



Response of Legal Aid Practitioners Group (LAPG) to the Ministry of Justice consultation 'Housing Possession Court Duty Scheme – Commissioning Sustainable Services'

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LEGAL AID PRACTITIONERS GROUP (LAPG)

LAPG is a membership organisation representing legal aid practitioners working in all areas of England and Wales, all practice areas and all sectors including private practice and not for profit. Members' organisations include partnerships, limited companies, alternative business structures and charities. We have recently been joined by barrister and costs lawyer members. We have been established since 1984 and due to the variety of work carried out by our members have an overview of the sector.

The LAPG director and volunteer committee members are extremely active in engaging with the Ministry of Justice and the Legal Aid Agency in relation to all aspects of legal aid policy as well as operational issues, and work hard to sustain and improve the provision of publicly funded legal advice and assistance. We attend both the Civil CCG and Crime CCG meetings.

LAPG staff, Committee members and organizational members have inputted into various meetings with the other representative bodies and we share their concerns about the impact of these proposals.

CONTEXT OF REFORMS

The latest legal aid statistics show a steady and continuing decline in legal aid work and expenditure. The number of providers continues to decline and the geographical spread of legal advice is patchy for both criminal and civil work. The Law Society has identified a number of areas where 'advice deserts' have developed in relation to housing provision¹.

LAPG believes that all changes and amendments must be made with a view to ensuring that access to justice is promoted and not further restricted.

We therefore strongly urge the LAA and Ministry of Justice to reconsider these proposals and to work with representative bodies to consider:

- the sustainability not only of those firms that administer or participate in HPCDS services, but all those providing housing and other forms of social welfare advice as these services are intrinsically linked both for clients and for providers;
- the broader impact of the HMCTS estates reform programme and how court and tribunal hearing centre closures will further undermine access to the legal system;
- the need to address the emerging gaps in mainstream housing provision as the reduction in housing providers is probably the single biggest threat to the sustainability of HPCDS services.
- the sustainability of the profession as it is and its ability to react to fee changes, changes to contracting arrangements and fee cuts. The Law Society has commissioned reports² over the years which highlight the difficulties;
- the sustainability of the profession in future if legal aid work continues to be poorly remunerated and new lawyers cannot be recruited.

¹ <http://www.lawsociety.org.uk/Policy-campaigns/Campaigns/Access-to-justice/end-legal-aid-deserts/>

² https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-crime-duty-contracts/supporting_documents/kpmgreport.pdf
https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/supporting_documents/paconsultingreport.pdf
https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/supporting_documents/paconsultingreport.pdf
<http://www.oxfordeconomics.com/recent-releases/forecasting-criminal-legal-aid-expenditure-2017-update>

LAPG RESPONSE TO THE HPCDS CONSULTATION

Q1. Do you agree with the proposal to consolidate the number of HPCDS schemes to provide for larger and more sustainable contracts?

No

Please give reasons.

We are concerned that the proposal to consolidate the number of HPCDS schemes is based on an undeveloped, or at least non-evidence based, premise assuming a link between size/volume of cases and sustainability. We believe this is an over-simplification of how HPCDSs operate, and does not take into account the link between the delivery of a HPCDS service and a provider's main Housing & Debt contract and other income streams. Some low volume schemes may in fact be sustainable for a supplier located close to the court in question, which has relatively low overheads, has an effective working relationship with the court and which takes on a high proportion of clients seen at court under certificated funding.

Low volume courts will tend to have fewer possession lists, so providers are required to attend less often. Fewer attendances mean less unpaid travel and waiting time and less time away from other chargeable work. If possession cases are block-listed in a small court, as they tend to be for all but emergency work, then a provider may see as many clients on a given possession day at a small court as at a large or busy court. The key metrics for sustainability therefore are how many clients a provider will see per session and how many of those clients advance to other forms of publicly or privately funded casework. There is no analysis of these metrics in the consultation paper.

Larger schemes on the other hand can create additional administrative burdens and therefore costs for providers. They have more complicated rota to maintain, they have to have more fee earners delivering the service and therefore taken away from other chargeable work, they may have to rely on and organise agents or sub-contracted parties. They may have to spend more unpaid time making referrals because of a lack of capacity to take on eligible clients. We would suggest therefore that it is too simplistic to assert that larger schemes are necessarily more sustainable or viable than smaller schemes. We would urge the Ministry to rethink these proposals and work with providers to analyse the current HPCDS on a court-by-court basis, with future court closures and other relevant issues taken into account, before considering any changes to the current contracting arrangements.

We are also concerned that this particular proposal may actually have the opposite effect of rendering some of the new contracts unsustainable due to the additional costs of administering a larger contract, spread across a larger geographic area. As noted above, larger contracts can create more administration, which is not catered for in the fixed fee funding scheme. However larger geographic areas, and the need to liaise with up to 7 courts, will create even greater travel costs, lost income whilst out of the office and administrative costs. It is certainly difficult to see how larger contracts automatically lead to the economies of scale mentioned in the consultation paper, which lacks detail or analysis about how the Ministry decided that these economies could be achieved.

When combined with our concerns over the potential consequences of the introduction of price competitive tendering (see response to Q3), this proposal may create contracts that are unsustainable and lead to significant gaps in provision if contracts collapse. At best they may result in a dilution of quality as providers seek to deliver the services within ever-decreasing margins.

It is not clear why the Ministry believes that it is necessary to consolidate contracts that are already operating well and, by the Ministry's analysis, have sufficient volumes to ensure sustainability. There is no evidence provided in the consultation to demonstrate that any of the existing contracts are unsustainable. Insufficient information has been provided about the 13 schemes that have had to be retendered or the reasons (if known) as to why the providers in question withdrew from those services. Providers may have decided to withdraw from the HPCDS contracts for reasons entirely unrelated to the court-based services or volumes of cases at court. HPCDS services do not operate as entirely discrete elements of a provider's business, which seems to have been overlooked by these proposals. If a mixed family and housing practice decides to withdraw from family work this could render their housing contract unviable and they would have to withdraw from their HPCDS contract. The consultation does not demonstrate that the 13 providers in question withdrew from their contracts because of the low volumes of cases at their local court.

We are also concerned that insufficient account has been taken of the court estate reform programme, which will impact on access and increase travel time and cost for many defendants. It is not clear whether HMCTS's plans to consolidate courts have been properly considered in the context of these HPCDS proposals. So, for example, where defendants will now be required to travel further and at greater expense to attend hearings, these proposals may mean that they also have to travel considerable distances to receive ongoing assistance from the provider of the HPCDS service.

Paragraph 12 states that:

An Impact Assessment indicates that those seeking advice and assistance for a Housing Possession Court Duty matter are not likely to be particularly affected. The proposals are unlikely to lead to significant additional costs or savings for businesses, charities or the voluntary sector.

It is concerning that such bold statements are made in a consultation without the publication of the impact assessment so that respondents can see how these assertions have been arrived at and the information or assumptions on which they are based. We would argue those seeking assistance are likely to be significantly affected, particularly if contracts secured following the introduction of these proposals subsequently collapse and defendants are left without representation.

Q2. Do you have any specific comments on the changes proposed in Annex A?

Although the broad criteria used to develop the new groupings have been set out at paragraph 24 of the consultation document, it is not clear how some of the groupings have been arrived at. Some of the groupings cover extremely large geographic areas and/or a large number of courts. Such large areas (such as the contracts proposed for Wales) have the potential to create significant additional costs for providers, and for clients who will need to access those provider's services after court. While this may be mitigated by the use of agents or sub-contracting arrangements, this is by no means certain, and creates a significant potential cost and therefore risk element for this tender process. It also creates real risk for access to justice, particularly for poorer, vulnerable and disadvantaged groups who already face significant barriers to the justice system and are over-represented in possession claim statistics.

It is also unclear whether the Ministry has compared the spread of existing Housing contract providers with the proposed groupings to see whether there are likely to be providers with sufficient capacity to deliver larger services in each new contact area. If this exercise has been carried out, we would ask whether the Ministry has looked beyond the bare number of providers and looked at how many are active in each area. We are aware that many providers are carrying out little or no legal help or certificated housing work. It is entirely

possible that new providers will secure contracts through the forthcoming civil contract tender round, but as this is an unknown it is not something that the Ministry should take into account when developing these proposals.

Q3. Should price be introduced as an objective criterion in addition to quality to distinguish between tenders?

No

Please give reasons

A lack of detail in the consultation paper makes it difficult to provide a reasoned response to this particular question. The system to date, based on quality criteria and proximity, seems to have worked effectively to award contracts to quality-assured providers, so it is unclear why an additional criterion needs to be introduced at this point. Given the concerns set out above, the introduction of a price criterion may have the opposite effect than that intended by the Ministry if contracts are less sustainable and further tenders are required to plug gaps in provision.

We are concerned that the proposed introduction of price as a selection criterion may have two negative, unintended consequences:

- firstly – it is entirely possible, even probable, that some bidders will deliberately set a low bid price in order to secure the contract. If this occurs, the contracts will not be sustainable and/or quality will suffer. Amalgamating existing contracts into larger groupings raises the *potential* that they *may* be more lucrative (although see the doubts we have expressed on this point above) and it is therefore more likely that low bid prices will be tendered in the hope that once secured, the business model can be adjusted to maximise profit. This is an extremely risky tactic but one that some businesses will employ to secure a contract and it might be difficult for the Ministry to distinguish between realistic and unrealistic bid prices.
- secondly – some providers may not be able to accurately calculate the true cost of delivering the service, particularly given that bidders will have to try to factor in unknowns, such as travel costs and the volume of work at multiple courts. Bidders will also have to try to distinguish between the costs of delivering their HPCDS services from their other services and overheads, when these aspects of their businesses are intrinsically linked. If bidders cannot accurately calculate the cost of the service they may price themselves out of the process if they bid too high or they might enter into unsustainable contracts if they bid too low. Either outcome risks the viability of the businesses in question and may further diminish the supplier base.

It seems highly unlikely that any provider that is genuinely interested in quality will bid at lower than the current rates as those rates are already too low to cover costs. Feedback from LAPG members is that most providers deliver HPCDS services at a loss because (a) they recognise the vital importance of HPCDS services and (b) they may be able to subsidise the services through the certificated work they generate and/or other income streams or grant funding. It is also very unlikely that providers will bid at anything approaching full cost recovery as they will be concerned that doing so will price them out of the tender process. As bid prices from responsible providers are likely to be at or close to the current fixed fee it begs the question as to whether the Ministry is creating an unnecessary and potentially significant selection headache, with the inevitable prospect of litigation. It would be more sensible to conduct a thorough examination of current fee levels and whether these do in fact reflect the cost of delivering the services and then tender based on the outcome of that analysis. At the very least the Ministry should set a minimum bid price, perhaps based on current fees, and reject any bid that claims to be able to deliver the services for less.

It is also unclear how the price element will be used to differentiate between competing bids. If price is a significant proportion of the selection process, the risks are greater that ill-conceived or inaccurately assessed bids will lead to unsustainable contracts. If however the price criterion is used only as a tie-break between two providers that have demonstrated equal levels of quality, experience etc., and if minimum fee levels are imposed to ensure that unrealistic bids cannot be tendered, then the price criterion could be a useful mechanism to distinguish between providers.

We are also concerned as to how the Ministry intends to assess whether a particular bid price is, in fact, realistic and sustainable. To do so the Ministry will have to analyse the entire business model of each bidding organisation. The viability of a HPCDS service cannot be assessed without understanding how the whole organisation operates. This means that the Ministry will have to insist upon, at a minimum, detailed business plans, income and cash flow forecasts and audited accounts covering several years. All of this will have to be analysed and a subjective judgement will have to be made by the Ministry as to whether a particular business can, in fact, deliver the service at a particular, unique fee. The Ministry will also have to avail itself of sufficient information relevant to each particular court or court grouping to be able to evaluate relevant issues such as travel costs, defendant attendance rates, the manner in which particular courts list cases and the tactics of local social housing providers. A failure to properly assess these factors will create difficulty for the Ministry if the tender outcomes are challenged.

It is also not clear, and no reasons are given, as to why the Ministry thinks (at paragraph 28) that '*the nature of HPCDS work and the manner in which it is delivered to clients at specified courts means that it lends itself to be competitively tendered with price as a factor.*' As this statement underpins this proposal, we would have thought that some justification or analysis would have been provided to demonstrate why the Ministry believe this to be the case.

This process could actually increase costs for the Ministry as it creates the very real prospect of further, ad-hoc tender processes to avoid a break in provision. It may also become necessary to negotiate with providers to cover gaps on an interim basis and to incentivise those taking on short-term arrangements with higher fees,. The personal, emotional, health and financial costs for unrepresented defendants who lose their homes are incalculable. There is also a potential knock-on cost for other public services (primarily local authority homelessness and social services) which have to deal with the consequences of evictions. Homelessness applications, statutory homelessness acceptances, and the use of temporary accommodation due to the lack of affordable social housing are all on the increase. We would therefore urge the Ministry to rethink any plans that could further destabilise HPCDS services and the supplier base and undermine the ability of tenants and occupiers to retain their homes.

Q4. Should we allow the use of Sub-Contracting and/or Agents to deliver HPCDS?

Yes

Please give reasons

As a general principle we support the continued use of sub-contracting and/or agents to deliver HPCDS as it enables local providers to work collaboratively to make best use of local resources and capacity. Sub-contracting and the use of agents also increase the referral links between local housing providers and thereby improve the chances that defendants will receive a continuous service after court.

However, the use of sub-contracting and/or agents will not necessarily mitigate the difficulties caused by consolidating existing contracts into larger geographic areas. The post-LAPSO reduction in the number of housing providers means that some areas have

insufficient providers able to contribute towards the delivery of a scheme. Also, the need to use agents or sub-contractors to ensure capacity to cover a larger area will increase costs for the contract holder and may make the contract less sustainable. However, as noted above, these are concerns about the consolidation and price competitive proposals, rather than the proposal to allow sub-contracting and the use of agents.

**Q5. What other criteria would effectively distinguish between individual bids?
Please give examples.**

Along with holding a Housing & Debt civil contract, bidders should be required to demonstrate that they:

- have the staffing capacity and are located close enough to the court(s) to:
 - cover every list
 - respond at short notice to changes in lists
 - respond to emergency applications and requests at short notice from the court for an adviser to attend
 - cater for fluctuations in demand
- ensure that the service is only provided by suitably qualified and experienced staff
- ensure that services delivered at court are subject to the same quality assurance systems as their mainstream housing work
- have experience of delivering and administering a HPCDS, including the need to maintain a positive, constructive working relationship with court staff, the judiciary and other stakeholders such as claimants
- have an understanding of the local environment and providers of other local services to ensure they understand how social landlords operate and how to make effective referrals
- have a demonstrated track record of providing services in the contract area

Q6. Do you agree with the proposed remuneration mechanism under the competition model?

No

Please give reasons

We do not believe that the Ministry has provided sufficient detail about the proposed remuneration mechanism to be able to provide a reasoned response to this question. We cannot therefore comment in detail on whether it is an appropriate mechanism to ensure that the contracts are sustainable.

However we assume that the following statement '*price would cover all costs associated with the delivery of HPCDS advice and representation to an individual*' (Paragraph 33 of the consultation) is premised on the Ministry's assumption that those bidding for contracts will include all associated costs in their pricing model when calculating their bid price. As noted above at Question 3, we are concerned that many bidders cannot or will not bid at a level that reflects the true cost of delivering the services.

We are also concerned that Paragraph 33 notes that [a]s *under current arrangements, the LAA will not pay for travel and waiting time*. Travel and waiting time are however an unavoidable and reasonably incurred cost associated with the delivery of HPCDS, and are likely to increase and become more of a burden on providers if they are required to service larger geographic areas. If price is to be an objective selection criterion, the MOJ should compensate providers for waiting time and the cost of travelling to and from court, as this has real costs in terms of public transport fares, mileage etc. and time that fee earners could spend on other chargeable work.

Q7. What do you consider to be the equalities impacts on individuals with protected characteristics of the proposals? Are there any mitigations the Government should consider? Please provide information and evidence where possible.

Possession claims tend to be triggered by one or more underlying legal or social problems, as acknowledged by the LSC when it decided to create contracting arrangements that could cater for clusters of interrelated social welfare problems. Those debt, benefit, family, employment, immigration and other legal and social issues tend to disproportionately affect those with protected characteristics, such as women, children, ethnic minorities and those with physical disabilities and mental health issues. If these proposals undermine sustainability, lead to gaps in provision at court and weaken the supplier base so that mainstream housing services also decline, then those with protected characteristics will be adversely affected.

The only way to mitigate against this impact is to increase the incentives for quality housing providers to deliver HPCDS services *and* mainstream housing services by setting fees at realistic levels that create sustainable contracts and remuneration that accurately reflects the cost of delivering the services. For the various reasons set out above we have serious concerns that these proposals will have the opposite effect.

Q8. What do you consider to be the impacts on families of these proposals? Are there any mitigations the Government should consider? Please give data and reasons.

The failure to procure sustainable services, and the potential for the subsequent collapse of contracts and resulting loss of provision, will adversely affect families. A lack of adequate provision of the service at court, or no provision if contracts collapse, will leave families without representation and therefore more likely to be evicted.

Given the potential outcome of possession claims the court process is stressful and daunting and even more so if defendants have to navigate the system unrepresented. Claimants are generally represented by in-house professionals or they instruct professional agents. A lack of representation will therefore create an imbalance of power, which cannot be adequately rectified by the judiciary's efforts to assist litigants in person or other forms of voluntary or unregulated support. In our experience only a tiny minority of defendants to possession claims instruct solicitors or other legally trained professionals prior to the first hearing, which was one of the reasons the LAA has continued to prioritise funding for HPCDSs. These proposals may undermine rather than increase the viability of contracts, leading to an increase in unrepresented defendants, many of whom are families, and an increase in possession orders and evictions.

If this occurs it is highly likely to lead to an increase in families seeking assistance from their local authority under the homelessness legislation. Families with children and those that contain vulnerable adults (who are more likely to encounter difficulties with debts, benefits and the other triggers for possession action) should be prioritised and assisted by local authorities, and this will create a significant additional burden for authorities that are already rationing services following reductions in central government funding.

We therefore urge the Ministry to rethink these proposals and consider a new approach to procuring such vital services. We would welcome the opportunity to work with the Ministry to develop a new approach to securing sustainable HPCDS services.