



The Law Society

Collective action in response to the Carter reforms

Statements by the representative Law Society
12 December 2006

Contents

Introduction from Andrew Holroyd, Law Society Vice President	1
Statement regarding means testing (29 November 2006)	2
Supplementary statement regarding the Carter reforms more generally - 1 December 2006	6
Supplementary statement - 8 December 2006	6
Supplementary statement - 12 December 2006	6

Introduction from Andrew Holroyd, Law Society Vice President

The Law Society, in its representative capacity, is issuing the following statement to criminal defence solicitors regarding the means test introduced in the magistrates' court in October 2006, and the Carter reforms more generally. It sets out the Society's representations in relation to problems associated with the means test. The position in relation to various forms of collective action undertaken by groups of practitioners, and the legal and ethical issues which practitioners should consider before deciding to join in such action are set out below, and are of general applicability.

Andrew Holroyd

Statement regarding means testing (29 November 2006)

Background

Since the re-introduction of means testing in the magistrates' court on 2 October 2006, the Law Society has become aware of a number of issues arising from the manner in which the system has been implemented which have resulted in considerable problems for both solicitors and their clients.

The key difficulties currently faced by defence solicitors can be summarised as follows:

- The requirement to submit a fully completed means application form within 48 hours of the client being charged, in order to claim the 'early cover' payment is extremely difficult to meet. Many clients do not actually instruct their solicitor within 48 hours of charge, and many solicitors do not see their client until the day of the first hearing. This has meant that where the client later proves ineligible for legal aid, solicitors will not be paid for any of the work undertaken in relation to that hearing.
- It is often extremely difficult to obtain the clients' partner's signature on the means application form, yet without this the form will be rejected and the client will not get legal aid.
- Self-employed clients in custody are still required to submit proof of means, which is often very difficult to achieve.
- The assessment of the Interests of Justice test is now being carried out by court administrative officers rather than clerks, which has resulted in a number of incorrect decisions being made, and forms being rejected for minor technical errors. This has caused considerable frustration for defence solicitors.
- The means assessment form is unnecessarily complex and time-consuming to complete.

What the Law Society is doing

The Law Society, together with the other practitioner representative bodies, (LCCSA; CLSA; LAPG), has been involved in detailed negotiations with the Legal Services Commission with a view to finding a solution to the difficulties being experienced by practitioners as a result of the means testing requirements.

Arising from these talks Vera Baird QC, the Legal Aid Minister has announced a number of modest but welcome changes as follows:

- A guarantee that representation orders will start from the date a complete form is first submitted.
- Improved Early Cover provisions.
- Greater flexibility concerning the need for a partner's signature.
- A commitment to simplify the application form.

These changes, which will be detailed to practitioners in a letter to be sent by the Legal Services Commission shortly, although welcome, are very unlikely to eradicate the problems that have arisen as a result of the way the Means Test scheme has been implemented. Thankfully, the Legal Aid Minister has pledged to conduct a review of the operation of the scheme and the Law Society intends to play a full part in that review.

Actions by solicitors

The Law Society has received reports that the frustrations and difficulties arising from means testing have led some groups of practitioners in different localities to consider taking collective action. Such action appears to take two forms:

- The collective withdrawal by duty solicitors for short periods from the provision of selected contracted services under the LSC contracts; and
- The collective adherence by both duty solicitors and other defence solicitors to protocols which restrict the manner in which contracted services are to be provided.

While the Law Society, as the representative body for the solicitors' profession, is very sympathetic to the concerns that have given rise to the collective action, it cannot recommend or encourage such action as a way of pressing those concerns. Apart from the effect it may have on the ability of individual clients to secure proper legal assistance and representation, collective action of this sort is likely to be in breach of the Competition Act. As such it will be unlawful and could give rise to legal liability not only for solicitors who participate in it but also for any of their representative bodies who recommend or encourage it. It must be through channels of lawful persuasion, protest and lobbying that those concerns should be pressed.

If individual solicitors are contemplating participating in such action, there are a number of issues which they should consider carefully first, including competition law issues, their ethical duties as solicitors and contract issues.

Competition law issues

Both forms of collective action are likely to be in breach the Competition Act. Under Chapter 1 of the Competition Act 1998, agreements between undertakings or concerted practices by undertakings which have the object or effect of preventing, distorting or restricting competition within the United Kingdom are prohibited and will be unlawful. It is important to appreciate that under competition law:

- The criminal defence sector will be regarded as a competitive market, despite the fact that the services provided within it are purchased for clients by one single buyer on unfavourable terms.
- Criminal defence firms will be regarded as businesses which compete against each other in the provision of those services to clients.

- The concept of a concerted practice in particular has a very wide application. It will embrace not just collective action to withhold contracted services, but also the type of collective action envisaged under the protocols. Even if firms on an individual basis may be entitled not to act for clients until funding is secure, for firms to do so on a concerted collective basis will breach competition law.

A breach of the prohibition contained in Chapter 1 of the Competition Act 1998 could lead to an OFT investigation against participating firms and this could result in a number of interim or final measures being taken. These could include injunctive action and ultimately a fine of up to 10% of turnover.

Ethical duties

As a representative body, the Law Society believes it is right for solicitors to protest against changes which they perceive to jeopardise access to justice. But it is also right that the form of protest adopted should not risk compromising the interests of individual clients or of the solicitors concerned.

The Law Society would emphasise to practitioners that in considering their ethical position in relation to such action, it is the likely effect that their participation in the action could have on the individual interests of individual clients that they should consider, rather than its intended effect on the overall interests of clients in general. This consideration applies to both forms of collective action proposed, that is to say, not only the collective withdrawal of contracted services, but also the adherence to protocols which specify how clients will be dealt with.

Practitioners should start with the basic principles of professional conduct set out in Practice Rule 1 which prohibit a solicitor from doing anything which compromises or impairs, or is likely to compromise or impair, (among other things) the solicitor's duty to act in the best interests of the client and the solicitor's duty to the court.

Chapter 1 of the Guide to Professional Conduct gives guidance as to the application of these basic principles and their inter-relationship with all the other principles of professional conduct, which in essence are an interpretive application of the basic principles to the circumstances arising in the course of a solicitor's practice (see Guide 1.02 paragraph 7).

It appears to the Law Society that some of the protocols which it has seen involve agreements between solicitors not to progress cases, and to support each other in not so doing, until legal aid orders have been granted. Practitioners should bear in mind that there could be risks from taking this type of blanket approach that the particular interests of individual clients in particular cases will get overlooked.

For example, some of the protocols work on the basis that defence solicitors will accept instructions for new clients limited in the first instance only to progressing the legal aid application. While solicitors are as a matter of ethics generally free to decide whether or not to accept instructions from a particular client (see Guide 12.01) and are generally free also not to act until funding is secure (whether the client is to be legally aided or privately paying), these are general principles and should be applied to the facts of each individual case. In each individual case the acceptance of initial instructions on a limited basis will establish a relationship of solicitor and client and

so the question of whether or not the limitation is in the interests of that individual client will always have to be considered. If all the solicitor is prepared to offer a client is such a limited retainer and this will not serve the interests of that particular client, then the proper course ethically for the solicitor may be to decline to accept instructions in the first place.

Since 1 January 2006, the Law Society has devolved its regulatory functions to the Regulation Board, (shortly to be renamed the Solicitors Regulatory Authority), which operates independently of the Council. Practitioners should therefore bear in mind that responsibility for the enforcement of regulatory standards no longer rests with the representative Council and now rests entirely with the Regulation Board. Practitioners should be aware that Peter Williamson, the Chair of the Regulation Board, has made the following statement:

“We are concerned that these proposed actions might deny clients access to justice and impede the courts system. In certain circumstances, solicitors could be in breach of their fundamental duties. Solicitors have the right to make their views on this important issue known, but we urge them to identify ways of making their arguments that would not damage the interests of their clients and the administration of justice.”

Contract issues

Since the protocols seem to have been formulated to avoid breaches of the contracts arising, it is unlikely that adherence to them will give rise to direct breaches of the contract. Indeed, subject to specific exceptions which relate only to court sessions on non-business days, clause 8.5.2 of Part B of the Contract Specification in the General Criminal Contract dated 2 October 2006 (“GCC”) appears to impose a contractual obligation on duty solicitors not to act where the client already has his or her own solicitor. However, practitioners should consider their position here very carefully.

The other form of collective action, that is to say, the collective withdrawal for short periods of contracted services, will be likely to have contractual implications. Again, practitioners should consider their position here very carefully. A refusal to undertake duty solicitor work is likely to amount to a breach of a solicitor’s contract with the LSC, in particular, clause 3 of Part A of the Contract Standard Terms, and clauses 8.2, 8.3 and 8.4 of Part B of the Contract Specification, in the GCC dated 2 October 2006. Such breaches could ultimately lead to the LSC serving, under clause 20 of Part E of the Contract Standard Terms in the GCC, notice of termination of the solicitor’s contract.

Where a duty solicitor fails to accept a reasonable number of panel calls or to accept rota cases, or unreasonably fails to attend a police station or carry out another duty, or some other good reason arises which makes his or her duty solicitor scheme membership incompatible with the standards of a duty solicitor, the LSC can suspend or remove a solicitor from a duty solicitor scheme, under clause 5.4 of the Duty Solicitor Arrangements 2001.

Supplementary statement regarding the Carter reforms more generally - 1 December 2006

This supplemental statement should be read in conjunction with the statement by the representative Law Society on means testing in the magistrates' court.

The Law Society has received further reports that collective action, of the type referred to in the previous statement, is being planned or undertaken by some groups of practitioners in different localities to protest not only against the re-introduction of the means testing in the magistrates but also against the Carter reforms to the legal aid system more generally.

Such collective action, whether it involves the collective withdrawal from the provision of contracted services or collective withdrawal by solicitors from the provision of selected contracted services under the LSC contracts or the collective adherence by solicitors to protocols which restrict the manner in which contracted services are to be provided, is likely to raise similar competition law, contractual and ethical issues as outlined in the previous statement and practitioners are urged to consider these issues carefully.

For the same reasons, the Law Society, while it is gravely concerned by the government's plans for implementation of the reforms, cannot recommend or encourage such collective action as a means of opposing them. It is through lawful means of protest, such as the Society's What Price Justice? Campaign, that such opposition should be expressed.

Supplementary statement - 8 December 2006

Some members have questioned whether the Law Society can take advantage of the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 that (in specified circumstances) afford to a trade union and its individual members immunity from civil suit for the tort of intentionally and without lawful justification inducing others to breach a contract (in this case, the relevant contract would be the contracts between solicitors and the LSC). That protection is only available in respect of a trade union and its members, and as the Law Society is not a trade union, TULRCA is inapplicable. Therefore, neither the Society nor its members would have any immunity from a civil action for inducing others to breach their contracts with the LSC.

Supplementary statement - 12 December 2006

The Society is advised that any group seeking to establish itself as a trade union for the purposes of opposing the current situation is likely to fail the "principal purposes" test in section 1 of TURLCA, and accordingly would not be able to rely on any immunity from action contained in the Act. To avoid tortious liability and exposure to claims for damages or injunctive relief, it will be necessary to avoid action that induces a breach of contract.