

## From the President

The Right Honourable Jack Straw MP  
Lord Chancellor and Secretary of State for Justice  
Ministry of Justice  
Selborne House  
54 Victoria Street  
London SW1E 6QW

7 August 2007

Dear Jack



The Law Society

### **The Legal Services Commission – Unified Contract**

As you will know, the Legal Services Commission (“the LSC”) was on 27 July found by the High Court to have acted unlawfully in regard to certain aspects of the Legal Aid reform now being introduced from 1 April 2007 by way of the new Unified Contract for civil legal aid, the Law Society being awarded 75% of its costs against the LSC (“the Judgment”).

In essence, the Law Society successfully challenged that aspect of the Unified Contract which purports to confer a wide unilateral power of amendment on the LSC. Both the LSC and the Law Society (“the Society”) were given permission to appeal those aspects of the case in which they were not successful. However, Mr Justice Beatson gave permission to the LSC only on the grounds of public interest and expressed the view that he doubted whether the LSC had realistic prospects of success in appealing against his finding that the wide unilateral power of amendment contained in the Unified Contract breached Regulation 9 of the Public Contract Regulations 2006 (dealing with technical specifications) and was (to the extent of that inconsistency) unlawful.

The learned Judge made no such comment in relation to the Society’s prospective appeal and indeed we are advised that we have very good prospects of overturning the learned Judge’s decision to the effect that the wide unilateral power of amendment did not contravene Regulation 4 (which requires transparency) or European principles of transparency. The Society is actively considering such an appeal.

We are mindful that the LSC is very shortly due to notify service providers of the revised fee structure due to come into force under the Unified Contract from 1 October 2007. It has published on its website (by way of a reaction to the Judgment) an indication that it proposes to go ahead despite having only partially succeeded in defending its actions at first instance, and (unless it is expedited) before any appeal has been heard. We note that the LSC has not thus far sought expedition of any appeal.

It is the Society’s view that the publication of less favourable fee structures to take effect from 1 October 2007 will almost inevitably be unlawful in the light of the Judgment. This is so *not only* if the Society succeeds on its appeal on the Regulation 4 issue (as it would expect to do) *but also* on the basis of the existing Judgment. This is because Mr Justice Beatson made it clear that the only basis upon which he found that the Unified Contract was not (as at the date of issue) in breach of Regulation 4 was because the challenge to the

unilateral power of amendment concerned “anticipated or future amendments rather than amendments already made”: thus (in effect) the challenge should await another day (Judgment, para 84).

As the Judge commented in that paragraph:

*“If, in future, the LSC makes amendments outside the scope of the amendments contemplated and identified by the LSC during the process I have described [essentially, in the White Paper proposing changes], it may not be able to do so without undertaking a new contracting procedure. This may also be the position if, as the Claimants fear, the LSC seeks to make amendments which alter the economic balance of the contract to the disadvantage of those who have entered into the Unified Contract or to the disadvantage of some of them”.*

As matters stand, the LSC appears to be proposing, in direct opposition to the above passage of the Judgment, to make amendments to the Unified Contract without a new contracting procedure, which amendments will or will be highly likely to be:

- (a) not changes contemplated and identified in the White Paper; this is highly likely since the White Paper was at a high level of generality; and in any event
- (b) will operate to the economic disadvantage of at least some of those who are parties to the Unified Contract: i.e. to all those whose financial position is worse after the amendments.

If this occurs, it is highly likely that this will give rise to further urgent court challenges, from any or all of: the Society, from disappointed firms, and by way of the appeal to the Judgment (which may then need to be expedited). We consider, in the light of the Judgment even if not disturbed on appeal, that the LSC will be at very great risk of again being found to have acted unlawfully if it seeks to bring in such changes.

The profession through the Society would much prefer to discuss the issues which arise before the amendments are published and, as previously stated, recognises the need for change and sensible reform. As has been shown, however, the mechanism adopted by the LSC is not faultless and in an area which will have such far reaching effects we consider it desirable to see whether some consensus can be reached to manage the change more smoothly and restore the goodwill of service providers.

You will I am sure appreciate that practitioners have felt enormously threatened, despite what the LSC says in regard to “take up” of the new Unified Contract. Further, the Society would wish to avoid more litigation with the LSC in respect of the Unified Contract, and would far rather proceed by way of negotiation and agreement.

However, I would not want you to be in any doubt that the Society will be resolute in defending the interests of the profession if necessary by way of further proceedings and an appeal, encouraged by the fact that it has succeeded in its main arguments against the LSC’s approach by reason of the Judgment.

I therefore invite you to urge the LSC to re-consider its position in the light of the Judgment and, before any further change is wrought, to discuss with us on behalf of the profession and the LSC how any such change can be better managed for the benefit of all.

I have naturally copied this letter to Sir Michael Bichard and Carolyn Regan.

I look forward to hearing from you.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Andrew Holroyd'. The signature is written in a cursive style with a large initial 'A' and a prominent peak at the end.

Andrew Holroyd OBE  
President