

# **Response of the Association of Law Costs Draftsmen to the Review of Legal Aid Procurement of Lord Carter**

## **Introduction**

1. The Association of Law Costs Draftsmen (The Association) was founded in 1977 with the object of promoting the status and interests of the profession of Law Costs Draftsmen in England and Wales generally and of ensuring maintenance of the highest professional standards of Law Costs Draftsmen. The Association is the only regulatory body for Law Costs Draftsmen. As a professional body its' Fellows are recognised as experts in the Civil Procedure Rules (48PD3 Section 52 Rule 48.6). On 11 September 2006 the total membership of the Association was 778 members. The membership is broken down as follows:

- 362 Fellows.
- 155 Associates.
- 255 Students.
- 6 Affiliates.

Induction of student members takes place in January and July each year. The number of student members is projected to rise by 50 in January 2007 with a similar number in July. It is estimated that there are probably 2000 full time Law Costs Draftsmen in England and Wales. Not all are members of the Association. Some may be employed by Solicitors or by other Law Costs Draftsmen or be self employed. The work of Law Costs Draftsmen is diverse

and covers all areas of legal costs. Some specialise in one field of legal costs whilst others are general practitioners.

2. The proposals, if implemented, will impact most significantly on those specialising in publicly funded work. It is an inevitable consequence of the implementation of the proposals that some will lose their livelihood. Others will suffer reduced income. Redundancies of employed Law Costs Draftsmen and employees of Law Costs Draftsmen are a certain outcome. The recommendations, if implemented, will have a greater impact on Law Costs Draftsmen than on any other professional body and its' membership. Whilst the Association acknowledges that the vested interest of no one group may be paramount, of necessity we cannot ignore the serious implications for our membership in our response. It is a matter of deep concern to the Association that it was not consulted at the report stage by Lord Carter and that there has been no economic impact survey undertaken. Before consideration of the proposals is completed an economic impact survey must be carried out.
  
3. Putting to one side the submissions made earlier the Association challenges the proposals because they are considered premature, unjustified and unnecessary. The Association contends:

- That the premise for the report of Lord Carter was inadequate. There was an opportunity to consider alternative means of financing publicly funded legal services. That opportunity has been missed and as a consequence a proper investigation leading to reduction in public expenditure has been lost.
- That Lord Carter restricted his work to devising a method of reducing remuneration of practitioners. Such consideration, as there was, relating to increasing and improving access to justice was cursory. Indeed as to this, the only conclusion that may be drawn from his report, is an optimistic hope that with reduced expenditure some semblance of the present access to justice might be maintained. The expense of the report and the consultation process could have been avoided by simply reducing the rates of remuneration for practitioners. The recommendations aim to achieve the same result through a different, more complex and expensive route;
- That there exists adequate and effective means of controlling expenditure;
- That the research and analysis leading to the conclusions reached and the recommendations made were both inadequate and flawed;
- That the individual recommendations themselves are flawed and unjustifiable;
- That there was inadequate (and in the case of the Association) no

consultation by Lord Carter before the report was finalised;

- That no, or no adequate, investigations were made before the report was completed to analyse the true level of expenditure (the expense to the public purse recorded in the report appears to have been mis-stated in that it records the gross figure for expenditure and not the net figure for expenditure after taking into account costs recovery both from inter-partes costs orders, recovery from the statutory charge and recovery from public funding contributions. The net figure when identified may give a different perception of the level of expenditure and enable an analysis of the reasons for the level of expenditure on public funded legal services. With more efficient costs recovery by the LSC the figures would be less.
- That the report failed to propose measures to control the fees of experts and expert assessments.
- That the report failed to address the main and most important principle being that of access to justice.
- That the implications for practitioners and for access to justice are such that until a pilot scheme has been undertaken and the results of this analysed the introduction of the proposals would be premature.

## **Timetable**

4. The Association sought, and to date has been refused, an extension to the timetable in order to respond properly to the report and the recommendations. The report of Lord Carter was itself not delivered within the prescribed timetable laid down. Of all the professional bodies affected by the report the Association appears to have been the only body not consulted during the report stage. The report at pages 136 to 140 lists the numerous stakeholders that were consulted. To date no explanation has been received by the Association for this omission. The Association has also been prejudiced by the late production of key data by the LSC. As a consequence the Association has been both disadvantaged and prejudiced. With more time the Association would have been able to respond to recommendations with greater quality and depth. More substantial and material data than has been collated would have been available. As a consequence of the limited time allowed the Association has had to concentrate its' response on limited areas. (Mainly on the impact of the proposals on Children Act cases.) With a more realistic timetable areas that have not been addressed in depth would have been. For these reasons the Association reserves its position and seeks confirmation that it will be consulted further when the recommendations and response are given further consideration.

## **The Need for Change and Alternative Means of Funding Legal Services**

5. The Association has always acknowledged the importance of control of public expenditure in relation to public funded legal services and the need to prevent abuse. The Association does not accept that the conclusions of the report and that the recommendations contained therein are an appropriate route towards the control of such expenditure nor that they will simplify administration. The Association does not accept that the amount expended on public funded legal services is an unreasonable burden on the tax payer. The report of Lord Carter indicates at page 18, paragraph 14 that comparison with other jurisdictions needs to be treated with caution. The Association agrees in principle with this, but observes that there have been year in and year out increases in rates of remuneration for publicly funded work both in Scotland and in Northern Ireland. There have been no such increases in England and Wales for many years. The expenditure in Scotland and in Northern Ireland appears higher per case than in England and Wales. These facts are persuasive evidence that the level of public expenditure in England and Wales is not excessive and that practitioners in England and Wales deliver value for money services. Lord Carter in his report suggests that firms who act for privately paying clients are more efficient. The Association does not agree. Were that statement correct the expense rates (the rate which comprises solely of their

commercial overheads) of such firms would not be as high as they are. Their charging rates (the rates charged to their clients comprising the expense rate and a profit element) are typically 3 times higher than those permitted to legal aid firms. Disclosure of the costs incurred and billed by other bodies providing legal services to Government departments and local authorities would be helpful to draw comparisons when considering efficiency. The amount of expenditure needs to be put into perspective. The total expenditure should be compared to the annual gross billing of individual major legal firms. The amounts individually billed annually by such firms demonstrate that the legal aid budget is modest. The amount accounts for less than 0.1% of total public spending. We should be proud not embarrassed by the amount of expenditure on public funded legal services.

6. It is a matter of regret that Lord Carter missed the opportunity to consider alternative methods of funding for publicly funded legal services. For example, consideration might usefully have been given to pre-emptive costs orders in public law and other appropriate proceedings (including high value cases) but this was not considered. The report concentrated on reducing expenditure only. The Association repeats the submission made earlier that no, or no adequate investigations appear to have been made before the report was completed to analyse the true level of expenditure or to analyse the reasons for the true level of expenditure.

7. The Association disagrees with the proposal to restrict the statutory charge. The Association believes that it is right that where there is recovery on the part of a funded client that recovery should be first (subject to limited exemptions) used to discharge legal fees incurred by the LSC. It has always been a fundamental principle of the legal aid system that public funding should be free at source only, Public Law Children Act Proceedings being an exception. That principle should not change. Public funded clients should continue to contribute to legal expenses when they are able to do so, just as privately paying clients do.
8. The Association also disagrees with the recommendation made in a separate paper to abolish inter partes costs orders in family cases. It surely cannot be right that where one party acts unreasonably in proceedings that the other party/funder of that party is not indemnified against the unreasonable and unnecessary expense incurred.
9. It is the view of the Association that the present systems provide adequate control of public expenditure in civil cases. All applications for funding have to satisfy a merits test before public funding is granted. Non Section 31 Children Act applicants for funding also have to qualify financially before public funding is granted. The present system allows the LSC to restrict representation to limited stages of a case or to limited investigations. Costs limitations are imposed to restrict the amount of



costs. Any increase in limitation either as to scope or costs has to be justified and sanctioned by the LSC. Where cases fail a costs benefit analysis during the currency of a certificate funding is withdrawn. Solicitors are not paid for costs and disbursements that are not covered by the scope of the certificate or the limitations under the certificate. Expenditure is also controlled by courts in their case management functions: when a case is concluded the amount of costs payable is scrutinised either by the LSC on assessment or by the court on detailed assessment. Only costs both reasonably incurred and of a reasonable amount are allowed. It is the submission of the Association that the controls in place are adequate, effective and the best way of controlling expenditure on costs. The systems have been in place for more than 50 years and work well. The administration involved is not complex, nor is it expensive. A change to the system would be expensive and would not result in the saving of expense to the public purse.

### **Access to Justice**

- 10 The assessments that have been made by the Association following data collation on present fee income compared with the proposed graduated fees confirms that the proposals will result in a significant reduction in income for solicitors undertaking public funded work. Such solicitors already struggle to meet their overhead expenditures from the

remuneration received. For many years these solicitors have become increasingly disillusioned with levels of remuneration coupled with greater administration required by contracts. The number of practitioners willing to undertake public funding work has fallen dramatically in recent years and continues to do so. Evidence of the diminishing number of specialists can be drawn from comparing the number of Law Society Children Panel Members now with those 5 years ago. There are now approximately 1,500 members when there previously were 2000. There are now only 3 members under the age of 30. There are no incentives to attract newly qualified solicitors to legal aid work. Surveys have indicated that newly qualified solicitors have been deterred from legal aid work by poor incomes and employment prospects. Legal aid firms with their current levels of income struggle to meet the cost of employing and training trainee solicitors. Whilst the LSC grants are a step in the right direction they represent only a drop in the ocean compared to what is needed. The pool of specialists will be reduced if the recommendations are implemented. The evidence that we have received is that there will be few firms still willing to undertake legal aid cases if the proposals are implemented.

- 11 Whilst the report suggests that the proposals will not reduce the quality of service provided or adversely affect access to justice for those entitled to public funded legal service there is no evidence in the report to justify

those conclusions. Real evidence indicates the opposite. The recommendations, if implemented will put those entitled to public funded legal services at a disadvantage compared with those able to pay. Those facing public bodies and corporations will be prejudiced. It is an overriding objective of our legal system as enshrined within the Civil Procedure Rules that parties should be on an equal footing. That principle cannot be achieved if the recommendations are implemented. Those entitled to public funded legal services will be denied access to justice by the recommendations. The report ignores the circumstances of the majority entitled to public funded legal services. They are the most vulnerable clients. They have the lowest incomes, capital and resources. The services affected by the recommendations impact upon clients with the greatest needs. Those affected include:-

- a. Those with mental health problems;
- b. Those who have addiction problems;
- c. Those who have special needs;
- d. Those with learning difficulties and little by way of communication skills.
- e. Those who do not speak English or where English is their second language;
- f. Those who have been the victim of violence;
- g. Children;
- h. Those who are living in poor housing conditions and

dependent on benefits;

i. Single parents.

It is these vulnerable people who will be denied access to justice by the recommendations. They are those for whom access to justice should be a priority. There exist large areas within England and Wales where access to specialist solicitors is restricted. The areas of law involved are highly specialised in nature. Practitioners affected have many years of legal training and experience. Special qualifications leading to accreditation and panel memberships have been obtained. To ensure proper access to justice it is vital, as a minimum, that the current level of representation is maintained. The recommendations will, in the view of the Association, either greatly restrict access to specialists or result in access to specialists being denied. In certain cases members of the public will not have representation within their locality. An example is Section 31 Children Act proceedings involving multiple parties. It is quite common in Children Act cases for extended family members to be parties. How will they achieve representation where the choice of legal representative is limited? The Association does not believe that the recommendations will enable them to be represented. Lord Carter encouraged merger of firms, but failed to appreciate that this proposal would only further limit locally the pool of representatives available and that it would further restrict access to representation. In areas with restricted numbers of solicitors, clients will

have to look far a-field for representation. They will not have easy access to a practitioner, if they obtain access at all. Many clients will be forced to act in person. This will cause great burdens and expense to the Court Service. Extra expense will be caused to other parties. The efficiency of legal procedures will be affected and delays caused.

12. The recommendations will cause any solicitors still willing to undertake legal aid cases to reduce costs. Quality of representation will suffer. There will be no incentive for solicitors to take on costly and complex cases. The proposals devalue the role of the specialist. The withdrawal of enhanced payments to panel members evidences this. The Association has received evidence that one firm has resolved that in order to continue undertaking public funded cases they will employ unqualified clerks (in place of qualified solicitors) to undertake the majority of casework. The Association believes that the proposals will result in reduced service and unsatisfactory outcomes. In Scotland research as to the impact of the introduction of fixed fees led lawyers to spend less time with their clients and to be more reliant on untested prosecution evidence leading to miscarriages of justice<sup>1</sup>. The Association believes that if the proposals are implemented there will be more wrongful convictions, more children wrongly placed in the care regime and more single parents who dependent on welfare benefits being denied proper access to justice. The

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<sup>1</sup> Impact on Lower Criminal Courts in Scotland of the Fixed Fee Regime - Criminal Law Review August 2006 by Cryus Tata and Frank Stephen of Strathclyde University.

proposals will lead to discrimination. The result will be a lack of respect for the legal system and an impact on society as a whole. The proposals will result in breaches of human rights<sup>2</sup>. Inevitably there will be proceedings alleging breaches of these rights and extra expense. The Association is most concerned with the implications of the proposals on Section 25 and Section 31 Children Act cases. If there is any doubt as to the importance of full and proper representation in such cases the report of Lady Butler Sloss<sup>3</sup> leading to the Children Act should be revisited. The Association believes that if the proposals are implemented that a crisis in access to justice will arise.

### **Economic Impact Survey**

13. The report does not contain an economic impact survey. The impact of the recommendations will be very substantial for members of the Association. Members specialising in the field of public funding costs face loss of business, loss of employment and loss of income. Nowhere has this been addressed in the report. The recommendations will lead to a reduction in the numbers of Law Costs Draftsmen and their ancillary staff. Those affected will not be able to find similar employment elsewhere. The consequences of this cannot be understated. The Association would

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<sup>2</sup>Article 6 (The Right to a Fair Trial) and 8 (The Right to Respect for Family Life) of the European Convention on Human Rights, enshrined in our law by the Human Rights Act 1998.

<sup>3</sup>Report of the Inquiry into Child Abuse in Cleveland 1987

welcome discussions as to the measures that will be introduced to compensate its' members who are adversely affected.

### **Conclusions**

14. ***The responses of the Association to the individual issues are attached.***
  - A. The Association does not believe that graduated or fixed fees are suitable for any cases. They are certainly not appropriate for Section 25 or Section 31 Children Act case.
  - B. That the levels of graduated fees proposed are, in any event, unjustifiable.
  - C. Change to the existing system is not required.
  - D. That until an economic impact survey has been completed the proposals are premature.
  - E. That until a pilot scheme has confirmed that access to justice will not be adversely affected the proposals should not be introduced.