otherwise hopeless cases. At the same time it removes the uncertainty for administrators which would occur were every application to proceed to a full hearing. This is a vital element in the procedure for judicial review. Consideration of the question whether the applicant has disclosed an arguable case is necessarily relatively short and is usually determined without oral proceedings. Nevertheless, when the official Group considered these matters, the statistics suggested that at least 50% of cases failed at the leave stage. Although most applications for leave are considered without a hearing, the Judge is free to hear the potential respondent if there is a hearing and sometimes Departments have taken advantage of this possibility. In some of those cases, leave has been refused though it is impossible to say whether the Judge might have refused leave without hearing the Department's representations.

2. The aim of the proposal to introduce inter partes hearings would be to increase the proportion of applications for leave which are refused. It is possible that the proposal might have this effect in a small number of cases. But there is no evidence which leads us to conclude that the Judges are not properly exercising their discretion, and set against the possible advantage are drawbacks which are considerable. The general introduction of inter partes hearings for leave would tend to distort the purpose of such applications and would inevitably tend to lead the Court into

J

consideration of the merits of the case. Not only would this consume scarce judicial time, but it would also place the Government as respondent in the position of having to defend its case before it had time to assemble its own evidence. There is a clear risk that the Government's position could be jeopardized.

3. We think risks of the same nature attend the possibility, which we have considered, of providing a respondent's right of appeal against the grant of leave.

4. A suggestion has been canvassed that the provision for inter partes hearings might be confined to cases involving public bodies and the Government. It was pointed out by the Department of the Environment that their greatest difficulties arise in cases brought by local authorities. We consider that such a proposal would be very difficult to justify. Judicial review is a means open to all to challenge the legality of decision-making by those in office and it would be difficult to justify subjecting individual applicants to special rules. We consider, as mentioned at the beginning of this section, that the judiciary can and should be relied on to make the system for application for leave work as intended.

B. Applications for leave should be heard by a panel of Judges

5. Before 1980 applications for leave were generally heard by a Divisional Court, but the system was then changed as part of the second major overhaul of the rules, to save judicial time and thereby to ensure that judicial review was a speedy remedy. We think that to return to the pre-1980 system would be a mistake, particularly having regard to the increasing volume of judicial review cases, and we do not believe that hearings by panels of Judges would be likely to lead to any decrease in the rate of granting of applications for leave.

6. It has been suggested that applications should be heard by Judges familiar with the subject matter. This is plainly very desirable, but it is an objective which cannot always be achieved. The Lord Chief Justice established in 1981 a panel of Judges, expert in administrative law, to hear judicial review cases, and this has undoubtedly further assisted in matching judicial expertise with the kind of litigation concerned. In Scotland, such cases have also in practice tended to be assigned to a few Judges who have now a degree of expertise in this field. We do not consider that the Judiciary can be expected to find an exact match between a Judge's knowledge of subject areas and the cases he considers.

C. Leave to amend grounds of application should be made harder to obtain

7. The proposal is that it should be made more difficult for an applicant to vary the grounds of challenge during the course of the proceedings. At first sight, this suggestion is most attractive. After all, an applicant should have his tackle in order before he begins, and should not be permitted to go fishing in the hope that something will turn up as the proceedings progress. But when one begins to flesh out this idea, it becomes clear that it would be impossible to introduce such a restriction without compromising the interests of justice. The Court must do justice in the individual case, and if a new point arises during the course of proceedings as a result of fresh information or even Counsel spotting something late, the Court is bound to take notice of that point. Indeed, it may raise new matters of its own motion. The Judges already have power to disallow late amendments and to permit amendments only on terms, for example as to adjournment, to enable the respondent to prepare in relation to the new point. We consider that Departments themselves may wish more frequently to urge the courts to exercise this discretion. Ultimately, however, we think this problem is an inevitable incident of litigation. We should remember that the possibility of amendment is available to both sides; in the GCHQ case we were glad to introduce a new point when the case reached the Court of Appeal, and it was on that new point alone that

we won in the House of Lords.

D. Courts should take greater account of consequences of their decisions

8. The Department of the Environment put the point very forcefully to us that decisions in judicial review cases may have very wide ranging effects, and that those effects may be felt, in particular, by third parties who have been unable to make representations in the course of the proceedings. The result of the Greenwich case, for example, was unfair to other London local authorities affected. The proposal is that there should be more scope for a court to decline to disturb the position, even though it upholds the challenge, if the remedy would produce a situation less just than the status quo.

9. We think the courts already have the necessary power in this respect. Relief in judicial review cases is a matter for discretion, and Departments have experience of the Courts refusing in the exercise of their discretion to grant the requested relief. Government Departments are well placed to bring to the Courts' attention, for this purpose, the likely consequences of the grant of particular forms of relief and to submit that particular remedies should not, in the Courts discretion, be granted. We do not consider that the rules could be changed to go beyond this position.

LEGAL PROC. Legal Power Decds

PRIME MINISTER

GOVERNMENT LEGAL SERVICE

In his minute at **Flag A**, Robert Armstrong makes detailed proposals for a review of the Government legal services and the legal resources available to Government. This arises from the Law Officers' minute of 7 April in which they said that they were:

> ".. gravely concerned for the state of morale in the Government legal service, and accordingly for its future efficiency. It is a matter of great anxiety to us that the present prospects of a strong and efficient Government legal service are so poor."

After other Ministers had endorsed these comments, Robert Armstrong suggested **(Flag B)** that he should discuss with interested Permanent Secretaries the possibility of a wide study of the matter. My minute at **Flag C** recorded your agreement to this discussion with Permanent Secretaries.

Some comments on the very wide draft terms of reference suggested by Robert Armstrong at Annex A to his latest minute:

(i) The reference to "the public service framework" is obscure. It is meant to convey the thought that the Government legal services must not expect to be able to provide a Rolls Royce type of service which, say, a merchant bank would expect from its legal department. Limitations on pay and resources generally rule that out. An admirable thought, but not one which is captured by the words in the terms of reference. Perhaps better to replace the phrase with: "and to the framework

DCACAL

of Civil Service management and operations within which.....".

(ii) The reference at inset (ii) to the most effective and economical procurement of legal expertise ought to include an explicit reference to the possibility of privatising or contracting out certain legal services. This might be achieved by inserting after the words "... expertise can ...", the phrase, "taking account of the Government's policies on privatisation and contracting out services",

(iii) I am a little surprised to see that the terms of reference include an examination of the remuneration of the legal service. It seems to me that if asked to give a view on remuneration, the committee will recommend higher pay, with difficult consequentials for other parts of the Civil Service. I suggest that before the terms of reference are promulgated, further thought needs to be given to this aspect.

Robert Armstrong puts forward names for the review committee at annex B. There are some odd names here. I do not think that Sir John Harvey Jones, whatever his eminence as an industrialist, is the right man to chair the Committee. I suggest, as Chairman, in order of preference:

Sir Michael Edwardes
Sir Austin Pearce
Sir Kenneth Durham
Sir Austin Bide

What do you think?

The suggestions for former Ministers look a little odd. Both Mr. Jenkin and Mr. Brittan are themselves lawyers; and I rather wonder whether Mr. Brittan is the right man for this job, especially since he is a serving MP.

If you agree, I will put these points to Robert Armstrong. In any event, I do not believe that the letter at annex C to his minute which he suggests should be sent to the Law Officers' Department should at this stage be copied to all members of Cabinet. This would be bound to lead to a premature leak of the committee. Much better at this stage of consultation to send the letter only to the Law Officers' Department, Lord Chancellor, Lord President, Chancellor of the Exchequer, informing the rest of the Cabinet just before the committee is announced.

N.L.W.

N.L. WICKS
20 July 1987

A

Ref. A087/2146

MR WICKS

I am now able to make proposals to the Prime Minister for the review of the Government Legal Services and the legal resources available to Government, which I proposed in my minute of 8 May (Ref A087/1290) and the Prime Minister, by your minute of 11 May, approved in principle. These proposals are made after consultation with the Departments concerned.

2. It is proposed that the terms of reference should be as at --- Annex A. These will allow the review group to consider the possibility of contracting more of Government legal work out to private sector law firms, as suggested in your minute.

3. It is proposed that the review group should consist of a mixture of "insiders" and "outsiders": people with experience of the provision and use of legal advice in Government, and people with experience of the provision and use of legal advice in the private --- sector. I attach at Annex B a suggested composition (with some alternative names). If the Prime Minister is content, I will sound out the willingness of these people to serve.

4. Sir Robin Ibbs does not want to be a member of the review group, but will be very ready to contribute anything he and the Efficiency Unit can contribute to the review group's work.

--- 5. I attach at Annex C a draft letter to the Law Officers' Department, conveying the Government's decision to set up this review.

RA

ROBERT ARMSTRONG

20 July 1987

ANNEX A

The amendments are suggested changes.

REVIEW OF GOVERNMENT LEGAL SERVICE

Draft Terms of Reference

To consider, having regard to the Government's requirements for legal advisory and other services and to the public service framework within which the Government legal service carries out its functions:

Civil Service management and operations

1. What legal and managerial expertise is needed by the Government in the handling of legal aspects of its business in England and Wales;

taking account of the Government's policies on privatisation and contracting out services,

2. how that expertise can most effectively and economically be procured and organised to meet these needs;

3. what changes are needed in the management of legal staff in Government service, including their recruitment, retention, training, deployment and remuneration, so as to make best use of them;

and to make recommendations.

The Committee is asked to report by 31 July 1988.

ANNEX B

REVIEW OF GOVERNMENT LEGAL SERVICE

Suggested Composition

	First Choice Suggestion	Alternatives
Chairman	Sir John Harvey-Jones	Sir Austin Pearce Sir Kenneth Durham Sir Austin Bide Sir Michael Edwardes
Members:		
Solicitor in practice	Mr F H Charlton (Linklaters)	Sir Max Williams (Clifford Turner) A W Mallinson (Slaughter and May)
Lawyer in industry	P H Dean (former Secretary, RTZ)	J D Keir (former Secretary, Unilever)
Former Minister	The Rt Hon Patrick Jenkin MP	The Rt Hon Leon Brittan MP
Former Permanent Secretary	Sir Angus Fraser	Sir Kenneth Stowe Sir Lawrence Airey
Government Lawyer	Mr Garth Jenkins, MAFF	
"User" civil servant	Mr W N Hyde, Home Office	
"Provider" civil servant (with specific reference to Crown Prosecution Service)	Mr John Merchant, DPP	

ANNEX C

DRAFT LETTER TO MICHAEL SAUNDERS ESQ, LAW OFFICERS' DEPARTMENT

The Law Officers sent the Prime Minister a minute on 7 April 1987 about the adequacy of the resources available to the Law Officers.

The Prime Minister, having considered that minute and the comments on it by other members of the Cabinet, has decided to set up a Committee to review the Government's requirement for legal advisory and other services, and the functions, organisation recruitment and management of the Government Legal Service. She proposes to give the Committee the attached terms of reference, which will enable it to consider inter alia the scope for contracting more Government legal work out to the private sector.

She proposes that the Committee should be chaired by an industrialist, and should include representatives of lawyers in private and industrial practice as well as representative users (former Ministers and officials) and providers of legal services in Government. A suggested list of members is attached as Annex B.

If the Law Officers are content, she proposes to set the review up as soon as possible, and ask it to report by 31 July 1988.

I am sending copies of this letter for information to other members of the Cabinet and to Sir Robert Armstrong.

LEGAL PROCEDURE

JUDICIAL

REVIEW

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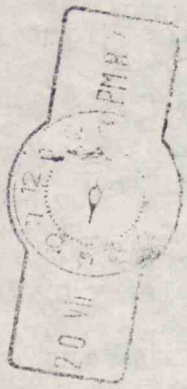

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LAW OFFICERS' DEPARTMENT
ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

M.L. SAUNDERS
LEGAL SECRETARY

CONFIDENTIAL 26.6

N L Wicks Esq.
Principal Private Secretary
10 Downing Street
London SW1A 2AA

25 June 1987

Dear Nigel.

JUDICIAL REVIEW

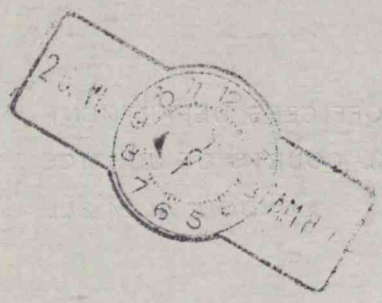
In your letter to me of 29 April you informed me that the Prime Minister would like to receive the Law Officers' views on the various proposals canvassed by Ministers in two months time. Since that letter was received work has of course been undertaken, in consultation with other Departments, on the various points made in the correspondence.

The Attorney General attaches great importance in particular to the new Solicitor General familiarising himself with the work that has been completed and to his reaching his own view on the issues. The Solicitor General, since his appointment, has however been fully occupied with the preparation of the extremely importantHeyzel Stadium Extradition case which will be heard by the Judicial Committee of the House of Lords next week and in which the Solicitor General will, at the request of the Attorney General, be leading for the Crown (not least as a mark of the importance the Government attaches to this case). He has not yet had the opportunity to consider the papers on judicial review with the care he needs to give to this most important subject. .

The Law Officers will accordingly submit their views to the Prime Minister as soon as possible after the conclusion of the hearing of the Heyzel Stadium case.

Yours sincerely,
Richard Saunders.

M L Saunders



LEGAL PROCEDURE

JUDICIAL

LEGISLATIVE

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CONFIDENTIAL

PRIME MINISTER

ADEQUACY OF RESOURCES AVAILABLE TO THE LAW OFFICERS

I have followed with interest the correspondence following on the Attorney General's minute to you of 7 April.

I would strongly endorse the points which he makes, as being in line with the experience of my Department in recent years. The effective prosecution of crime in Scotland depends almost entirely on having an efficient and well-staffed Procurator Fiscal Service. It is necessarily demand-led.

The pressures of an increased work-load, insufficient prospects of promotion and a level of salary for experienced personnel which is not commensurate with earnings to be made in private practice, has been reflected recently in the loss of a number of such experienced officers to private practice. This is a disturbing trend. Such losses cannot be made good by recruitment from outside nor by recruitment at lower levels. The consequence is that at present further pressure is being placed upon those who remain in the Service particularly in the higher grades, and this threatens the morale and with it the efficiency of the Service as a whole.

I am copying this minute to all members of the Cabinet, to the Law Officers and to Sir Robert Armstrong.

C&L.

CAMERON OF LOCHBROOM

21 MAY 1987

NBPM

Prime Minister

ADEQUACY OF RESOURCES AVAILABLE TO THE LAW OFFICERS

I have read the Law Officers' minute to you of 7 April and the comments which various colleagues have made about the precarious condition of the Government Legal Service. I am equally concerned.

The Department of Transport has continuing requirements for primary and secondary legislation to implement our policies and programmes, as well as on-going regulatory functions and the direct executive work of improving the trunk road network. All these activities require high quality legal advice and assistance if we are not to make serious and potentially damaging mistakes.

The Department is served by an out-station of the Treasury Solicitor's Department with a complement which has been slimmed down to the lowest practicable level. Much of the work is very demanding and because of the volume of work by comparison with the resources available it is not possible for the lawyers to give as much time as they would wish to carrying it out.

The slimness of complements in the Legal Service generally and the fact that Departments are often under-staffed means that when there is a particularly heavy demand in one area good lawyers have to be transferred at short notice from one Department to another. We are robbing Peter to pay Paul.

At the same time as the Government Legal Service has been losing lawyers, the nature and volume of our policy initiatives have increased the requirements for legal advice, above the level needed for ensuring that the functions of Departments are safely kept working, and at the same time we are seeking to minimise the risk of making mistakes or being successfully challenged by way of judicial review.

I am in full agreement that the Law Officers have indicated a serious problem and I agree with colleagues that if it is not dealt with quickly we may be faced with serious difficulties. So I welcome the consideration which the Treasury is giving to the needs of the Treasury Solicitor's Department as a first step.

I am copying this minute to all members of the Cabinet, the Law Officers and to Sir Robert Armstrong.

JOHN MOORE

20 MAY 1987

1282/080

CONFIDENTIAL

FROM: CHIEF SECRETARY
DATE: 15 MAY 1987

PRIME MINISTER

ADEQUACY OF RESOURCES AVAILABLE TO THE LAW OFFICERS

I have seen the Lord Chancellor's minute to you of 13 May, and earlier contributions from colleagues following the Law Officers' minute to you of 7 April.

2. I entirely agree that it is essential that we have an effective Government Legal Service and therefore that good quality legal advice to Government from lawyers in our own employment (rather than just from the Bar) is an issue which needs to be addressed.

3. I agree with the Lord Chancellor that questions need to be asked about the way in which the Government Legal Service is organised and managed, and how the expertise of lawyers in government can best be brought to bear. I do not think that this is simply a question of pay; and in that context we need to bear in mind the risks of even greater legal aid spending, since the Bar last year used the pay rates of Civil Service lawyers in support of their own remuneration claims.

4. I therefore support the proposal for a review; but I think that this should be chaired by an individual from outside Government. I suggest that Sir Robert Armstrong be invited to carry forward the task of consulting with departments on the terms of reference and membership.

5. I am copying this minute to all members of the Cabinet, to the Law Officers and to Sir Robert Armstrong.

JOHN MacGREGOR

LEGAL PROCEDURE – Judicial Review

12/85

NBPM

CONFIDENTIAL

PRIME MINISTER

Kap
??
Tue 11th

ADEQUACY OF RESOURCES AVAILABLE TO THE LAW OFFICERS

I have read the Law Officers' submission to you of 11 April in which they express concern about the present state and prospects for the Government Legal Service. I share their concern.

2 Experienced lawyers are essential for many parts of my Department's work, for legislation, for advice and for regulation. In recent years our needs have steadily grown in quantity and quality. Much of the work is particularly demanding. It has been increasingly difficult to retain our better people : the high quality work on commercial, and industrial and regulatory policy issues which they do make them particularly attractive to the financial sector and to industry and they are constantly being lured away by rewards, including fringe benefits, which we are nowhere near matching. This group of our staff have a highly marketable skill and though the work in Government continues to attract many because of its instrinsic interest, there is a limit to financial sacrifices they will make on behalf of themselves and their families. It is not enough that we may still be able to get some recruits, because even where satisfactory candidates are available, it takes years to rebuild the experience of working within Government and of issues peculiar to Government.

DW3CCE

CONFIDENTIAL

3 Although I still enjoy the services of very able people at middle and senior levels in my Department, I am seriously worried at the drain of experience which has taken place over recent years. I feel we are now much more on a knife edge, if any significant members at middle or senior levels were now to leave : it will then be too late to take remedial measures.

4 I feel that the Law Officers have identified a real problem which will need to be addressed quickly if the legal services available within Departments are to be maintained at an acceptable standard.

5 I am copying this minute to all members of the Cabinet, to the Law Officers and to Sir Robert Armstrong.

P.C.

PAUL CHANNON

15 May 1987

DEPARTMENT OF TRADE & INDUSTRY

DW3CCE

LEGAL PROCEDURE: Judicial Review

Dec 1985

CF

BF this letter together with the Law Officers' response to my letter of 29 April at Flag. PM can see later

NLW 13.5.

CBS

PRIVY COUNCIL OFFICE

WHITEHALL, LONDON SW1A 2AT

13 May 1987

Dear Nigel,

JUDICIAL REVIEW

Vat May

Among the points made in your letter to Michael Saunders of 29 April, copied to me, you asked for the Lord Privy Seal's views on the suggestion by the Secretary of State for the Environment of an accelerated procedure for Bills prompted by adverse decisions at judicial review, possibly on the lines of the procedure for Consolidation Bills or by some form of order making power applicable in such circumstances.

Clearly, any need for additional Government legislation arising from Court judgements is an extra burden on the Parliamentary programme and an undesirable complication in managing Government business. The Lord Privy Seal therefore strongly endorses the need for the drafting of legislation to take account of judicial review, and to minimise, wherever possible, the risk and effects of adverse Court judgements. Furthermore, he has an instinctive sympathy with the suggestions of the Secretary of State for the Environment. That said, however, he does not consider that there is any realistic possibility of Parliament adopting an accelerated procedure for Bills arising from adverse decisions in the Courts. To be workable such a major procedural innovation would need a measure of all-party support - or at least acquiescence - following some form of enquiry and recommendation by a joint House body. The principal obstacle to any such support would, in the Lord Privy Seal's view, be the unlikelihood of arriving at an agreed definition of the circumstances in which it could be shown that, as proposed by the Secretary of State for the Environment, the letter of the adversely reviewed legislation 'failed to reflect accurately what Parliament intended', and in which the new procedure might therefore be applied.

The Lord Privy Seal considers that the likely Parliamentary reaction to any such proposal would be strongly adverse, as was illustrated by what happened when, following a recommendation (106) made by the Renton Committee on the Preparation of Legislation, a Bill was introduced in 1977 in the House of Lords to 'facilitate the correction of mistakes in Acts of Parliament'. Although this Bill was designed merely to enable clerical errors to be corrected by Order in Council on the basis of an explanation by the Clerk of the Parliaments, it immediately ran into widespread criticism, partly on general constitutional and legal grounds, and partly on the argument that facilitating the correction of statutes would encourage slipshod initial drafting. The Bill had to be withdrawn before its Second Reading. The Secretary of State for the Environment's proposal would of course be much more far-reaching insofar as its scope would depend not merely on whether a 'mistake' had been made, but on a potentially more contentious interpretation of Parliament's 'original intention' in the legislation concerned. To that extent it would seem likely that its reception in both Houses would be even less favourable than that accorded to the much more limited 1977 proposals, and the chances of the necessary measure of general agreement that much more remote.

Accordingly, in the Lord Privy Seal's view, an accelerated Parliamentary procedure for legislation arising as a result of judicial review is not a serious 'starter'. He thinks that - as the recent Social Fund (Maternity and Death Benefits) Act shows - a defect resulting from what is genuinely no more than a slip in the drafting can be expected to be repaired with no great Parliamentary problems under normal procedures.

I am copying this letter to the Private Secretaries to Members of the Cabinet, Ministers in charge of Departments, the Socttish Law Officers and to Sir Robert Armstrong.

Yours sincerely,
Steven Wood.

S N WOOD
Private Secretary

Nigel Wicks Esq
Principal Private Secretary to
the Prime Minister

LEGAL PROCEDURE – Judicial Review

12/85

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

LORD CHANCELLOR

HOUSE OF LORDS,
LONDON SW1A 0PW

NBBD

CONFIDENTIAL

PRIME MINISTER

ADEQUACY OF RESOURCES AVAILABLE TO THE LAW OFFICERS

I have followed the exchange of correspondence on this topic with keen interest since the Attorney General's minute to you of 7 April.

This is a long-standing problem, and I agree we must do everything in our power not merely to improve the morale of members of the Government Legal Service, but also to ensure that it attracts and retains a proper share of the available legal talent. But there are a number of different problems here, and they are not necessarily matters which are going to be solved by money alone. We need to have a much clearer idea than certainly I myself have at present about the reasons why the Government fails to attract better lawyers, how it uses them, what the relationship should be between lawyers and administrators and how we can retain and motivate members of the Legal Service.

I think that the whole range of problems, organisational, functional and of morale, pay and personnel management ought to be looked at very thoroughly by a group of officials who should be charged to put proposals to Ministers. I see that the Legal Group Management Committee is already engaged on an examination of the adequacy of the Service to cope with judicial review cases. I wonder whether that Committee's remit might not be extended to cover the wider issues that in my view need to be studied. I suggest that these should include the way in which we use lawyers in the Government, and whether we could not also make use of good quality graduates with law degrees, who did not have formal legal qualifications. All the same it is better to choose those with some experience of practice and in this we have to compete in the open market for experienced professionals.

I am copying this minute to all members of the Cabinet, the Law Officers and to Sir Robert Armstrong.

H: of S: M.

13 May 87

CONFIDENTIAL

LEGAL PROCEDURE

JUDICIAL REVIEW

12/15

MINISTRY OF AGRICULTURE, FISHERIES AND FOOD
WHITEHALL PLACE, LONDON SW1A 2HH

NBPM

From the Minister

CONFIDENTIAL

PRIME MINISTER

ADEQUACY OF RESOURCES AVAILABLE TO THE LAW OFFICERS

I have seen the Law Officers' minute to you 7 April, and the comments of colleagues on what is said in that minute. I entirely agree with the view that it is in the Government's interest to ensure that its increasing volume of legal business is handled by a strong and effective Government Legal Service, and I believe the Law Officers are right to draw our attention to the recruitment and other problems which presently exist in that Service.

As the Law Officers say, their remit arose in the context of our concern with the growth in the number of judicial review cases, and our ability successfully to combat that trend must be a first priority. We should not, however, lose sight of the increasing complexity and volume of legal work in other areas of direct concern to the Government. My Department has had its share of judicial review and other cases, but it is also in the forefront of those Departments involved with the development of Community law. The implementation of Community legislation, and the handling of cases in the European Court, is demanding work of high quality, and it is important that I should be served in these as in other important matters by a legal department which is adequately staffed by a team of able lawyers.

Primarily because of the Department's particular concern with Community law, it has been successful over the past few years in attracting and retaining a number of lawyers of very high quality. However, the position is now changing, and the Department is presently 3 under its complement of 34 professional staff. Whilst pay levels are no doubt a significant factor in the difficulties which the Government Legal Service generally is experiencing in recruiting and retaining high quality staff, I believe that the overall career prospects for lawyers is of equal importance. I therefore welcome the proposal that the Treasury Solicitor should undertake a review of the structure of the Government Legal Service with a view to improving its ability to cope with the demands which are now made on it.

Copies of this minute go to all members of the Cabinet, the Law Officers and to Sir Robert Armstrong.

MJ

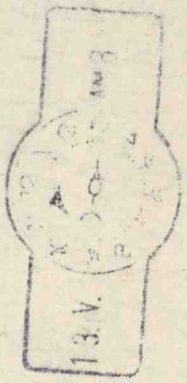
13 May 1987

LEGAL PROCEDURE

JUDICIAL

REVIEW

12/15



10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

SIR ROBERT ARMSTRONG

ADEQUACY OF RESOURCES AVAILABLE TO THE LAW OFFICERS

The Prime Minister saw over the weekend your minute of 8 May in which you advise on the Law Officers' minute of 7 April, and subsequent comments from Ministers, about the adequacy of resources available to the Law Officers.

The Prime Minister is content that you should proceed as you propose in your minute. She is also content that you should put in hand the wider study of the legal resources available to Government and the way they are organised, provided:

(a) the study group does include, as you tentatively suggest in your paragraph 4, membership from outside the Civil Service, e.g. a senior partner from one of the big firms of solicitors and the head of the legal department of a large company, such as BP or ICI, which will need, to some extent, the same legal services as a government department.

(b) this group should consider the possibility of contracting out more of government legal work to private sector law firms. The Prime Minister recalls that the Bank of England does not have its own legal branch but uses Freshfields.

(c) Sir Robin Ibbs should be given the opportunity to associate either himself or the Efficiency Unit with the work.

I am not minuting out to Departments generally the Prime Minister's conclusions. I suggest that I do so when you have put firm proposals to her. Could I ask that at that time you should provide a letter to Cabinet Ministers' Private Secretaries conveying the conclusions?

N. L. WICKS

11 May 1987

Ref. A087/1290

MR WICKS

Adequacy of Resources Available to the Law Officers

The Law Officers have copied to me their minute of 7 April, and I have seen the subsequent minuting.

2. I am doubtful whether the recruitment of one additional criminal lawyer to the Department, and that to fill a vacancy within the existing complement, entirely disposes of the concerns that led Cabinet to invite the Law Officers to carry out this review. It seems unlikely to have a major effect on the way the Department's business is discharged. But if the Law Officers are content, it is very difficult for us to go behind that.

3. At the same time the Law Officers have pointed to a wider concern about the state of the Government Legal Service. From the comments that have been made in response to the Law Officers' report on judicial review it is clear that Cabinet colleagues share this concern.

4. Having discussed this with Sir Peter Middleton, I think that we ought to put in hand a wider study of the legal resources available to Government and the way they are organised. This should cover the Lord Chancellor's Department, the Treasury Solicitor's Department and the Office of the Parliamentary Counsel, as well as the Law Officers' Department; and it should also cover legal branches in Departments and their relationship to the central legal activities. The composition of the review team should include some people with practical experience of the provision of legal services and advice to the Government. Here I am thinking both of former legal advisers and former senior civil

servants. It would also be important to include people with practical experience of what the Government requires of its professional lawyers. Here we might think of one or two former senior civil servants from Departments which are particularly extensively involved in law enforcement or litigation. We should also have to think whether there is a requirement for advice from outside the Civil Service - whether from the legal profession or from people with experience of the role of legal advice in private sector concerns.

5. If the Prime Minister is content in principle with this proposal Sir Peter Middleton and I will discuss with senior members of the Government Legal Service the institution of a review of the arrangements for providing the Government with legal advice and of the functions, organisation, recruitment and management of the Government Legal Service on the lines indicated in this minute. I would aim to report the results of that consultation to you at an early date, so that we could put firm proposals to the Prime Minister immediately after the Spring Bank Holiday or directly after the Election, if an Election is called for June.

RTA

ROBERT ARMSTRONG

8 May 1987

RTAAEF

B

1

PRIME MINISTER

ADEQUACY OF RESOURCES AVAILABLE TO THE LAW OFFICERS

In his minute at **Flag A** below Sir Robert Armstrong comments on the minute of 7 April from the Law Officers at **Flag B** on which Mr. Fowler has commented at **Flag C**, Mr. Ridley at **Flag D** and Mr. Hurd at **Flag E.**

The Law Officers come to three conclusions:

(i) They come down against a third law officer, on the grounds that in the light of the statutory limitations of the Law Officers, such an appointment is not justified.

This is the well established position of the Law Officers. It is very difficult to contest, if they are adamant they do not want another Minister.

(ii) They ask for one additional criminal lawyer within their department.

I agree here with Robert Armstrong's advice in paragraph 2 of his minute. This minor addition seems unlikely to be of much help to the department. But it is difficult to wish extra staff on Ministers who say they do not need them.

(iii) They state, in apocolyptic terms, that the morale of the Government legal service and its future efficiency, are causes for grave concern. Not surprisingly the other Ministers (whose principal legal officers would no doubt have had a hand in drafting their minutes) endorse these comments.

Sir Robert Armstrong suggests that we should respond to the concern by establishing a wide study of the legal resources

available to government and the way they are organised. I suggest that you agree to this proposal provided:

(a) the study group does include, as Sir Robert floats in a most tentative way in his paragraph 4, membership from outside the Civil Service, e.g. a senior partner from one of the big firms of solicitors and the head of the legal department of a large company, such as BP or ICI, which will need, to some extent, the same legal services as a government department;

(b) this group should consider the possibility of contracting out more of government legal work to private sector law firms. It is relevant here that the Bank of England does not have a legal branch, but uses Freshfields;

(c) Sir Robin Ibbs should be given the opportunity to associate either himself or the Efficiency Unit with the work.

Agree to proceed in this way?

N.L.W.

(N.L. WICKS)

8 May 1987

CONFIDENTIAL

E

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CC(87)5

PRIME MINISTER

ADEQUACY OF RESOURCES AVAILABLE TO THE LAW OFFICERS

I have seen the Law Officers' minute to you of 7 April.

2. The lawyers in the Home Office are up to complement. I am satisfied that the complement is adequate.

3. The Department does not conduct its own litigation: for this - including cases of judicial review, of which there are many - we rely on the Treasury Solicitor. To that extent I have a clear interest in the state of the Treasury Solicitor's Department. I strongly endorse the need for them to be properly staffed, to provide the service which is needed. The same is true of Treasury Counsel.

4. I am sending a copy of this minute to other members of the Cabinet, to the Law Officers and to Sir Robert Armstrong.

Douglas Hurd.

6 May 1987

CONFIDENTIAL

LEGAL PROC: Legal power Dec 85.

CONFIDENTIAL

SECRETARY OF STATE FOR THE ENVIRONMENT

PRIME MINISTER

ADEQUACY OF RESOURCES AVAILABLE TO THE LAW OFFICERS

I have seen the Law Officer's minute to you of 7 April and the Foreign Secretary's comments on it.

In common with a number of other departments, the Department of the Environment has its own legal department to provide advice, to instruct Parliamentary Counsel to draft Bills and to draft subordinate legislation. The Department has been constantly short of lawyers for several years: and has found it hard to recruit good lawyers in adequate numbers.

Lawyers here face taxing workloads with poor long term promotion prospects. Pay is of course also a factor. Three have resigned in the last 6 months or so. We are now 6 below a new complement of 45, and anticipate further losses. We have reached a stage when the legal department can scarcely service the Department's immediate needs, although I am glad to say that the Treasury Solicitor is urgently considering whether help can be drafted in from elsewhere in Whitehall.

In the circumstances, I strongly endorse the concern expressed by the Law Officers, and by Geoffrey Howe.

I am copying this minute to all members of Cabinet, the Law Officers and to Sir Robert Armstrong.

N R

6 May 1987

LEGAL PROC: Legal powers Dec 85

CONFIDENTIAL

Prime Minister 2

RTA well advised in due course.

mrs N.C.W

5.5

PRIME MINISTER

ADEQUACY OF RESOURCES AVAILABLE TO THE LAW OFFICERS

I have seen the Law Officers' minute to you of 7 April.

I should like to associate myself with the concern they express about the adequacy of the Government Legal Service. We have no option but to place increasing demands on the Service, not least because of the development of judicial review. My Department, with its responsibilities for administering nearly 100 statutes, cannot operate without the best legal advice. It is needed, too, if we are to handle effectively not only main legislation but the 150 or so sets of Orders and Regulations that have to be made each year in implementing the statutes in the areas for which I have responsibility.

It is no reflection on those who advise us now to say, with the Law Officers, that the prospects for the future are disturbing. For some years now, we have found it impossible to recruit legal candidates with the right combination of age and ability to ensure the continued development of legal services of the calibre we need and, of the four new lawyers taken on here in the last two years, none could be said to fall within this category. So I am glad that the Treasury is now reconsidering the needs defined by the Treasury Solicitor, which affect us all.

I am also glad that the Treasury Solicitor will be taking the lead in considering whether the present organisation and structure of the Government Legal Service is appropriate for the handling of judicial review cases. I understand that my Department's Solicitor will be a member of the Treasury Solicitor's group. I welcome this, because I am sure that the experience of Departments

E.R.

like my own, which have been in the frontline of judicial review, should be given full weight in the work which the Treasury Solicitor has in hand.

I am sending copies of this minute to Cabinet colleagues and to Sir Robert Armstrong.

April 1987

N F

LEGAL PROCEDURE

JUDICIAL REVIEW

12/15

CONFIDENTIAL

JA 2AOC

CBA

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

29 April 1987

Dear Michael,

JUDICIAL REVIEW

The Prime Minister is grateful to the Attorney General and the Solicitor General for their minute of 17 March and to Ministers who have commented on the issues raised.

The Prime Minister would now welcome the views of the Law Officers, consulting colleagues as necessary, on the various proposals that have been canvassed. In particular, she believes that the proposals that applications for leave to be heard might be heard by a panel of judges, and that defendant departments might be enabled to oppose such applications, are worth further consideration: they might offer scope for terminating at least some challenges at a preliminary stage. The Prime Minister would also be grateful for the advice of the Lord Privy Seal on the suggestion by the Secretary of State for the Environment of an accelerated procedure for Bills prompted by adverse decisions at judicial review.

The Prime Minister would like to receive the Law Officers' views, and take stock of all these points, in two months time.

I am copying this letter to the Private Secretaries to members of the Cabinet, Ministers in charge of Departments, the Scottish Law Officers and to Sir Robert Armstrong.

Yours ever,

Nigel Wicks

(N. L. WICKS)

M. L. Saunders, Esq.,
Law Officers' Department.

CONFIDENTIAL

ccBG

Prime Minister

Agree I should write the draft letter at Flag ?

(No need to read red flags - attached for your reference only.)

Ref. A087/1164

MR WICKS

Flag A

You asked for a summary of the significant points made by Ministers who commented on the minute of 17 March by the Attorney General and the Solicitor General, together with advice on the next steps.

--- 2. I attach at Annex A a summary of the comments made by Ministers. A number of these - for example, on the importance of careful drafting of legislation, on the proper involvement of lawyers in the decision-making process and on training of administrators - were the subject of recommendations in the report by the Official Group on Legal Challenges to Ministerial Decisions (MISC 125(86) 15), whose conclusions were accepted by Ministers in July 1986.

N.L.W. 28.4

--- 3. Annex B sets out the various measures taken to implement the MISC 125 Report and this shows that good progress has already been made particularly in increasing officials' awareness of judicial review.

4. Other suggestions by Ministers go wider than the recommendations made by MISC 125. For example, the Secretary of State for the Environment makes a number of proposals for changes in judicial review procedures such as providing for applications for leave to be heard by a panel of judges rather than a single judge and tightening the rules which allow applicants to change their grounds as the case proceeds. The Chancellor of the Exchequer suggests that a well-chosen case might be taken to the House of Lords for an authoritative view on the proper scope of judicial review.

Flag B

Flag C

TAWABG

Flag B

5. The Secretary of State for the Environment suggests also the establishment of a foreshortened procedure for Bills prompted by an adverse decision at judicial review. It seems doubtful that this would be acceptable to Parliament, but the Lord Privy Seal will have views.

Flag B

6. The Secretary of State for the Environment also floats the idea of an inquiry by a Parliamentary Committee or a committee of senior judges, or a combination of both, to consider the whole issue of judicial review. The Official Group on Legal Challenges covered much of this ground and its report and recommendations were endorsed by Cabinet Ministers and by the Law Officers. There must be some doubt, therefore, whether much could be gained from a further general review, especially since an outside Committee is unlikely to recommend any narrowing of the scope for judicial review.

7. Sir Robert Armstrong believes that the next step should be to invite the Law Officers to consider the various comments that have been made, and to report their conclusions, consulting other colleagues as necessary, to the Prime Minister within the next two months. He thinks that they might be invited to comment particularly on the proposals for changing the procedures on applications for leave to be heard: these would seem to provide a possibility of at least sometimes being able to short-circuit the process. He also thinks that the Law Officers might be asked to consider whether there might be any basis on which there could be an exchange of views, however informal, with members of the judiciary on this subject. The judges are traditionally very loath to let themselves get drawn into such an exchange of views. But some of them at least view the development of judicial review with disquiet, and might be ready to share their worries with a few people from within the

public service. Such a discussion could modify attitudes, and even lead to other ideas for helpful changes of procedure or practice.

--- 8. I attach a draft minute for your signature accordingly.

Trevor Woolley

T A WOOLLEY

27 April 1987

TAWABG

ANNEX A

JUDICIAL REVIEW

MINISTERIAL RESPONSES TO LAW OFFICERS' MINUTE OF 17 MARCH TO THE PRIME MINISTER

GENERAL

There is general acceptance among Ministers commenting on the Law Officers' minute of 17 March to the Prime Minister that judicial review is an inevitable and permanent feature. On occasion, the exercise by the courts of their power of judicial review over local authorities has been very welcome, but in other cases the Government's freedom of manoeuvre has been unhelpfully restricted. There is a danger of opting for weak and safe decisions designed to avoid judicial review and of effort being put into ensuring that the form of decision is not susceptible to challenge rather than getting the decision itself right.

There appears to be an increasing trend, not only in this country, towards judicial action in relation to Government decision-making. Although the judiciary have held consistently that they are empowered to adjudicate only on the process by which administrative decisions are reached, and not on the merits of such decisions, in practice the use of the criterion of 'Wednesbury unreasonableness' (whether a decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the decision would have arrived at it) is tending to blur this distinction. The Chancellor of the Exchequer suggests that it might be worth taking a well-chosen case to the House of Lords to get a ruling from them on the scope and limits of judicial review.

The Chancellor of the Exchequer identifies a risk that judicial review may come to restrict the ability of financial regulators to make their decisions stick, and points out that this could have very damaging consequences.

FRAMING LEGISLATION

Several Ministers point out that careful consideration needs to be given in framing legislation to minimising the risk of judicial review. A number of suggestions are made on how this might best be achieved:

simple, clear and unambiguous drafting;

restricting and clearly defining consultation requirements;

providing for rights of appeal where appropriate; and

providing for key decisions to be specifically endorsed by Parliament.

Fly) The Lord Chancellor suggests that the risk of judicial review could be reduced by relying wherever possible on primary, rather than secondary, legislation.

DECISION-MAKING PROCESS

Fly E The Home Secretary suggests that decisions are less susceptible to judicial review if they concentrate on findings of fact (which cannot be challenged) and if the applicant has first been given a full opportunity to state his case.

DEFENDING CHALLENGES IN THE COURTS

E D

Both the Home Secretary and the Lord Chancellor suggest that the Government should have no hesitation in pursuing appeals where there is a reasonable prospect of success and the Lord Chancellor suggests also that orders for costs should be applied for wherever practicable.

B

The Environment Secretary suggests that consideration be given to

(a) enabling defending Departments to oppose "applications for leave";

(b) providing for applications for leave to be heard by a panel of judges rather than a single judge;

(c) tightening the rules which allow applicants to change their grounds as the case proceeds;

(d) requiring courts to take more account of the wider consequences in the timing and content of their decisions.

RESPONDING TO CASES LOST ON JUDICIAL REVIEW

B

The Environment Secretary suggests that it might be appropriate to introduce a foreshortened procedure (perhaps on the lines of that for consolidation Bills), or an Order-making power derived from statute, for remedial legislation necessitated by an adverse decision at judicial review.

LEGAL ADVICE

A number of Ministers emphasise the importance of the integration of lawyers into decision-making teams, where feasible, and the training of administrators on the principles and procedures of judicial review.

F E

Both the Foreign and Commonwealth Secretary and the Home Secretary stress the need for adequate legal resources of the right quality.

G

The Trade and Industry Secretary suggests that there may be scope for the pooling of information and ideas among legal advisers in different Departments.

COMMITTEE OF INQUIRY

B

The Environment Secretary asks whether there would be merit in asking a Parliamentary Committee, or a Committee of senior judges, or a combination of both, to consider the whole issue of judicial review as it has evolved and to make recommendations.

ANNEX B

IMPLEMENTATION OF MISC 125 REPORT'S RECOMMENDATIONS

RECOMMENDATION	IMPLEMENTATION
1. Drafting of Legislation	
Where an enactment is intended to do something that the courts are likely to regard as unfair or oppressive, the clearest possible language is needed even at the cost of drafting in terms that are presentationally or politically unattractive. It will also be useful to consider whether the inclusion of devices such as an appeals procedure, or subjecting action to be taken to the affirmative resolution procedure will reduce the risk of successful challenge.	(i) First Parliamentary Counsel issued a note to this effect to all counsel on 1.7.86. (ii) Also covered in the guidance issued to all departments by PS/Secretary of the Cabinet on 23.10.86.
2. Training of Senior Administrators	
Training of senior administrators in awareness of the potential impact of administrative law needs to be reviewed and systematised.	Training Division of the MPO have completed a study of the training available on administrative law and judicial review. That report, which contains a number of recommendations will be ready by the end of April 1987. Individual departments have also reviewed their arrangements for training administrators.
3. Information on Basic Facts	
Information on the basic facts about judicial review and on some simple precautions that could be taken should be made available to a wide spread of administrators.	(i) The Treasury Solicitor's Department have prepared a pamphlet 'The Judge over your Shoulder'. 20,000 copies will be ready for distribution in mid-April 1987.

RECOMMENDATION	IMPLEMENTATION
	(ii) A guidance note was issued to all departments by PS/Secretary of the Cabinet on 23.10.86. (iii) A summary of the MISC 125 Report was circulated to all Establishment Officers in September 1986. (iv) The revised Guide to Legislative Procedure now contains an appendix on judicial review. (v) Individual departments have issued their own guidance to staff at appropriate levels. (vi) The Treasury Solicitor's Department circulates periodically a digest of administrative law cases.

4. Involving Lawyers in Decision-Making and Integration of Legal Specialisms

Permanent Secretaries should review the procedures in their departments for ensuring that lawyers are properly involved in the decision making process. Departmental legal advisers and solicitors should ensure that the various legal specialisms are properly integrated so that information is shared and a team approach encouraged.	Sir Robert Armstrong's letter of 6.8.86 instructed all Permanent Secretaries to ensure proper integration of lawyers and the various legal specialisms. Permanent Secretaries have reported good progress on implementing this.

5. Involvement of the Law Officers

The Cabinet Office, Law Officers' Department and the Lord Advocate's Department should consider how the circumstances in which the Law Officers should be involved in a decision might best be drawn to the attention of Ministers and senior officials.	The Law Officer's Department and the Lord Advocate's Department believe that the current procedures are generally satisfactory. They have proposed an amendment to the section on the Law Offices in Questions of Procedure for Ministers (QPM) to include a reference to judicial review. This will be made at the next revision of QPM.

RECOMMENDATION	IMPLEMENTATION
6. Draft Legislation to be vetted by an Expert	
The practice in the local government finance field of arranging for draft legislation to be vetted by an expert in litigation in that field might be extended to other areas of highest risk.	Covered in the guidance from PS/Secretary of the Cabinet to departments on 23.10.86.
7. Preparation of Cabinet Papers	
Cabinet papers seeking policy decisions should draw attention to any perceived risks of legal challenge.	(i) Contained in guidance from PS/Secretary of Cabinet to departments on 23.10.86. (ii) Also to be included in revised version of the Cabinet Document Officers' Handbook.
8. Use of Expert Counsel	
While the Treasury Counsel and Law Officers' panels provide a source of expertise in general administrative law these could be usefully supplemented for particular cases by Counsel with expertise in the relevant field of law.	This has already been done in the areas of rate-capping and rating generally. The Treasury Solicitor's Department will take the opportunity to use this resource wherever appropriate.

TA2 AOC

DRAFT LETTER FROM N L WICKS TO

M L SAUNDERS ESQ, LAW OFFICERS' DEPARTMENT

Judicial Review

The Prime Minister is grateful to the Attorney General and the Solicitor General for their minute of 17 March and to Ministers who have commented on the issues raised.

The Prime Minister would now welcome the views of the Law Officers, consulting colleagues as necessary, on the various proposals that have been canvassed. In particular, she believes that the proposals that applications for leave to be heard might be heard by a panel of judges, and that defendant departments might be enabled to oppose such applications, are worth further consideration: they might offer scope for terminating at least some challenges at a preliminary stage. The Prime Minister would also be grateful for the advice of the Lord Privy Seal on the suggestion by the Secretary of State for the Environment of an accelerated procedure for Bills prompted by adverse decisions at judicial review.

The Prime Minister also wonders whether there is any possibility of there being exchanges of views, on however informal a basis, with members of the judiciary. She recognises that some judges would be loath to become drawn into such exchanges, for fear of seeming to compromise their impartiality; but some at least view the development of judicial review with disquiet, and might be ready to share their worries with a few people from within the public service. Such exchanges might serve to modify attitudes, or even generate ideas for helpful changes in procedures or practices.

The Prime Minister would like to receive the Law Officers' views, and take stock of all these points, in two month's time.

I am copying this letter to the Private Secretaries to members of the Cabinet, Ministers in charge of Departments, the Scottish Law Officers and to Sir Robert Armstrong.

LEGAL PROCEDURE: Legal powers: Dec 85

CONFIDENTIAL

PM/87/020

PRIME MINISTER

Adequacy of Resources Available to the Law Officers

1. I have seen a copy of the Law Officers' minute of 7 April to you.

2. What they say about the present state and prospects of the Government Legal Service is extremely disturbing. I know from my own experience how important it is for the Law Officers to have assistance of the right quality from that Service; and it is of course very much in the interest of the Government as a whole that the Service should be in a position to make a consistently strong and effective contribution. It seems to me that we ignore the Law Officers' unusually trenchant comments at our mounting peril.

3. I am copying this minute to all members of Cabinet, to the Law Officers and to Sir Robert Armstrong.

(GEOFFREY HOWE)

Foreign and Commonwealth Office

13 April 1987

CONFIDENTIAL

LEGAL PROCEDURE : Legal powers Dec 1985

Restricted

LAW OFFICERS' DEPARTMENT
ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

M.L. SAUNDERS
LEGAL SECRETARY

8 April 1987

Dear Nigel,

As you will see from the attached letter, all copies of the minute had gone out last night. All Private Offices were telephoned this morning, asking that the minute be classified "confidential". The attached letter is to remind Private Offices of this reclassification.

Yours sincerely

Richard Saunders.

M.L. SAUNDERS
LEGAL SECRETARY

LAW OFFICERS' DEPARTMENT
ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

RESTRICTED

Nigel Wicks Esq.
Private Secretary
Prime Minister's Office
70 Downing Street
London SW1

8 April 1987

Dear Nigel,

ADEQUACY OF RESOURCES AVAILABLE TO THE LAW OFFICERS

The minute from the Law Officers to the Prime Minister of 7 April (with NLO) should have been classified "Confidential". I should be grateful if you would classify accordingly this minute and if other recipients of this letter would classify the copy they received.

I am copying this letter to the Private Secretaries of Cabinet Members.

Yours sincerely,
Richard Saunders.

M L SAUNDERS

RESTRICTED

CONFIDENTIAL

Prime Minister
RTA will
advise on this.
N.L.W.
8.4

PRIME MINISTER

ADEQUACY OF RESOURCES AVAILABLE TO THE LAW OFFICERS

1. In summing up a discussion at Cabinet on 5 March of the general issues raised by judicial review of Ministerial decisions, you concluded that a further question that needed exploration was whether the resources available to the Law Officers were sufficient to enable them to carry out their proper functions in this context.

2. It may be helpful if we first set out what we regard as being our principal functions. They are:

(i) Superintendence of the Crown Prosecution Service and the Director of Public Prosecutions (Northern Ireland).

(ii) Prosecution decisions.

(iii) Superintendence of the Serious Fraud Office (when it comes into operation).

(iv) Legal advisers to Government.

(v) Supervision of Government litigation.

3. In our function as Legal Advisers to the Government we do not, and of course cannot advise on all legal questions arising for consideration by the Government. We advise only when our advice is sought by the Cabinet, by a Cabinet Committee, or by a Minister or Department. Paragraph 23 of Questions of Procedure for Ministers states:

> "23. The Law Officers must be consulted in good time before the Government is committed to critical decisions involving legal considerations. It will normally be appropriate to consult the

Law Officers in cases where:

(i) The legal consequences of action by the Government might have important repercussions in either the foreign or domestic field.

(ii) A Departmental Legal Adviser is in doubt concerning:

(a) the legality or constitutional propriety of legislation which Government proposes to introduce; or

(b) the vires of proposed subordinate legislation; or

(c) the legality of proposed administrative action.

(iii) Ministers, or their officials, wish to have the advice of the Law Officers on questions involving legal considerations, which are likely to come before the Cabinet or Cabinet Committee.

(iv) There is a particular legal difficulty which may raise political aspects of policy.

(v) Two or more Departments disagree on legal questions and wish to seek the view of the Law Officers."

As our present functions are defined, we are not responsible for legal advice which is given to the Government by Departmental Legal Advisers (who of course have access to Counsel) and not referred to us. The remit you gave at Cabinet on 5 March does not require us to examine our role in the provision of advice to Government or the organisation and structure of the Government Legal Service. We have, however, asked the Treasury Solicitor to refer for examination by the Legal Groups Management Committee (of which he is Chairman) the question whether the present organisation and structure of the Government Legal Service is appropriate for the handling of judicial review cases and the involvement of the Law Officers in advice given in such cases.

4. The main sources of assistance available to us are essentially three: first, our own Department; secondly, the Bar and, thirdly, Departmental Legal Advisers. We have examined whether, as certain Ministers have suggested, there should be a third Law Officer. We have concluded that, in the light of the statutory limitations on the Law Officers, such an appointment is not justified. Much of our work is done under statutory or common law powers which, as the law stands at present, can be exercised only by the Attorney General or delegated only to the Solicitor General. As regards the provision of legal advice to Government, it would in any event be expected that, given the importance of the matters referred to us, the advice should continue to be given by the senior Law Officers. Superintendence of the Crown Prosecution Service is indeed a new responsibility for the Law Officers, as will be the Serious Fraud Office. However, Members of Parliament seem to have accepted that responsibility for the day to day operations of the Crown Prosecution Service is a matter for the Director of Public Prosecutions, and that "superintendence" involves ensuring the overall efficiency and effectiveness of the service and consulting with the Crown Prosecution Service on major cases. It is necessary, therefore, for us to visit the various Branches of the Crown Prosecution Service, and to satisfy ourselves that it is adequately staffed and resourced. We do not, however, feel that the burden is such as to necessitate the appointment of another Minister. We consider that this assessment is unlikely to change after the creation of the Serious Fraud Office. We also conclude that, in order to provide the assistance which would be required for three Ministers, it would be necessary to have a substantial increase in the number of lawyers and supporting staff in our Department. We do not believe that this would an effective use of resources.

5. As regards the resources available to us in our own Department, we are of the view that we need one additional criminal lawyer. The additional work deriving from the Crown Prosecution Service and the planning of the Serious Fraud Office will keep one lawyer fully occupied. The Director of Public Prosecutions has already agreed to provide the additional lawyer; his arrival will bring us up to the established complement of ten legal staff. For the present work load of the Law Officers we do not consider that we require any further legal or supporting staff. That this is so is a tribute to the very high quality and marked dedication of all those who serve us.

6. The Law Officers personally cannot possibly have expertise across the vast range of Government legal business. We therefore often have recourse to the Bar to assist us not only in litigation but also advisory work. We are most ably served by our two Treasury Juniors, John Laws and John Mummery, and the Common law and Chancery Panels who support them. In accordance with the recommendations of MISC 125, we additionally nominate, in suitable cases, Counsel experienced in the particular area of law at issue. Counsel of course need full, accurate and timely instructions being provided to them from Government Departments and such instructions are at present invariably delivered. The hazards of litigation increase with the complexity of legislation. We have no hesitation in saying that the Law Officers are well served at present by the Bar.

7. Turning to the assistance we seek from Departmental Legal Advisers, we must remark upon the state of the Government Legal Service. Notwithstanding recent restructuring of the service, which is enabling higher starting salaries to be offered by the Civil Service Commission Recruitment Boards, the number of well qualified candidates has dropped to its lowest level for many years. One pool of recruitment has almost dried up; able young solicitors are paid at £10,000 per annum more in the private sector (and much more later in their careers), and the Bar is not attracting a great deal of surplus talent due to uncertainty about its future. The Treasury Solicitor's Department, at the heart of the Government Legal Service, has now been obliged to stop recruiting lawyers, and even to defer the replacement of senior lawyers who retire or resign, in order to stay beneath its approved running costs ceiling for 1987/88. These steps have been made inevitable by the inflexible application of the running costs "regime" to a small, demand-led department. This has occurred notwithstanding that it is under very considerable pressures, as the Chief Secretary has acknowledged, from the volume of work in all three of its main areas of activity (advisory, litigation and conveyancing). These enforced cost-cutting measures will undoubtedly affect the efficiency of the Department, including the preparation of litigation in the Courts.

8. We regard this as extremely dangerous. The Solicitor General has warned the Chief Secretary that, as a consequence, the Government may well be subjected to public criticism, and the Treasury is now reconsidering the needs of the Treasury Solicitor in the light of his own representations and those of the Solicitor General.

9. The quality of the advice given by the Law Officers to the Government must inevitably depend to some extent on the quality of the instructions provided for the Law Officers by the Departmental Legal Advisers. Our experience leads us now to be gravely concerned for the state of morale in the Government Legal Service, and accordingly for its future efficiency. It is a matter of great anxiety to us that the present prospects of a strong and effective Government Legal Service are so poor.

10. We are copying this minute to all members of Cabinet and to Sir Robert Armstrong.

M.H.
P.M.

7 April 1987

Cite 881
07
ccBG

10 DOWNING STREET

From the Principal Private Secretary

MR. WOOLLEY
CABINET OFFICE

JUDICIAL REVIEW

Following my letter of 23 March to departments seeking comments on the Attorney General's minute of 17 March, we have now received comments from the Ministry of Agriculture (13 March), Department of Trade and Industry (3 April), Lord Chancellor's Department (3 April), Department of the Environment (6 April), HM Treasury (6 April), Home Office (6 April), Ministry of Defence (7 April), Foreign and Commonwealth Office (undated).

All these letters appear to have been copied to you, with the exception of the Department of Trade and Industry's, a copy of which I now attach.

BF

I should be grateful if you could let the Prime Minister have a summary of the significant points made by departments, together with advice on the next steps.

N L WICKS
7 April 1987

F

CCBA

Foreign and Commonwealth Office

London SW1A 2AH

Dear Nigel,

Judicial Review

Your letter of 23 March to Joan MacNaughton invited comments on the joint minute from the Attorney General and the Solicitor General of 17 March on judicial review. The Foreign Secretary has also seen Shirley Stagg's letter of 30 March.

The Foreign Secretary shares the concern of some colleagues about the extent to which judicial review increasingly impinges on Government policy-making. This is not just a British phenomenon: it is a world-wide trend, partly as a result of the growing scope and complexity of domestic legislation. Judicial activism is widespread, not least in the United States.

Successive Governments have moreover encouraged this trend: cases like Crichel Down inspired the 1958 Tribunals and Inquiries Act. Controversies over comprehensive education provoked important precedents like the Enfield Schools case.

In the same way, trade union authoritarianism enabled the European Commission on Human Rights to carry forward the process of weakening the closed shop. Of the 21 countries in the Council of Europe, all but Malta and Cyprus now allow individual petitions to the ECHR.

The Foreign Secretary agrees that we should look for practical ways to limit unnecessary exposure to judicial review. Beyond that, however, his own vivid recollections of the pressures that existed during his time as Solicitor General - in an age that looks in retrospect like one of legal tranquility - prompt him to suggest that we may also need to consider reinforcing the resources of the Government's legal service. Recent cases have underlined the importance for the Government as a whole of maintaining

/legal

legal services of high calibre, which can react promptly and effectively to the steadily growing demands on them.

I am sending copies of this letter to Private Secretaries to members of Cabinet, Ministers in charge of Departments, the Attorney General and the Solicitor General, the Scottish Law Officers and to Sir Robert Armstrong.

Yours ever,

(L Parker)
Private Secretary

N L Wicks Esq
No 10 Downing St

PO6ABG

LEGAL PROC. Legal Power Dec. 85

MINISTRY OF DEFENCE
MAIN BUILDING WHITEHALL LONDON SW1
Telephone 01-~~830 7822~~ 218 2111/3

MO 21/8/5L

7th April 1987

Dear Nigel,

JUDICIAL REVIEW

Thank you for sending us a copy of your letter of 23rd March to Joan MacNaughton, in which you invited comments on the minute of 17th March from the Attorney General and the Solicitor General to the Prime Minister.

The Defence Secretary accepts the Law Officers' conclusions that judicial review forms an integral feature of the rule of law and that the scope for excluding challenge in the preparation of legislation is limited, but that the risk could be reduced by careful drafting and the incorporation where appropriate of provisions for appeal, and, more generally, by improving legal awareness within Departments and the involvement of legal advisers in the decision-making process.

I am sending copies of this letter to the Private Secretaries to members of the Cabinet, Ministers in charge of Departments, the Attorney General, the Solicitor General and the Scottish Law officers, and to Sir Robert Armstrong.

Yours ever,
David Ball

(D C J BALL)
Private Secretary

Nigel Wicks Esq
10 Downing Street

E

CCBG

PRIME MINISTER

JUDICIAL REVIEW

I have read with interest and anxiety the Law Officers' Opinion of 17 March, which puts the present position very clearly.

2. The Home Office is very exposed to judicial review. The Tamils case has illustrated how judicial review can distort and distract the ordinary process of decision taking. Potentially the number of cases is enormous - every decision of Home Office Ministers or Home Office officials which affects the rights of other persons. In recent years we have averaged 200 or 300 cases a year, mainly immigration cases, in which leave to apply for judicial review has been granted. There are at least as many other cases in which the application fails but might still have hampered our efforts to remove the immigrant concerned from the country.

3. I accept that the basic principles of administrative law, as they emerge from judicial review, are binding on us, and rightly binding on an Administration committed to upholding the rule of law. The mischief lies in the impact of judicial review cases on proper decision taking by the Executive, and thence on our responsibility to Parliament and the electorate. There is a danger of drifting into "weak and safe" decisions in order to avoid judicial review. The executive process will become slower and more bureaucratic, and so worse. The emphasis will be on the form of decision taking, rather than the substance: we and our officials will put much more effort into getting the decision letter right, rather than the decision itself.

4. I think we need to counter these unfortunate aspects of judicial review, in three ways.

5. First, I believe that there are opportunities to make our rules and procedures, and sometimes our legislation, less vulnerable to criticism by the courts: in other words, more judge-proof. I am considering how best to

review the position in the immigration area, where the early legislation now in prospect offers an opportunity of statutory amendments if they are found to be helpful.

6. In the Home Office we also try to insulate a decision from the courts by concentrating ourselves on findings of fact (which cannot be challenged) and by ensuring that any person or tribunal which takes a decision has given the applicant a full opportunity to state his case.

7. Secondly, we need to be alert and vigorous in defending cases on judicial review. There is an ebb and flow in the zeal with which the courts challenge the Executive in particular areas. Where the tide is flowing in favour of the Executive we should take every opportunity to go for the basic rulings of the principle we need. Because the courts on judicial review often apply a test of "reasonableness" which is of its nature subjective, it is important that judges should realise the strength of the Executive's case in favour of the decision that is being challenged.

8. Similarly, with "legitimate expectations", where the courts on occasion take a very stratospheric and pure view of the procedures and processes that the citizen might expect the Executive to follow in his case because they have been followed in other cases, courts should be true to their subjective approach and ask only whether the applicant had those expectations, or could reasonably have had them.

9. It is important that the courts should realise the scale of the problem. I hope that the Law Officers will agree that Government Departments should always be ready to fight cases of judicial review in the courts provided, of course, there is an arguable case to fight, and that they should not let cases go by default in the hope that a better opportunity to establish the point concerned may arise at a later date.

10. All this shows that we will continue to need to deploy considerable legal resources in handling cases of judicial review. It is important that they should be available and should be of the right quality. I do not know whether the Law Officers have any anxieties on this score.

11. Thirdly, we realise in the Home Office that we have a continuous task, for management and training, in educating officials in the evolving principles and procedures which emerge in judicial review. This is a difficult but necessary task, and inevitably takes up scarce resources.

12. Finally, in the total administrative response to judicial review, we have to remember that there is the separate and parallel dimension of the European Convention on Human Rights. Though not part of the law of the country, Strasbourg produces law which is even more general, subjective and developmental than our courts give us on judicial review; and we are all under an obligation to consider carefully whether any policy proposal could be successfully challenged at Strasbourg. This adds to, and complicates, anything we do to cope with the problems of judicial review.

13. I am copying this minute to members of the Cabinet, to the English and Scottish Law Officers and to Sir Robert Armstrong.

Douglas Hurd.

6 April 1987

RT8.47

CONFIDENTIAL

CCBG

C

Treasury Chambers, Parliament Street, SW1P 3AG
01-270 3000

PRIME MINISTER

JUDICIAL REVIEW

The Law Officers' minute of 17 March is admirably clear. I am concerned, however, that the situation on the ground often seems to be less clear.

For instance, it is a key distinction that the judges will review only the process by which a decision is reached, not the merits or demerits of the decision itself (paragraph 5). But in some cases this distinction does seem to be blurred where "Wednesbury unreasonableness" is the criterion.

Similarly, if the criterion which Diplock calls "procedural impropriety" were related only to the case he describes as "failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument", we should be dealing with a relatively clear-cut procedural point. But the more difficult cases turn on considerations like natural justice, legitimate expectations and custom and practice, which are part and parcel of our law but are naturally more open-ended and difficult to define.

I understand the points which the Law Officers make about the role of law in our society. But the practical upshot seems to be that the legal requirements within which the business of government has to be carried on are being extended piecemeal and rather unpredictably. I do not think we can look on that process with equanimity.

I am also concerned that financial regulators should be as free as possible to use their judgement and to make their

decisions stick if the financial markets are to work properly. So far, there have been no problems; but there is scope for difficulty, and for disproportionate damage.

I supported the recommendations from the Official Group to improve the way government business is handled in the face of these uncertainties, including the drafting of legislation. And I realise that much hard thought has been given to the more fundamental question of defining the role of judicial review in the first place. But I do wonder whether it might be worth considering taking a well-chosen case right up to the House of Lords in order to get some authoritative ruling on the scope and limits of judicial review.

I am copying this minute to other members of the Cabinet, the Attorney General, the Solicitor General, the Scottish Law Officers and Sir Robert Armstrong.

N.L.

6 April 1987

CEPG

B

2 MARSHAM STREET
LONDON SW1P 3EB
01-212 3434

My ref:

Your ref:

N L Wicks Esq
Private Secretary to
The Prime Minister
10 Downing Street
LONDON
SW1A 2AA

6 April 1987

Dear Nigel,

JUDICIAL REVIEW

My Secretary of State has some comments arising from the minute of 17 March from the Attorney General and the Solicitor General.

My Secretary of State accepts that judicial review is now an inevitable and permanent feature of the administrative landscape. He notes that the Courts have consistently held that they have no power to adjudicate on the merits of administrative decisions, but shares Mr Jopling's concern that the Court's approach to issues of procedural propriety and reasonableness in particular, may on occasions be influenced by views about the merits of the issue.

The most significant area of judicial review so far as this Department is concerned is local government finance. Local authorities have shown themselves much more willing to bring cases in this area in recent years. (It may be relevant that the cost of bringing proceedings is not a serious consideration for local authorities as it can simply be passed on to the local ratepayer). Nonetheless, apart from the recent Greenwich case, only 1 of the 13 cases in the last year or so have been lost on a judicial decision.

My Secretary of State concludes that, where relevant, new legislation must now be drafted with judicial review very much in mind. The Rates Act 1984 (which introduced rate-capping) was prepared in this way and has so far stood up very well in the Courts. He intends to apply a similar approach to the local government finance legislation now in preparation here. He believes that key elements are keeping the legal requirements simple, clear and unambiguous even at the risk of some political and presentational disadvantages; restricting and defining clearly consultation requirements to reduce the likelihood of losing cases on procedural grounds; and ensuring that key decisions are endorsed by Parliament, in the most economical way available, to reduce the likelihood of losing cases on "Wednesbsury unreasonableness". He notes, however, that while these requirements are easily expressed they are by no means so easily achieved, especially where the arrangements for distributing grant fairly to over 400 diverse authorities are concerned.

My Secretary of State also considers, however, that further thought might be given to two other areas: the conduct of judicial review proceedings themselves, and what has to be done when a case is lost on a point of legal interpretation.

On judicial review proceedings themselves, my Secretary of State considers that thought might be given to enabling defendant departments to oppose "applications for leave" to cut off as many cases as possible at that stage; whether it would be better if applications for leave were heard by a panel of judges rather than a single judge; tightening the rules which allow applicants to change their grounds as the case proceeds from those on which leave was originally given; and whether the Courts could be required to take more account in the timing and content of their decisions, of the wider consequences of them. He has in mind here particularly how to avoid the administrative chaos created at a late stage in local authorities' budget and rate setting by the recent Court judgement in the Greenwich case, which also demonstrated how a decision in favour of one authority can radically change the position of other authorities, which were not parties to those proceedings.

On action after a case is lost, my Secretary of State notes that the decision usually arises because in the event the letter of the legislation may have failed to reflect accurately what Parliament intended. Nonetheless the only way of putting matters right is to introduce remedial legislation which, even where it is only re-expressing Parliament's original intention, has to go through all the legislative stages in both Houses that are designed to deal with completely fresh proposals, at considerable cost in Parliamentary time. My Secretary of State wonders whether, in circumstances of this kind, it would be more appropriate to have a foreshortened procedure perhaps on the lines of that for Consolidation Bills, or an Order making power deriving from Statute limited to the necessary consequences of amending legislation due to a Court judgement.

Finally, my Secretary of State wonders whether there would be any merit in asking a Parliamentary Committee, or a committee of senior judges, or a combination of both, to consider the whole issue of judicial review as it has evolved and to make recommendations.

I am copying this letter to the Private Secretaries to members of Cabinet, Ministers in charge of Departments, the Attorney General, the Solicitor General, the Scottish Law Officers, and to First Parliamentary Counsel and Sir Robert Armstrong.

Yours sincerely

Robin Young

R U YOUNG
Private Secretary

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

HOUSE OF LORDS,
LONDON SW1A 0PW

CONFIDENTIAL

3 April 1987

The Right Honourable
The Prime Minister
10 Downing Street
LONDON
SW1

Dear Margaret:

Judicial Review

I am writing with my comments on the minute of 17 March 1987 from the Law Officers on judicial review, which, of course correctly sets out the current position.

The jurisdiction is widely perceived as beneficent. But I believe that its extensive use can present dangers to the independence of the judiciary who are sometimes seen as intervening in policy matters, and to the executive whose hands in the administration may be thought to be too strongly tied.

The report of the Official Group (MISC 125), whose conclusions we accepted last July, indicated ways in which the risk of challenge could be reduced without attempting to limit the courts' powers to review. In particular the process of judicial review cannot easily be reduced by the use of ouster clauses even when these are drafted restrictively (see for instance Anisnimic Ltd v Foreign Compensation Commission [1969] 2 AC 147) and paras 49 and 50 of the officials paper and para 9 of the Law Officers' papers.

I share the Law Officers' view that we should respond positively to the situation by ensuring that our decisions are made - and are clearly seen to have been reached - in a fair and proper manner, with due regard paid not merely to the letter of the enabling legislation but also to its spirit. There is often room for improvement in the quality of legislation and also in the presentation of policy and decisions. But I feel that we need to have no hesitation in pursuing appeals where these have a reasonable prospect of success or in securing and enforcing orders for costs when we win the battle whether at first instance or on appeal. It is of course always possible to reduce the danger of review in relying less on secondary legislation which is itself open to attack as well as the action taken under it and more on well drawn Acts of Parliament.

I am copying this letter to the other members of the Cabinet and the Law Officers and to Sir Robert Armstrong.

Yrs:

L.

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DEPARTMENT OF TRADE AND INDUSTRY
1-19 VICTORIA STREET
LONDON SW1H 0ET
Telephone (Direct dialling) 01-215 5422
GTN 215) .....
(Switchboard) 01-215 7877

Secretary of State for Trade and Industry

PS/

3 April 1987

N L Wicks Esq CBE
Principal Private Secretary to the
Prime Minister
10 Downing Street
LONDON
SW1A 2AA

Dear Nigel

JUDICIAL REVIEW

Thank you for sending me a copy of your letter of 23 March to Joan MacNaughton in the Lord President's Office with the minute of 17 March from the Attorney General and the Solicitor General.

The Note prepared by the Law Officers is most helpful. The DTI is very conscious of the need to minimize the risk of judicial review in decision-making processes and every endeavour is made by means of careful drafting to ensure that new legislation for which the Department is responsible limits the scope of challenge whenever possible. However, if a circular is to be issued in connection with the Note, it would be useful if Legal Advisers in Government Departments could be encouraged to share with one another any new approaches they devise in the context of judicial review implications.

Yours

Timothy

TIMOTHY WALKER
Private Secretary

JF2AFX

LEGAL PROCEDURE

JUDICIAL REVIEW

12/05

Ministry of Agriculture, Fisheries and Food
Whitehall Place London SW1A 2HH

From the Minister's Private Office

NW o/r.

N L Wicks Esq
Private Secretary
10 Downing Street
London
SW1A 2AA

30 March 1987

Dear Nigel,

JUDICIAL REVIEW

My Minister has seen the Law Officers' note of 17 March, and has found their analysis of the present position relating to judicial review extremely helpful. He is sure they are right to commend to us the Report of the Official Group, and it is no doubt the case that the implementation of the Group's recommendations should improve the situation. However, this will take time, and he has sympathy with colleagues who believe that judicial involvement in the field of administrative decision-making has already been taken too far. He therefore wonders whether, notwithstanding the dangers to which the Law Officers refer, the time may not have arrived when consideration should be given to some curtailment of judicial intervention in this area.

In saying this, he has, of course, noted paragraph 4 of the Law Officers' advice, and the reliance which they place on the so-called Wednesbury principle. However, in the present climate of what they rightly describe as "judicial activism", he wonders whether they are not a little too sanguine about the unwillingness of the courts to have regard to the merits of a particular administrative or Ministerial decision. As we understand the position, it is true that under the Wednesbury principle the courts will not (except in the most exceptional circumstances) substitute their decision for that of the original decision-maker, and this is particularly so where that decision-maker is exercising a clear statutory power. But the position is surely less clear where a Minister has a wide discretion, and, having regard to the special features of the case, he does not find the passage from Lord Scarman's Speech in Notts County Council v Secretary of State particularly reassuring in the general context. Even his Lordship refers to an exception in the case of "abuse of power", and the Minister feels that it is by continually refining the meaning of that expression that the courts may well find further room to

/ manoeuvre. In his ...

manoeuvre. In his Speech in the GCHQ Case, Lord Diplock equated his third ground for judicial review (procedural impropriety) with "unfairness", and it occurs to us that this ill-defined concept is capable of being made to cover a multitude of perceived sins.

The Law Officers are, of course, right to remind Ministers that there have been occasions when "the exercise by the courts of their power of judicial review to impose restraints on those authorities which have sought to act beyond their powers has been very welcome". Nevertheless, since further expansion of judicial intervention in this field is bound to create increasing problems for the implementation of Government policies, my Minister believes that we should take whatever preventive action is open to us.

I am copying this letter to the Private Secretaries to members of Cabinet, Ministers in charge of Departments, the Attorney General, the Solicitor General, Scottish Law Officers and to Sir Robert Armstrong.

Yours sincerely,

Liz Davis

for SHIRLEY STAGG (MRS)
Private Secretary

LEGAL

PROCEDURE

JUDICIAL REVIEW

12/V5

File

DSG

10 DOWNING STREET

From the Principal Private Secretary

23 March 1987

Dear Joan.

JUDICIAL REVIEW

The Prime Minister would welcome comments from colleagues on the minute of 17 March from the Attorney General and the Solicitor General on Judicial Review.

BF 11

If your Minister has comments, please could I have them by Monday 6 April.

I am copying this letter to the Private Secretaries to members of Cabinet, Ministers in charge of Departments, the Attorney General, the Solicitor General, Scottish Law Officers and to Sir Robert Armstrong.

Yours sincerely,

Nigel Wicks

N. L. Wicks

Miss Joan MacNaughton,
Lord President's Office.

DSG

Prime Minister

Await colleagues' comments?

N.L.W.

Yes

20.3.

PRIME MINISTER

JUDICIAL REVIEW

1. The Cabinet has asked us to advise on "the possibilities for reducing the scope of judicial review and other means of judicial questioning of Government decisions, especially in the field of immigration control". The Cabinet was concerned in particular with the involvement of the courts in support of an apparent abuse of the right of asylum, but of course the question which we were asked extends to the whole range of Government activity.

2. Colleagues will recall that last year an Official Group (MISC 125), set up by the Cabinet Secretary, made a wide-ranging enquiry on this topic, after Ministers had noted with concern the apparently increasing number of cases in which the exercise of a Minister's statutory powers was subjected to legal challenge and judicial review. Although that Group's terms of reference were not identical to those of the request made to us, its excellent report covered the issues with which we are concerned. The report was circulated to Ministers under cover of the Cabinet Office Note MISC 125 (86) 15 - we attach the reportas Annex A to this minute - and was approved by Ministers in July 1986. It would be superfluous for us in this minute to undertake the thorough analysis of the growth of administrative law in the last 25 years that was rightly included in that report.

3. Crucial to an understanding of the present scope of judicial review of administrative decisions is the following passage from an address by Lord Diplock in 1974:

> "In a modern democratic state which acknowledges the rule of law and recognises limits imposed by the constitution or by legislation upon the executive powers of government, if there is made available to a court of justice material that enables it to ascertain how and why a decision was taken to do or to refrain from doing a particular administrative act, the legal training and the human instincts of the Judges who compose the court will make them do their utmost to set the decision aside if they are of the opinion that the administrative act did not fall within the limits, constitutional or statutory, of the authority under which it purported to be made or that the decision to do or to refrain from doing it was arbitrary or was arrived at in a way that was not fair to someone affected by it. And, being lawyers, they will find some principle of law to justify what they do."

4. The key distinction is that the Judges will review only the process by which a decision is reached. It is recognised that they are not to be concerned with the decision itself, its merits or demerits. This is well illustrated by the following passage from the speech of Lord Scarman in the recent case of Notts and Bradford (Notts County Council -v- Secretary of State [1986] 1 All ER 199, HL):

> "I cannot accept that it is constitutionally appropriate, save in very exceptional circumstances, for the courts to intervene on the ground of 'unreasonableness' to quash guidance framed by the Secretary of State and by necessary implication approved by the House of Commons, the guidance being concerned with the limits of public expenditure by local authorities and the incidence of the tax burden as between tax payers and rate payers. Unless and until a

statute provides otherwise, or it is established that the Secretary of State has abused his power, these are matters of political judgment for him and for the House of Commons. They are not for the Judges or your Lordships' House in its judicial capacity."

Much of the character of the development of judicial review has been the development of judicial insistence upon fairness in the exercise of discretionary power by those in whom it has been vested: the development of the principle that, if the decision has not been reached by a process that is fair, it has not been reached lawfully. The salient facts of three land-mark cases in the development of judicial review we set out in Annex B to this Note.

5. Ten years after the address mentioned in paragraph 3 above, Lord Diplock's speech in the GCHQ case (CCSU -v- Minister for the Civil Service [1984] 3 All ER 935, HL) provided what is now the classic exposition of the principles of judicial review. To the very recent decisions in the Tamil and Greenwich cases, the following passage is very relevant:

"Judicial review has I think developed to a stage today when ... one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety' ....

By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness' .... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it....

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

6. In the recent Greenwich case the matter turned on whether the Secretary of State had understood correctly the law that regulated his decision-making power, and had given effect to it. This is essentially a case of the right of the Court to interpret the meaning of legislation. In the Tamils case the matter (in part) turned on whether the applican ts had an arguable point that Home Secretary had observed procedural rules (albeit set out in undertakings given by him rather than laid down by legislative instrument). The courts (rightly, in our opinion) take the view that if a Minister or department has created a legitimate expectation that a certain procedure or safeguard will be applied, then it cannot be altered to the prejudice of

an individual without prior notice.

7. It will already be seen that any significant action to cut down the scope of judicial review, especially if taken in the wake of these adverse decisions, will be seen primarily as action taken to protect even seriously flawed administrative decisions from being overturned by the exercise of 'the judicial power of the State'. Reference to the administrative blemishes which were successfully challenged in the cases mentioned in Annex B illustrates how presentationally unattractive any significant curtailment of the scope of judicial review would be.

8. It would furthermore be seen as a reversal of a major policy shift achieved by Parliament as long ago as 1958. (Modern judicial review is not the creation of the Judges alone). Until then many of the statutes governing a multiplicity of administrative tribunals incorporated ouster clauses providing that the decisions of these tribunals should not be questioned in any legal proceedings. The Tribunals and Inquiries Act 1958 repealed (with two minor exceptions) all ouster clauses in earlier statutes by which previous Parliaments had sought to exclude review by courts of law of the legality of decisions of particular tribunals or governmental or public authorities. It also entitled parties affected by decisions of Ministers made after holding a statutory inquiry to require reasons to be given for the decision reached. In those cases to which the Act applied, the Government Department concerned was compelled to disclose the policy to which the decision was intended to give effect, together with the reasoning process by which the application of that policy to the particular facts of the case led to the decision reached. The disclosure of reasons and policy enabled the High Court to examine, upon complaint, whether the Department had gone wrong in law or misinterpreted its proper powers. The Act reflected the post-war reaction of public and parliamentary opinion against secrecy, and consequent immunity from legal challenge, in an administrative process that was by then intruding more and more into the lives of citizens. Implicit in the Act's provisions was the recognition by Parliament in 1958 of the constitutional

propriety, and of the desirability, of giving to the courts the function of controlling, by way of review, the legality of administrative action. It was a reassertion of the courts' historic role as protectors of the private citizen against unlawful or unjust treatment by the executive branch of Government.

9. We agree with the conclusion reached by the Official Group that the scope for excluding challenge in the preparation of legislation is limited. The use of ouster clauses could not today be relied upon with confidence to achieve the desired result since the courts will tend to interpret such clauses narrowly, leaving intact the power to decide what is and is not intra vires. Steps are, however, open to Government to reduce the risk, by means of careful drafting and by applying in appropriate cases provisions such as rights of appeal, the existence of which in some cases has deflected judicial review. The position should also be improved by the implementation of the Official Group's recommendations regarding training for administrators, and the involvement of legal advisers in the decision-making process. The Tamils case illustrates how the accessibility of judicial review can be narrowed: the Home Secretary's statement about the future of references to UKIAS should preclude further claims based on a legitimate expectation that such references would be made. We do not suggest that, in the present climate of judicial activism, steps of this nature will in all cases prevent individuals seeking leave to bring forward challenges through the courts, but they would reduce the scope for challenge and increase the number of cases which fall at the first hurdle in the judicial review process (the requirement for the court's leave.) On the legislative side, the Home Secretary has brought forward the Immigration (Carriers Liability) Bill, which should reduce substantially the numbers of travellers to this country with suspect claims for asylum. There are, however, no special attributes of immigration law which would make it more likely that the difficulties surrounding ouster clauses could be overcome by legislation.

10. We have of course noted that some colleagues believe that judicial involvement in the field of administrative decisions is now taken too far, and that this might be blurring the accepted boundary between law and policy making. While fully understanding the frustration that certain decisions have occasioned to Ministers striving to cope with exceedingly difficult problems, we cannot agree with that proposition. We emphasise that the courts themselves have consistently held that they have no power to adjudicate on the merits of administrative decisions. It is worth remembering that on other occasions the exercise by the courts of their power of judicial review to impose restraints on those authorities which have sought to act beyond their powers has been very welcome: e.g., the t.v. licences case (Congreve); the comprehensive schools case (Tameside); the several GLC cases. Judicial review does form an integral feature of the rule of law.

11. The Scottish Law Officers, while noting the procedural differences between the Scottish and English jurisdictions relating to the review of administrative decisions, associate themselves with the views and conclusions expressed in this minute.

12. Copies of this minute go to all Cabinet Ministers, the Scottish Law Officers and to Sir Robert Armstrong.

M.H.

P.B.B.

17 March 1987

ANNEX B

Padfield -v- Minister of Agriculture (1968 AC 997)

The Minister had declined to refer to a statutory committee of investigation a complaint made by milk producers. The Act appeared to give him unfettered discretion. One of his grounds was that if the complaint were upheld he might be expected to make a statutory order to give effect to the committee's recommendations. Held, by deciding in part on such reasoning he was not exercising the discretion in accordance with the intentions of the Act. He was influenced by an irrelevant consideration.

Ridge -v- Baldwin (1964 AC 640)

A Watch Committee dismissed a chief constable for being negligent in the discharge of his duty, or otherwise unfit for his duty, when he had neither been charged nor informed of the grounds on which they proposed to proceed and had not been given a proper opportunity to present his defence. Held, that the Watch Committee had not observed a cardinal rule of natural justice.

Conway -v- Rimmer (1968 AC 910)

The Home Secretary claimed Crown privilege (now known as public interest immunity) in respect of probationary reports on a police constable who, having been acquitted on a charge of theft, sued a superintendent for malicious prosecution. The superintendent had earlier told the constable that his probationary reports were adverse and urged him to resign. Held, the reports might be of vital importance to the action; accordingly the production of the reports for the inspection of the court would be ordered, and if it was then found that disclosure would not be prejudicial to the public interest, or sufficiently prejudicial to justify non-disclosure, an order for disclosure of them to the police constable would be made.

Prime Minister
to note
N.L.W
24.10.

70 WHITEHALL, LONDON SW1A 2AS

01-233 8319

From the Secretary of the Cabinet and Head of the Home Civil Service

Sir Robert Armstrong GCB CVO

Ref. A086/3013

23 October 1986

Dear Nigel,

In the last few years there has been a considerable increase in the extent to which Government decisions are challenged in the domestic courts, mostly by way of applications for judicial review. Similar challenges have also frequently been brought before the European Commission and Court of Human Rights (ECHR).

With a view to minimising the risks of successful challenges Ministers gave instructions for separate reviews by officials to be carried out on the domestic and on the ECHR aspects. Both reviews have now been completed, and Ministers have approved the action to be taken on them. Part of that action is that Departments should pay close attention to the points set out in the two attached notes. Other steps are being taken in parallel with this letter, and it is not the purpose of the attached notes to provide detailed background information or analyses of the underlying issues. An account of the substance of the Report on challenges in the domestic courts and a summary leaflet based on it are shortly being sent to Departments for training and related purposes.

Sir Robert Armstrong would be grateful if Departments would now make arrangements to follow the guidance in the attached notes. This guidance includes some additions - which take immediate effect - to the list of requirements for papers submitted to Cabinet Committees: the Guide to Legislative Procedure and the Cabinet Document Officers' Handbook will be amended in due course.

/I am

N L Wicks Esq CBE
10 Downing Street

I am sending copies of this letter to the Private Secretaries to all members of the Cabinet, the Law Officers, the Minister of State, Privy Council Office and the Minister of State for Overseas Development.

Yours sincerely,

Trevor Woolley

(T A Woolley)
Private Secretary

REDUCING THE RISK OF LEGAL CHALLENGES

I CHALLENGES IN THE UK COURTS

Consultation

1. A ground for judicial review to which the judges appear to be paying particular attention is the lack, or alleged inadequacy, of consultation with those affected by the decision. The risk of challenge on this ground therefore needs to be carefully borne in mind when formulating policy. This does not mean that consultation should always precede a controversial decision; there are bound to be circumstances where consultation is not possible or desirable if a decision is to be implemented quickly and effectively. In deciding whether to consult, Departments should consider whether consultation is required by legislation and, if it is not, whether it has been undertaken in the past or whether there is a legitimate expectation of it. In deciding to proceed without full consultation, Ministers need to have had drawn to their attention any heightened risk of legal challenge that may result.

Preparation of Legislation

2. The risk of challenge to administrative action can be reduced if the legislation governing that action is expressed in the clearest possible language, even at the cost of drafting in terms that are presentationally or politically unattractive. The courts are reluctant to go against something which is clearly the express wish of Parliament and making decisions subject to Parliamentary procedure may therefore be an important safeguard. They will also be influenced in their decisions by such factors as the provision in legislation of avenues of appeal for those affected. Again, there are no hard and fast rules in these areas, but the possibility of reducing the risks of challenge in these

ways is a factor which Ministers will need to weigh when making decisions on the shape of legislation, and Departments should ensure that it is drawn to their attention.

Vetting of draft legislation by outside Counsel

3. Where there is a history of legal challenges being mounted in a particular area, there may be advantage in having draft legislation seen by an outside Counsel expert in that field. A Department wishing to follow that course should consult the draftsman and the Law Officers' Department or, in respect of Scotland, the Lord Advocate's Department.

Cabinet documents

4. Memoranda submitted to a Cabinet committee seeking policy decisions should draw attention to any perceived risks of legal challenge. Memoranda accompanying Bills submitted to Legislation Committee should draw attention to any steps taken to reduce the risk of legal challenge.

REDUCING THE RISKS OF LEGAL CHALLENGES

II THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Introduction

1. The United Kingdom has been a party to the European Convention on Human Rights (TS No 71 of 1953, Cmnd 8969) since 1951 and is also a party to several of the Protocols to it. Since 1966 we have accepted the right of individuals claiming to be victims of a violation of the Convention by the United Kingdom to make direct application to the European Commission of Human Rights. We are obliged to give effect to judgments of the European Court of Human Rights and decisions of the Committee of Ministers concerning violations by the United Kingdom. Important changes in law and practice have been required as a result. The main rights and freedoms protected concern, briefly: life; torture and inhuman and degrading treatment or punishment; liberty and security (ie freedom from wrongful arrest and detention); fair trial; private and family life; home and correspondence; religion; expression and information; peaceful assembly and association; marriage; property; education; and free elections. Most of the rights permit certain exceptions. There is much case-law of the Commission and Court interpreting the Convention - often on the basis of its purposes rather than literally - and a consistently high level of applications and decisions concern the UK. The Convention has been held to apply in areas where it might not have been initially considered - e.g. school corporal punishment and aircraft noise. Questions on it can sometimes arise in most of the areas of law administered by Departments.

Preparation of legislation and administrative measures

2. It should be standard practice when preparing a policy initiative for officials in individual Departments, in consultation with their legal advisers, to consider the effect of existing (or expected) ECHR jurisprudence on any proposed legislative or administrative measure. Wherever possible, officials should at this stage alert any other departments likely to be affected by the initiative in a similar way. If Departments are in any doubt about the likely implications of the Convention in connection with any particular measure, they should seek ad hoc guidance from the Foreign and Commonwealth Office. This request for advice should always be copied to the Law Officers' Department, the Lord Advocate's Department, the Home Office, the Scottish Home and Health Department and the Northern Ireland Office.

Cabinet documents

3. Any memoranda submitted to a Cabinet committee or accompanying a Bill submitted to Legislation Committee, should include an assessment of the impact, if any, of the European Convention on Human Rights on the action proposed (much as Departments already do for European Community implications).

Settlement of cases

4. Where applications to the ECHR have been referred to the Government and there is a serious risk of an adverse finding by the Commission or Court, Departments should give early consideration to the possibility of friendly settlement if this seems likely to offer a less damaging outcome. The Convention expressly provides for settlement

to be considered after the Commission's decision on admissibility, but it is possible at any stage, including during proceedings before the Court. (In the nature of things, however, friendly settlement will not in practice be available where an application has been brought as a test case in order to get a ruling from the Court.) Before a friendly settlement is offered in Strasbourg, the responsible Department must ensure that other Departments which will be affected by the outcome of the case are given sufficient opportunity to comment.

Existing measures

5. Although it is not intended that Departments should conduct a systematic retrospective look at all existing measures, they should nevertheless consider whether action is needed on existing measures where it is clear that there is a serious risk of an adverse finding at Strasbourg which will affect them.

PRIVY COUNCIL OFFICE
WHITEHALL. LONDON SW1A 2AT

31 July 1986

Dear Michael,

LEGAL CHALLENGES TO MINISTERIAL DECISIONS

The Lord President ~~minuted~~ at May the Prime Minister and other Cabinet colleagues on 9 July with the report of the Official Group set up to review cases in which ministerial decisions have been successfully challenged in the courts and a minute from Sir Robert Armstrong of 4 July giving his views and its conclusions.

You will have seen that the report has met with general approval and the Lord President would be grateful if Sir Robert would now proceed to implement its recommendations through the action he outlined in his minute of 4 July. In doing so he will of course need to take account of the points made in Mark Addison's letter of 21 July in relation to the proposal for a seminar involving judges and in the Lord Advocate's letter of 22 July in relation to implementation in Scotland.

I am sending a copy of this letter to the Private Secretaries to the members of the Cabinet, and to Michael Saunders (Attorney General's Office), Ian Jack (Lord Advocate's Department), Paul Thomas (Office of the Minister of State, Privy Council Office) and Murdo Maclean (Chief Whip's Office).

Yours sincerely

Joan.

JOAN MACNAUGHTON
Private Secretary

Michael Stark Esq

LEGAL PROCEDURES Legal Powers Dec85

Lord Advocate's Chambers
Fielden House
10 Great College Street
London SW1P 3SL

Telephone Direct Line 01-212 0515
Switchboard 01-212 7676

CONFIDENTIAL

LORD PRESIDENT OF THE COUNCIL

22/7/86.

LEGAL CHALLENGE TO MINISTERIAL DECISIONS

I have just seen (by courtesy of the Secretary of State for Scotland) a copy of your minute of 9 July to the Prime Minister.

My office was involved in the preparation of this report, and I would wish to be fully involved in its implementation.

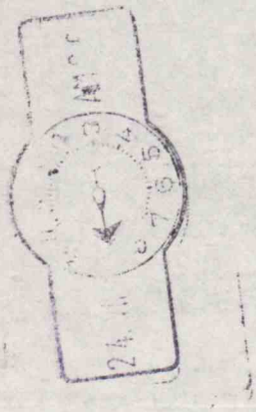
I agree generally with the report and with Sir Robert Armstrong's comments on it. Although the general problem exists in Scotland as in England, the number of cases of judicial challenge has been very much fewer, but as the report indicates we have only recently implemented a new form of judicial review procedure. Our approach in Scotland may therefore be slightly different, for instance on the question of whether it is appropriate that there should be consultation with the judiciary. Also on the matters mentioned in paragraphs 6e and g, as well as 6d, consultation with me will be appropriate in relation to Scottish cases, and I and my Department will consult with the Attorney General and his Department in relation to cases raising issues involving both legal jurisdictions.

I am copying this to the Prime Minister and to the recipients of your minute to her.

CAMERON OF LOCHBROOM

Legal Procedure: December 1985.

Legal Powers: challenges against DHSS and other Dept's.



CS3/36

CONFIDENTIAL

CBG

Treasury Chambers, Parliament Street, SW1P 3AG
01-233 3000

MCA
Sec

LORD PRESIDENT OF THE COUNCIL

WITH MEA

I have seen the report from the Secretary of the Cabinet, covering the work of an interdepartmental group of officials, about legal challenges to Ministerial decisions and the action that might be taken to minimise the risks of defeat in the future.

It is a thorough piece of work, with sensible and realistic recommendations, and I agree that you should ask the Cabinet Secretary to proceed with implementation.

I am sending a copy of this letter to the Prime Minister, the other members of Cabinet, the Chief Whip (Commons), the Attorney General, the Minister of State, Privy Council Office (Mr Luce) and Sir Robert Armstrong.

N.L.

21 July 1986

LEGAL PROCEDURE

LEGAL POWERS

TPM

12/15

CONFIDENTIAL

file DG2AHY

cc DG

10 DOWNING STREET

From the Private Secretary

21 July 1986

Dear Joan

LEGAL CHALLENGES TO MINISTERIAL DECISIONS

The Prime Minister has seen the Lord President's minute of 9 July, and the report of the Official Group set up to review cases in which Ministerial decisions have been successfully challenged in the courts, together with the covering minute from Sir Robert Armstrong.

The Prime Minister agrees that the recommendations in general offer a sensible way forward, and that Sir Robert Armstrong should be asked to proceed with their implementation. She does not, however, consider that the recommendation at paragraph 4 of Sir Robert's minute, for a seminar involving judges, members of the Bar and the Civil Service, should be pushed. She believes it would be easy to misrepresent this as an attempt by the Government to influence the judiciary improperly, even if the judiciary themselves were willing to agree to it.

I am copying this letter to the Private Secretaries to the members of Cabinet, Michael Saunders (Attorney General's Office), Paul Thomas (Office of the Minister of State, Privy Council Office), Murdo Maclean (Chief Whip's Office) and Michael Stark (Cabinet Office).

Yours ever

Mark Addison

Mark Addison

Miss Joan MacNaughton,
Lord President's Office.

CONFIDENTIAL

C. CPpps please.
file +
MISC 125(86) is attached

PRIME MINISTER

18 July 1986

LEGAL CHALLENGES TO MINISTERIAL DECISIONS

When we suggested a review of legal challenges to Government policy last December, DHSS and DoE proposals were going down like ninepins. The position has already begun to improve as departments learn the lessons usefully summarised in Sir Robert Armstrong's report. It is striking, for example, that rate-capping has survived without successful legal challenge from any local authority.

Sir Robert Armstrong's note makes two important points:

- Judges are more sympathetic if Government can show that it has consulted before reaching a decision.

- Clear, straightfoward law is more likely to be judge-proof. Ministers must resist the temptation to go for ambiguous legislation to hide their real purposes.

The report goes on to make some sensible specific proposals, for example: (a) Cabinet Ministers seeking policy decisions should draw attention to any perceived risks of legal challenge; and (b) Law Officers should be properly involved in decisions with legal implications.

We recommend that you endorse this useful and sensible set of proposals.

David Willetts

DAVID WILLETTS

PRIME MINISTER

The Lord President has forwarded to you the report which has emerged from the review set in hand following a number of defeats the Government has suffered in the courts. The Lord President endorses the conclusions and recommendations of the report, which is at Flag A, under cover of a minute summarising these from Sir Robert Armstrong. The Lord President's covering note is at Flag B, and advice from David Willetts is at Flag C.

You don't need to read the report in full, and Sir Robert Armstrong's summary is a good one. The recommendations offer a number of businesslike and relatively modest proposals to tackle the problem without suggesting that there should be any attempt to devise a completely new system of administrative law.

The only recommendation I would question is the one suggesting that seminars might be arranged with judges, members of the Bar, and civil servants to illustrate some of the constraints under which Ministers work in making and implementing decisions. It could be easy to misrepresent this as an attempt by the Government to influence the judiciary improperly. — I agree

We cannot possibly have this

Agree to endorse the proposals set out in Sir Robert Armstrong's covering minute?

Agree also to note that the suggestion of a seminar with judges and civil servants would need to be handled very carefully indeed, to ensure that it's purpose could not be misrepresented?

Julie Bowers
Duty Clerk
PP **MEA**
18 July, 1986.

JD3AOG

CONFIDENTIAL

CCBG

CABINET OFFICE
WHITEHALL, LONDON SW1A 2AS

Chancellor of the Duchy of Lancaster

Tel No: 233 3299
7471

14 July 1986

Joan MacNaughton
Principal Private Secretary to the
Lord President of the Council
Privy Council Office
68 Whitehall
LONDON
SW1A 2AT

BF N Ireland DW comments

Dear Joan.

LEGAL CHALLENGES TO MINISTERIAL DECISIONS

The Chancellor of the Duchy has seen a copy of the Lord President's minute of 9 July to the Prime Minister.

The Chancellor agrees that Sir Robert Armstrong should be asked to proceed with implementation of his report, as the Lord President proposed.

I am sending a copy of this letter to the private secretaries to the Prime Minister, members of Cabinet, the Chief Whip, the Attorney General, the Minister of State, Privy Council Office, and to Sir Robert Armstrong.

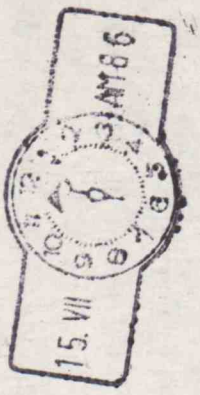
Yours Sincerely,

Andrew Lansley

ANDREW LANSLEY
Private Secretary

LEGAL
PROCEDURE

LEGAL
-POWER
2/18



CONFIDENTIAL

B.

cc BG

PRIME MINISTER

LEGAL CHALLENGES TO MINISTERIAL DECISIONS

You will recall that at the end of last year you asked for a review to be set in hand of the recent defeats that the Government had suffered in the courts and the action that might be taken to minimise the risks of such defeats in the future. I subsequently asked the Secretary of the Cabient to carry this forward and report back to me. I now attach his report, together with that of the Official Group which looked into the matter in some detail. Sir Robert's report reflects a discussion he has had on this issue with Permanent Secretaries.

2. Sir Robert's report summarises the main issues and indicates how he would propose to implement the various recommendations the Official Group have made. I agree with his conclusions and think the recommendations offer a sensible and realistic means of minimising the risk of challenge in the future. Unless you and colleagues have any objections, I propose to ask him to proceed with implementation.

3. I am sending a copy of this minute to the members of Cabinet, the Chief Whip, Commons, the Attorney General, the Minister of State, Privy Council Office (Mr Luce) and Sir Robert Armstrong.

Privy Council Office
9 July 1986

CONFIDENTIAL

LEGAL PROCEDURE: Legal Powers: Dec. 1985.

cc BGT

70 WHITEHALL, LONDON SW1A 2AS

01-233 8319

From the Secretary of the Cabinet and Head of the Home Civil Service

Sir Robert Armstrong GCB CVO

Ref. A086/1954

LORD PRESIDENT OF THE COUNCIL

Legal Challenges to Ministerial Decisions

In December last year you were asked by the Prime Minister to institute a review of cases in which Ministerial decisions had been successfully challenged in the courts. The aim was to identify common factors; to assess how far the problems resulted from matters within the control of Government and how far they reflected changes either in the behaviour of pressure groups or the judiciary; to identify other areas at risk; and to consider what if anything could be done to head off further problems before they arose. You subsequently asked me to carry forward this remit and report the outcome to you.

2. I attach the report of the Official Group I set up to consider the matter: it is preceded by a short summary of both its analysis, conclusions and recommendations. The report traces the growth of judicial review of administrative action and the factors that stimulated growth. Although it identifies a significant extension of the role of the courts as a result of this expansion, it concludes that the Government would not wish at the present time either to attempt to limit the powers of the courts by legislation or to devise wholly new systems of administrative law as periodically canvassed by some groups,

including the Law Commission, since the 1960s. They suggest rather that the best way of proceeding is to recognise the wide potential that exists for a legal challenge to be mounted and to take various steps either to prevent it or, if that proves impossible, to win the subsequent court case. It finds that this process has already begun and makes a number of recommendations to extend and accelerate it.

3. I have discussed the report with the Permanent Secretaries in the Departments most concerned. We think it is right in its general approach and that its recommendations are sensible and effective measures which will reduce the scope for successful challenge. Two areas emerge which will be of particular interest to Ministers. The first is that a ground for judicial review to which the judges appear to be paying particular attention is the lack of, or allegedly inadequate, consultation with those affected by the decision. The risk of challenge in this area will therefore need to be increasingly a factor to bear in mind when formulating policy. The report does not advocate that consultation should always precede a controversial decision: there will always be circumstances where consultation is not possible or desirable if a decision is to be implemented quickly and effectively. But in deciding to proceed without full consultation, Ministers need to have been warned of, and to have considered the heightened risk of, legal challenge that will result.

4. When discussing this problem, Permanent Secretaries also thought that another measure that might be of benefit would be to arrange seminars with judges and members of the Bar and civil servants participating, which could be used, for our part, to illustrate some of the constraints under which Ministers worked in making and implementing decisions; there was a feeling that judges sometimes appeared unaware of these constraints and expected unrealistic procedures to be followed.

5. The second area of particular interest is the extent to which legislation can be drafted in such a way as to minimise the risk of challenge. The report concludes that it is not possible for legislation to seek to exclude subsequent review by the courts. This "judge-proofing" has been tried on various occasions in the past, and the judiciary have always proved most ingenious in finding ways to circumvent it. The report does, however, suggest that the risk of legal challenge can be minimised if the Government's intention is embodied in legislation in the clearest possible language even at the cost of drafting in terms that are presentationally or politically unattractive; the courts are reluctant to go against something which is clearly the express wish of Parliament. They will also be influenced in their decisions by such factors as the provision in the legislation of avenues of appeal. Again these are areas in which no hard and fast rules can be laid down, but the possibility of reducing the risks of challenge in these ways is a factor which Ministers will need to weigh when reaching decisions on the shape of legislation.

6. The remainder of the report is principally concerned with ensuring that the risks of judicial review and preventive measures that could be taken are made widely known to Ministers and senior officials.

a. The report emphasises the importance of administrative law being included in the training of officials. A good deal of work has already been done by the Civil Service College and Departments in this area, but there are no doubt improvements that can be made and I shall be arranging for the Management and Personnel Office to review this area and to ensure that current arrangements are properly systematised and improved where necessary.

b. To build on this training the report also suggests that a short leaflet giving information on the basic facts about judicial review and on precautions that could be taken should be made widely available. This seems right, and I intend asking the Treasury Solicitor to put this in hand, in association with the Management and Personnel Office.

c. The report identifies a need for the proper integration of lawyers into the decision-making process and for ensuring that the lawyers themselves, particularly those working on advisory work, are aware of developments in other legal specialisms such as litigation. This is already the case in many Departments, but we need to ensure that it is carried out comprehensively across the service. I will ask the Treasury Solicitor and other Permanent Secretaries to ensure that this is so.

d. A particular point of difficulty is the degree to which the Law Officers should become involved in decisions with legal implications. A balance needs to be struck between overwhelming the Law Officers with requests for advice and ensuring that they are always consulted where necessary. The current rules on consultation with the Law Officers set out in "Questions of Procedure for Ministers" are well-tried and we should build on them; but they will bear some recasting to take account of the growth of judicial review, and I propose that the Cabinet Office in consulation with the Law officers' and Lord Advocate's Departments should set in hand revisions accordingly.

e. The report considers that the practice in the local government finance field of arranging for draft legislation to be vetted by an expert in litigation in that field might be extended to other areas of highest risk. I will arrange for this possibility to be drawn to the attention of those

concerned. I think the decision on whether to seek the advice of outside Counsel is one best left to the departmental Minister, in consultation with and acting through the Attorney General.

f. The report also proposes that Cabinet papers seeking policy decisions should draw attention to any perceived risks of legal challenge. Although I am concerned to limit the growing number of matters to which reference needs to be made in Cabinet papers, I think in this instance a new rule is justified, and I propose to arrange for the guidance on preparation of Cabinet papers to be amended accordingly.

g. Finally, the report recommends that, in selecting Counsel to appear on behalf of the Government in cases of this sort, a Counsel expert in general administrative law might usefully be supplemented by a Counsel specialising in the particular area of substantive law under consideration - for example, local government finance. I will ask the Law Officers' Department to bear this in mind when advising the Attorney General on the selection of Counsel.

7. One or two of these recommendations have a bearing on recommendations in a similar exercise just concluded on reducing the scope for challenge in the European Court of Human Rights. The Prime Minister has now agreed to the ECHR measures, and if agreement is reached on these measures also they can be implemented together.

7. If you are content with the report I will set in hand the action indicated above. You may also wish to report the outcome of the review to the Prime Minister and other Cabinet colleagues.

Robert Armstrong

4 July 1986

ROBERT ARMSTRONG

LEGAL PROCEDURE: Legal Powers: Dec 1985

CONFIDENTIAL

PRIVY COUNCIL OFFICE
WHITEHALL, LONDON SW1A 2AT

6 January 1986

NBPQ.

Dear David

LEGAL POWERS

In your letter of 9 December 1985 attached to Joan MacNaughton, you conveyed the Prime Minister's request to the Lord President to consider instituting a review of the legal challenges the Government has faced in the recent past.

The Lord President has asked the Secretary of the Cabinet to put in hand an urgent review of the cases in which the exercise of a Minister's statutory powers has been subjected to legal challenge and judicial review, to see why the risk of challenge (and of successful challenge) has apparently increased, how far problems result from matters within the control of Government, and how far they reflect changes outside (for instance in the propensity to challenge or in changing attitudes of the judiciary), to consider what areas may be most at risk, and to consider what can be done to reduce the risk of challenge and maximise the chances of successful outcomes when challenges are made.

The Secretary of the Cabinet will report the outcome of this review to the Lord President, who will report to the Prime Minister and make proposals for whatever Ministerial consideration is needed when he has the Cabinet Secretary's report.

Yours Sincerely
Ron Lawrence.

RON LAWRENCE
Asst Private Secretary

D R Norgrove Esq

CONFIDENTIAL

PRIVY COUNCIL OFFICE
WHITEHALL. LONDON SW1A 2AT

11 December 1985

Dear David, NBPP

LEGAL POWERS

Thank you for your letter of 9 December. We are considering how best this might be taken forward, and I will come back to you as soon as the Lord President has a firm view on it.

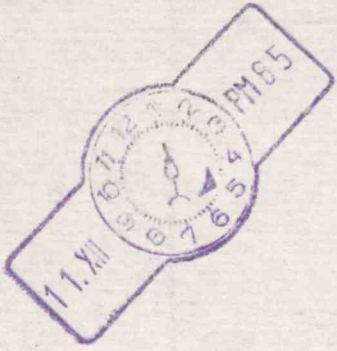
Yours sincerely

Joan.

JOAN MACNAUGHTON
Private Secretary

David Norgrove Esq

Legal Proc, legal Powers Dec 85



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10 DOWNING STREET

9 December 1985

From the Private Secretary

Dear Joan,

LEGAL POWERS

The Government's legal powers to make policy changes have been challenged successfully in the courts on several occasions recently. Examples have included DHSS powers to implement their new contract with pharmacists and their ability to reclaim excess payments from opticians. These are not of course isolated examples. There have been others, both in the DHSS and in other Departments, including Department of the Environment, Department of Transport and the Home Office.

The Prime Minister has asked whether the Lord President, in his capacity as Chairman of H Committee, would consider instituting a review of the legal challenges the Government has faced in the recent past. The aim would be to identify common factors, to assess how far the problems result from matters within the control of Government and how far they reflect changes either in the behaviour of pressure groups or of the judiciary, to identify other areas at risk, and to consider what if anything can be done to head off further problems before they arise.

A review of this kind would need to involve the Law Officers, legal advisers to Departments and of course Ministers themselves.

I am not copying this letter to other Departments in order to allow maximum scope for you to consider how best this might be taken forward.

Yours ever

David.

(DAVID NORGROVE)

Miss Joan MacNaughton,
Lord President's Office.

CONFIDENTIAL

SL2ADB

PRIME MINISTER

LEGAL POWERS

David Willetts' minute below points out the extent of the legal challenges which have been made against DHSS and suggests that 'H' Committee should take a paper to see what can be done to head off other problems.

It seems wrong to single out the hapless DHSS in this way. The Department of Transport, Department of the Environment and Home Office have also had substantial problems.

An alternative approach would be to invite the Lord President to consider a more general review of the legal challenges the Government have faced in the past year or two. This would identify common factors, assess how far the problems result from matters within the control of Government and how far they reflect changes either in the behaviour of pressure groups or of the judiciary, identify other areas at risk, and consider what if anything can be done to head off further problems before they arise.

If you feel that this could be productive, agree to write in this sense?

DAVID NORGROVE
6 December 1985

I think we need the wider approach involving the A-G's office (some things clearly should have been dealt differently) and the legal advisers to several departments. Obviously Ministers themselves must attend as responsibility falls on them

PRIME MINISTER 4 December 1985

DHSS LEGAL POWERS

H Committee yesterday discussed two areas of health policy where the lawyers have decided that the DHSS does not have the powers it thought it had:

- to implement their new contract with pharmacists;
- to reclaim excess payments from opticians.

These are not isolated examples. There have also been successful legal challenges on benefits, notably board and lodging allowances.

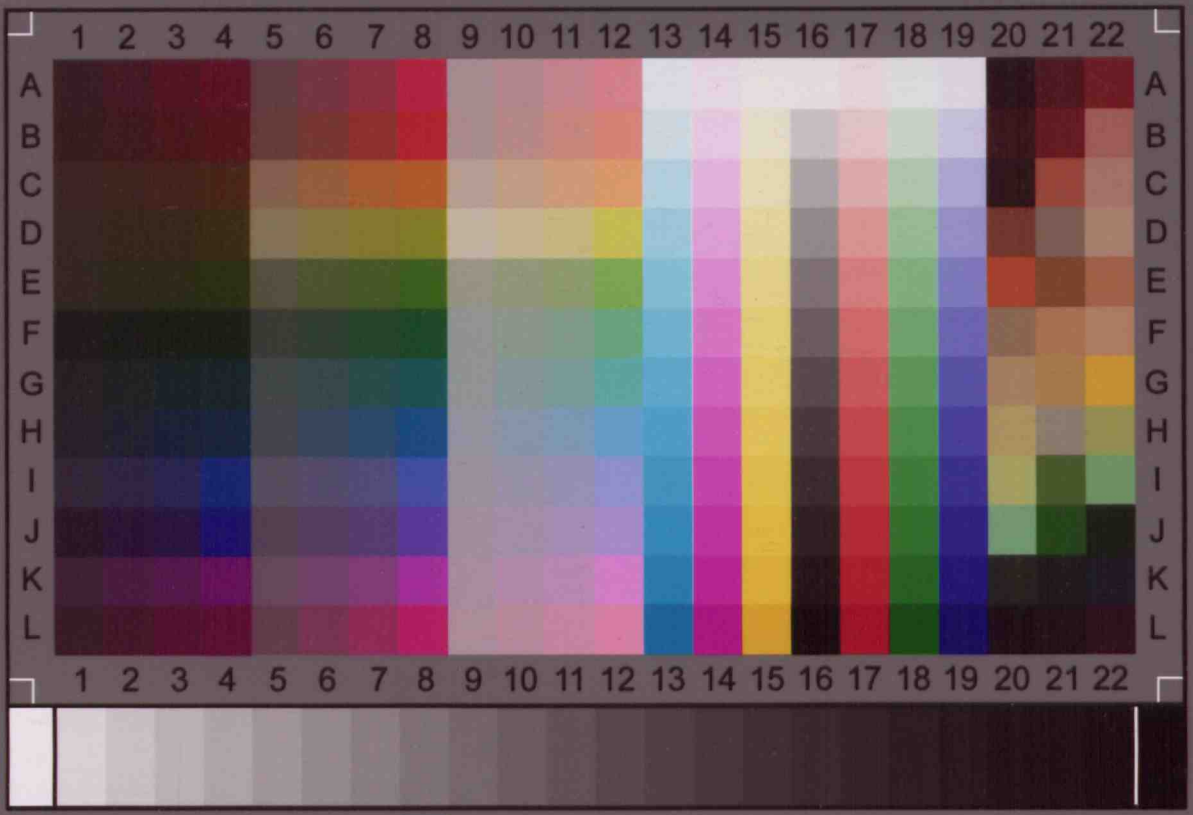
The DHSS appears to have underestimated the threat to its powers from challenge in the courts. They are now living a hand-to-mouth existence, unsure which power will be shot away from them next. I recommend that your office suggests that H Committee might take a paper from the DHSS which:

- sets out the facts of recent legal challenges to the Department;
- identifies the general themes;
- identifies other areas at risk, and considers what action can be taken so as to head off problems before they arise.

H Committee might also wish to look at other Departments - such as DoE - with the same problem.

David Willetts

DAVID WILLETTS



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