

# How not to make changes

## Lucy Scott-Moncrieff challenges the LSC on serious issues of substance

In May 2004 the LSC produced a consultation paper on a scheme whereby police station telephone advice would, in certain circumstances, be given by non-solicitors working in a call centre, rather than by duty solicitors. In October 2004, having evaluated the consultation responses, the LSC confirmed that the pilot would be going ahead, starting at the beginning of April 2005. CDS Direct would deal with non-imprisonable offences for the whole country, and, in two areas in England, the pilot would deal with all matters save for indictable-only offences.

Opposition, from the Law Society, LAPG, CLSA and other consultees, has been sustained, consistent, and principled: to use non-solicitors to give advice without the prior approval of a duty solicitor is bound to lead to a reduction in the quality of advice given to detained people, which, in its turn, is bound to lead to miscarriages of justice, many of which will be undetectable or impossible to challenge. This fact is recognised in the current duty solicitor arrangements, which require a duty solicitor to deal with the initial call.

When the LSC provided details of how the scheme was to be run, a number of serious problems became apparent. For a start, the LSC has decided that the CDS Direct advisors will be employed by First Assist, the commercial enter-prise that runs the Duty Solicitor Scheme Call Centre. When the Law Society pointed out that practice rule 4 prevents solicitors employed by non-solicitors (such as First Assist) from giving advice directly to the public (except in very limited circumstances), the LSC tried to argue that the rule did not apply, as the advice was being given by accredited representatives rather than by solicitors. It had to give way on this point after acknowledging that the accredited representatives were representatives of solicitors and doing solicitors' work, but it then claimed that the pilot was limited to giving advice on the phone and that it therefore fell within one of the exemptions to practice rule 4.

The Law Society, however, advised by practitioners, established that the work being done by the CDS Direct advisors went well beyond merely giving advice to the client, so that avenue was also closed off.

The LSC then started having discussions with the Law Society, with a view to requesting a waiver from practice rule 4, so that the pilot could go ahead. In the course of the discussion the Commission established that it would not need a waiver if the First Assist staff were seconded to solicitors who were exempt from the rule. Section 38 of the Access to Justice Act allows solicitors employed by the LSC to give advice direct to the public, so the LSC is now intending to continue without a waiver by getting First Assist to "second" the advisors to solicitors in the Public Defender Service, who, as employees of the LSC, are exempt from the rule.

This is a high-risk strategy. If a complaint is made, for instance by LAPG or an individual practitioner, that First Assist is breaching the practice rules, the Law Society, acting as a regulator, will investigate, and if it considers that the rules have been broken, it could report the PDS solicitors to the Solicitors' Disciplinary Tribunal, which could remove them from the roll.

To avoid this risk, all the LSC needs to do is to clear the details of the scheme with professional ethics at Law Society. Its friends must surely hope that it does.

In addition, there are issues to do with the legality of the details of the scheme. The intention is that a detained person who has asked for the duty solicitor will be telephoned by somebody who will introduce himself or herself as an accredited representative, but will not say that he or she is not a solicitor. It is arguable that this would amount to pretending to be a solicitor, which is, of course, a criminal offence under the Solicitors Act 1974.

Furthermore, there is a real issue as to whether or not the use of accredited reps in this way is lawful: section 58 of PACE provides that a person detained in the police station is allowed to speak to a solicitor, and there is nothing in PACE to suggest that "solicitor" means anything other than what it says – a solicitor of the Supreme Court. The LSC is intending to have a PDS duty solicitor available at all times to speak to anyone who specifically asks to speak to a solicitor, but if the detained person is unaware that an accredited representative is not a solicitor (because s/he has not been told) s/he will effectively be denied the opportunity to exercise his/her s 58 right to speak to a solicitor. This could amount to a breach of article 6 of the ECHR, for which First Assist and the LSC might have to take responsibility.

Alert readers will have noticed that the intended start date for the pilot, April 2005, has been and gone. The delay in implementation has been caused by the continued negotiations between the LSC and the Law Society, but that very delay has now created another thorny problem: last year the LSC agreed that it would only bring in contract changes in April or October (save in very unusual circumstances). The April date having passed, the Law Society believes that the pilot, if it goes ahead at all, cannot do so until October. The LSC does not accept this, and is hoping to begin the pilot in July. If it doesn't give way, the prospect of litigation cannot be ruled out.

The following are the serious issues of substance that the LSC needs to address:

- Will the scheme be amended to comply with s58 of PACE?
- Will the CDS advisors make it clear at the outset that they are not solicitors and that a solicitor is available if wanted?
- Does the arrangement between First Assist and the PDS amount to "secondment" in the true sense of the word?
- Is the LSC allowed to introduce the contract changes consequent on the pilot before October?

This pilot is a classic example of how not to change something: in the NHS the changes that allowed GPs to opt out of night-work were widely welcomed, and as lawyers want and need their sleep as much as doctors, it seems very likely that a voluntary scheme seen as tackling poor working conditions would have been welcome. However a scheme such as this, designed to cut costs by cutting corners, was never going to be accepted by professionals who, despite everything that is thrown at them by the LSC and the government, are still committed to protecting the civil liberties of their clients.

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