End of the Green Paper Saga – A South African Perspective

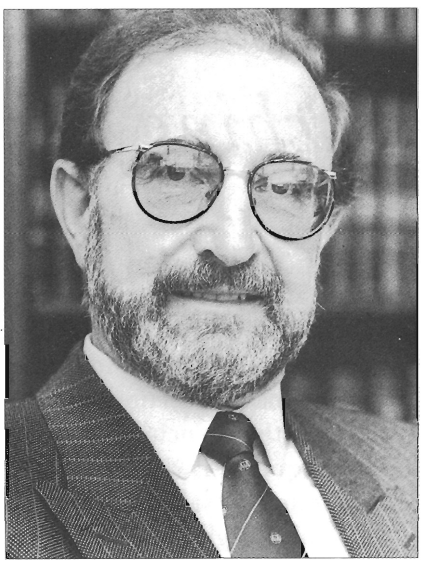
Milton Seligson SC, Chairman of the General Council of the Bar of South Africa, recently attended the IBA Council meeting held in Venice and thereafter visited London where he *inter alia* made a study of the latest developments concerning the *Courts and Legal Services Bill*. In this contribution Seligson gives an overview of those developments and also deals with the implications of the measure for South Africa.

Background : the Green and White Papers

When, in January 1989, Lord Mackay, the Lord Chancellor of Great Britain, dropped a bombshell by presenting the controversial Green Paper to Parliament titled "The Work and Organisation of the Legal Profession", it was both condemned and heralded as a radical proposal which would drastically alter the structure of the profession in England and Wales and markedly affect the administration of justice in the Courts. Indeed, the Lord Chief Justice, Lord Lane, described it as "one of the most sinister documents ever to emanate from government". Many in the legal profession and particularly Bench and Bar were no less scathing in their rejection. Supporters of the much in vogue market-force economics, however, welcomed the Green Paper's objective of widening consumer choice in the provision of legal services.

In July 1989 a follow-up White Paper was published, in which the Lord Chancellor made some significant concessions without deviating from the basic concept of the Green Papers.*

The English Bar has since been



successful in its campaign against a number of the original proposals which would have threatened the continued existence of an independent Bar, including the Government's proposals for direct lay access to barristers, partnerships between barristers and solicitors and multi-disciplinary practices. As the proposed changes in England have profound implications for our own legal system and the role of the Bar therein, the course of events in England should be of considerable interest to the legal profession in South Africa.

* The background to the Green Papers (of which there were three) and their successor, the White Paper, their contents and the reaction of the legal profession, were fully discussed in two articles by RH Zulman SC, which appeared in the April 1989 and October 1989 issues of *Consultus*.

The Courts and Legal Services Bill

The legislative version of the White Paper, The Courts and Legal Services Bill, was launched in the House of Lords where it had its Second Reading on 19 December 1989. Thereafter, it passed through the Lords and the Commons where the Report and Third Reading stages took place on 25 July 1990. During its passage through the Lords and the Commons several hundred amendments were made to the Bill. All that remains is for the Lords to consider the Commons amendments which will occur in October this year, whereupon, after royal assent, it will become law.

It is interesting to note some of the criticisms which were levelled at the Bill by legal peers and judges in the Lords when it was introduced in that House. Lord Lane (the Chief Justice)

and Lord Donaldson (Master of the Rolls), both expressed their concern that the Bill had dropped the White Paper's "interests of justice" criterion for legal reform. Lord Mackay responded that this principle was still present in the Bill as the paramount consideration, even though the "statutory objective" was expressly stated to be –

> the development of legal services . . . by making provision for new ways of providing such services and a wider choice of persons providing them.

Lords Ackner and Hooson expressed the view that the Bill was likely to "Americanise" the English system of justice. Lord Hailsham, a former Lord Chancellor, saw a paradox in a government which was generally intent on the privatisation of industry producing a Bill –

> . . . the effect of which is the nationalisation of the legal profession and part of the judiciary.

Lord Beloff found it extraordinary that centuries of legal experience were being set aside by a Government that was behaving like a wholly-owned subsidiary of the Institute of Economic Affairs.

Lord Byron, formerly a barrister and now a practising solicitor, in a trenchant maiden speech in the Lords, noted the high reputation of the English legal system and the fact that internationally England is the preferred forum for resolving commercial disputes. He saw the Bill as –

> . . . a politically inspired piece of legislation designed to extend the government's philosophy of market forces and consumerism into new areas.

Lord Byron raised the question –

> . . . whether the practice of law and the administration of justice is amenable to the government's approach.

He suggested that there were two major reasons why the legal profession should not be subject to the sort of market forces envisaged by the Bill:

> First, lawyers are not simply selling a product or service – where the only criterion is to obtain the right relationship between quality of service and price, so that the product can be attractive and saleable to the public at large. What distinguishes present members of the legal profession, whether they be barristers or solicitors, is that they all owe an overriding duty to the court in the conduct of their profession. Those who have practised at the Bar will know that the system operates on a basis of trust; likewise the integrity of the solicitor's branch of the profession is of the utmost importance, perhaps even more so than that of the Bar, because the scope for abuse in the preparation of cases is so much greater . . .
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> Secondly, the consumer of legal services is different from the consumer of the services of a hairdresser or garage mechanic. The layman may only have to seek the services of a lawyer once or twice in a lifetime. He must be assured of a service which is truly 'professional'.
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> Of course it may be said that these are all matters which can be covered by means of a code of conduct. Nobody with any experience, however, believes that the mere existence of a code of conduct will ensure that the desired conduct will prevail.

There is no doubt that these views have carried considerable weight during the passage of the Bill through Parliament and have provided the momentum for a number of important amendments.

Key provisions of the Bill as amended to date

Subject to what emerges from the Lords' consideration of the Commons amendments, the final shape of the Bill is now clear. Broadly speaking, it deals with four types of legal services – advocacy, litigation, conveyancing and probate. The Bill as amended adopts what are described as "the statutory objective" and "the general principle", in relation to such services. The statutory objective is defined as –

> . . . the development of legal services in England and Wales . . . by making provision for new or better ways of providing such services and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice.

The general principle requires that the right of audience and the right to conduct litigation should depend only on whether –

(a) the person concerned is appropriately qualified;
(b) the person is a member of a professional or other body which has rules of conduct and an effective mechanism for enforcement, and is likely to enforce such rules;
(c) such rules of conduct make satisfactory provision in relation to the conduct of litigation that no member may withhold advocacy services on grounds broadly similar to those on which barristers may not at present refuse to represent clients in terms of the so-called "cab-rank" rule. The effect of this rule is generally to obligate counsel to act for any client whom counsel is asked to represent in a case falling within his/her sphere of practice;
(d) such rules of conduct are appropriate in the interests of the proper and efficient administration of justice.

Professional bodies and others affected by the Bill must exercise their functions in accordance with the general principle and in furtherance of the statutory objective.

It will be observed that (on the insistence of the Bar and some judges) the Bill was amended to extend the "cab-rank" principle to all advocates who practise in the higher courts, so that solicitors who in due course obtain rights of audience under the provisions of the Bill will be in the same position as a barrister who, in the words of Anthony Scrivener, QC, the Vice-Chairman of the General Council of the Bar, is –

> . . . not allowed to discriminate against acting for someone because he is legally aided or because his cause is unpopular or because his crime is particularly heinous. . .

New machinery is created for deciding who (apart from barristers) in the future should be entitled to rights of audience and to conduct litigation in the higher courts. The relevant professional body is required to submit to the Advisory Committee established under the Bill, details of any rights to provide advocacy or litigation services which it proposes to grant. The Advisory Committee is a lay-dominated body with a judicial chairman. The rules must be approved by the Lord Chancellor and each of the four senior judges. The Director-General of Fair Trading must advise whether the proposals are likely to restrict or prevent competition. Under the Bill as amended, each of the four senior judges retains an individual veto in respect of the proposals for extending the rights of audience of the practitioners concerned. Efforts by the Law Society to obtain immediate extensions to solicitors' existing rights of audience were defeated in the Lords and the Commons. Future rights of audience will therefore be determined

by the new machinery referred to above. On the other hand, the Bill recognises that any person called to the Bar by one of the Inns of Court will have rights of audience exercisable in all courts upon completion of pupillage, thereby providing a "fast track" for the Bar.

Other important provisions affecting the Bar are as follows –

- ☐ The immunity of advocates from actions in negligence and for breach of contract has been retained, notwithstanding efforts by certain consumer interest groups to remove the immunity.
- ☐ The Bar Council's power to make rules prohibiting barristers from entering into multi-disciplinary practices is retained, subject to approval of the rules under the new machinery.
- ☐ Under strong pressure from both the Bar and the Law Society, the Government abandoned amendments aimed at restricting legal aid to one lawyer in the higher courts. It is now provided that regulations under the Legal Aid Act shall not restrict representation in proceedings in the Supreme Court (including the Crown Court), or the House of Lords to a single barrister, solicitor or legal representative, save in unusual circumstances.
- ☐ An advocate will be allowed to enter into a conditional fee agreement under which he will receive normal fees, or normal fees plus an uplift, in the event of the litigation succeeding, but nothing should the litigation fail.

Conveyancing and probate services

The Government has stood firm on its decision to allow banks, building societies, insurance companies and estate agencies to provide conveyancing services under the supervision of a new regulatory authority. Similarly, such bodies will be allowed to apply for grants of probate and to administer deceased estates. The Bar Council has supported the Law Society's attempts to narrow down the conveyancing reforms so as to ensure that the new "practitioners" compete with solicitors on a fair basis and that clients receive the same protections which they enjoy when they employ solicitors.

Effects of the legislation

The General Council of the Bar in England is of the view that the Courts and Legal Services Act which will emerge differs markedly from that envisaged by the main Green Paper and that major improvements have been achieved through amendments which were adopted during the passage of the Bill through Parliament. This view is not shared by everyone. Writing recently in the *Financial Times*, Robert Rice, its legal correspondent, in an article headed "Little to please profession in coming measure on courts", commented as follows –

> The bill has survived largely intact. Neither the Bar nor the Law Society can claim to have made much progress in recent months. For all its support at Westminster, the Bar has achieved little by way of changing the fundamental aspects of the bill apart perhaps from a minor victory over the extension of the cab-rank rule.
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> What has the Law Society achieved? The loss of domestic conveyancing in exchange for some vague prospect of extended rights of audience for solicitors in the higher courts?
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> The bill has resolved nothing in relation to rights of audience and the society knows it.

Rice believes that giving the banks and building societies the right to offer conveyancing services will have a drastic impact on the smaller provincial and rural solicitors for whom conveyancing typically accounts for 40 to 50 per cent of their revenue. He fears that many such solicitors may be driven out of practice and that –

> . . . the consequences for the national network of solicitors' offices and for the provision of legal services across the country are potentially disastrous.

Another commentator, Marcel Berlins, writing in *The Spectator* of 4 August 1990, regards the Bill as an emasculation of the Lord Chancellor's proposals. In an article entitled "Law Reform is an Ass", Berlins writes:

> Today, the senior judiciary and the Bar can scarcely talk about the imminent legislation without smirking. A potentially radical reform has been reduced to a benign tinkering . . . The reality is that the new law will change very little in the profession; relationships between solicitors and barristers will alter minimally and most of the professional advantages enjoyed by barristers will remain intact, even if some have been dressed up in the marketing jargon of the 1990's.

He argues that solicitors will find it difficult to become advocates in the High Court and the Crown Court –

> . . . not least because the rules governing the grant of advocacy certificates would have to pass through the consultative process with four senior judges – the Lord Chief Justice, the Master of the Rolls and the heads of the Chancery and Family Divisions of the High Court. For 'consultation', read veto.

He suggests that an easier passage for solicitors would not really have made a difference anyway:

> The vast majority of solicitors are not in the least interested in audience rights in the higher courts: their far greater overheads compared to barristers made it financially impossible for them to spend time in court at the kind of price barristers can charge. The wonderful new world of choice that was to open up for the user of lawyers' advocacy services was always illusory. The fight over rights of audience has been a great red herring all along, but it was a necessary distraction.

Berlins sees "the hidden agenda" of the Bill as being a cheaper legal aid bill for government. Legal aid work is badly paid and solicitors' firms are increasingly being driven away from doing legal aid work. The loss of their conveyancing monopoly will, he suggests, further diminish the number of solicitors able to take on this type of work. He summarises the effect of the legislation thus –

> For the average person – not just the poor – legal help and advice at reasonable cost will become even harder to get than it is at present: it will be concentrated in fewer firms in fewer towns, or made available only at advice centres with non-lawyers dispensing the advice. The result: a cheaper legal aid bill for government. That is the hidden agenda. The . . . Act may do a lot to streamline and make more efficient some of our legal procedures and institutions: but to the ordinary consumer of legal services it is a large irrelevance.

It remains to be seen whether this rather cynical and gloomy prediction proves accurate.

Recent reforms at the Bar

Perhaps ironically, given the prophecies of doom which accompanied the release of the Green Papers, the Bar

in England appears to have emerged not only relatively unscathed, but considerably revitalised. The controversy surrounding the extension of rights of audience in the superior courts has given added impetus to a number of important domestic reforms which are aimed at improving the quality of legal services offered by the Bar and at streamlining and modernising its Code of Conduct. Thus, there has been a complete restructuring of the vocational course at the Inns of Court School of Law so as to focus on skills in advocacy, negotiation and communication, drafting and ethics. The pupillage system has been completely overhauled and the Bar has established a system of funded pupillages. Over £3 million has been pledged by practitioners which will provide at least 400 pupillages in 1991-92. The scheme envisages the payment of at least £3000 per six months, with many chambers offering more. The Bar Council is also allocating funds to provide awards for able pupils in financially poor sets of chambers. There will also be a central computerised register for matching available pupillages and tenancies with potential pupils and tenants.

A Practising Library, based on the Scottish model, is being established to permit barristers of ability who are unable to obtain a tenancy in chambers to set up in practice. The Library will provide facilities for 50 barristers up to three years call who will be affiliated to established chambers. In addition, a system of continuing legal education for barristers has been introduced.

The Bar has removed a number of restrictions from its Code of Conduct which it was felt could reasonably be dispensed with. Since July 1989 there is complete freedom to advertise, it being left to the good sense and discretion of the practitioner to decide what is appropriate. At present most advertising is done in the form of tastefully produced brochures put out by the different sets of chambers, describing their members and the kind of work they do. Restrictions on the management and place of practice as a barrister have been removed, except for the requirement of efficient management. Another important change was introduced in April 1989 – since then the rules of conduct allow direct professional access to the Bar by professionals from other recognised professions without the intervention of a solicitor in non-litigious matters.

These developments, coupled with the satisfactory outcome for the Bar of the Green Paper saga, have enabled its Chairman, Peter Cresswell QC, in a recent message to members of the Bar to state –

> I am confident that the independent Bar will not only survive, but will emerge stronger.

This seems a fair assessment of the situation.

Lessons for South Africa

To the South African observer, the events surrounding the Courts and Legal Services Bill have significant implications for our own divided legal profession. Firstly, it is a fact that the Bar is not simply a business enterprise whose practices can be manipulated in accordance with market-force principles without regard to professional considerations and their complex role in the administration of justice.

As the Judges stated in their formal response to the Green Papers –

> In general, advocates in the Supreme Court have four characteristics. They are all:
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> (i) lawyers;
> (ii) bound by a single code of conduct administered by one professional body;
> (iii) subject to a considerable measure of control by the judges in respect of their standards of conduct; and
> (iv) self-employed, sole practitioners, instructed, not directly by the lay client, but by a professional intermediary.
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> Each of these characteristics is important for the maintenance by advocates of the necessary high standards of professional integrity and competence.

Secondly, while widening the scope and delivery of legal services to all is a worthwhile and necessary goal to strive for, it must be pursued without compromising the standards, efficiency and professional integrity which are essential to the effective administration of justice. The danger is that excessive bureaucratic tinkering with established institutions in the name of free competition may result in the baby being unceremoniously thrown out with the bath water!

Thirdly, while there are certain professional rules and traditions which are fundamental to the continued existence of an independent Bar, there are at least some hallowed rules of conduct which are no longer reasonably required to maintain accepted standards of professional integrity. The lesson for the Bar is that there must be a constant re-evaluation by the profession in this regard and outdated rules which serve no purpose should be discarded. Furthermore, pro-active steps must be taken to improve access to the Bar by all sections of the community and to enhance the training of advocates and their accessibility to those who use their services.

Finally, when all is said and done, the divided Bar with advocates and attorneys playing inter-active and complementary roles, has much to do with what is excellent in the legal systems of both England and South Africa. Certainly the smaller solicitors' firms in England have realised that their continued existence is very much dependent on their clients having access to the wide-ranging specialised talents available at the Bar. This accessibility is assured under the "cab-rank" rule. There is an increasing realisation that the Bar and the attorneys are natural allies and that the threat to their continued existence comes from outside the profession.

Thus, the solicitors' profession in England would surely agree in retrospect that, despite the gain of some extended rights of audience in competition with the Bar, given their having to share their conveyancing rights with the powerful financial institutions, the game has hardly been worth the candle.

Editorial Note:

See also "*Consultus* gesels met mnr HJ Coetsee, LP, Minister van Justisie" and "Fusion of the profession: A Zimbabwean Perspective" elsewhere in this issue. In an editorial in the July 1990 issue of *De Rebus* our present system (whereby only advocates may appear in superior courts) was described as "archaic". We certainly do not agree with that approach. On the contrary, it seems that the whole question of rights of audience and related matters call for very careful examination, with due regard *inter alia* to conditions prevailing in South Africa (as opposed to Britain or any other country), before a final decision is taken. A particularly relevant consideration would be South Africa's vast rural areas where legal services should be extended rather than placed in jeopardy eg by permitting big financial institutions to encroach upon the traditional functions of attorneys and depriving the latter of the services of a strong Bar. ■