

Shelter response to MOJ Consultation Housing Possession Court Duty Scheme (Commissioning Sustainable Services)

March 2017

Shelter helps millions of people every year struggling with bad housing or homelessness through our advice, support and legal services. And we campaign to make sure that, one day, no one will have to turn to us for help. We're here so no one has to fight bad housing or homelessness on their own

For further details, contact: Jacky White, National Legal Services Manager,
jacky_white@shelter.org.uk

Introduction

Shelter helps millions of people every year struggling with bad housing or homelessness through our advice, support and legal services. Shelter has 17 offices around the country and its legal services team provides representation to those in housing need in many homelessness, possession, disrepair, and unlawful eviction cases, as well as dealing with claims for anti-social behaviour injunctions. We have considerable experience in the provision of HPCDS in a wide range of courts, including in rural and urban areas. We provide housing duty possession representation in 26 locations around the country through 11 contracts. We work with partners both as agents and instructing agents.

Shelter is already concerned about the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) on access to justice in homelessness and housing cases. There is a significant risk that these proposals could compound this impact still further, leading to more families being at risk of losing their homes or unable to tackle poor housing conditions.

The public values and understands the need for adequate access to justice. In a 2015 YouGov survey, 84% of respondents rated access to justice as a fundamental right, compared with 82% for healthcare that is free at the point of use and 79% for the state pension. The survey also found that, when told the definition of legal aid, 89% of the sample believed that its availability is important for ensuring access to justice for all income groups. It is therefore a fundamental issue for the public that there is access to justice funded by legal aid.

We are concerned that these proposals could mean that the Government's aim of maintaining access to justice will not be met. Shelter believes that the wider issue at stake needs to be addressed first, namely the impact of LASPO on the sustainability and viability of legal aid providers, and more particularly the issue of advice deserts. We will not rehearse the issues here as they are well documented by The Law Society and others. To implement these proposals prior to the general review of LASPO is therefore premature.

We accept that running some smaller HPCDS on the current model raises some fundamental issues of viability for providers. While on the face of it the proposal to group courts together and for competition on price may be attractive, we believe this seriously compounds rather than addresses the cause of the problems; namely, the viability of legal aid providers and diminishing access to justice.

Many not-for-profit agencies, including Shelter, deliver services outside scope of legal aid in attempting to prevent the need for possession proceedings at all and thereby assist the prevention agenda. The reduction in the number of schemes and increase in geographical spread will restrict the opportunity for local providers to engage in such work and thereby put their continued viability at risk.

Summary

1. Funding for HPCDS is currently inadequate for all providers except where distances are small and the number of clients per court duty session is high. Most legal aid providers subsidise the loss in a number of ways, such as obtaining inter partes costs in other cases, or may be able to minimise the loss if there are significant numbers of duty cases at a particular court and/or if the duty cases lead to certificates where there is a defence to the possession claim. There is a complex relationship between the elements of funding which provide a sustainable legal aid sector.
2. In the light of this and other reviews including LASPO, online courts and the Government's pending green paper on Legal Support, to be making a significant change to the funding of one element of the current package of legal aid provision is premature and does not address fundamental issues in the round.
3. In the interim the MOJ could ensure continued sustainability in the areas at risk, that is, the less busy or non-metropolitan duty schemes which are financially less viable, by offering additional costs in those particular schemes. It is likely that the LAA have the data on where these schemes exist or could obtain this through working with providers and representative bodies. Such costs could include travel expenses, waiting time, increasing the minimum number of fixed fees payable and/or a higher minimum fee.

4. The proposal as it stands is difficult to comment on because there is so little data. To make sense of the proposals one needs data for the individual courts. In addition, there is very little, if any, evidence provided about underlying assumptions. For example;
 - the costs reasons for the proposals such as how many HPCDS providers have pulled out and from where;
 - how the proposed changes might be costs neutral, except by driving down the price, particularly where there may be an increase in travel costs depending on the location of the provider within a cluster of courts some considerable distance from each other;
 - how one provider taking on an additional court or two where they have a considerable distance to travel to see only a few clients is going to be compensated by running the duty scheme at a busier court closer to their office.
5. There is a real risk to access to justice. A more effective service can be provided to a client if the court duty provider is able to carry out any follow up work on the possession claim. This link is at risk of being broken when HPCDSs are combined, since distance may make it significantly more difficult for the court duty provider to do the follow up work. (and clients may not be able to get to see them because they are too far away). Conversely, giving the contract to a non-local provider where before there was a local one could threaten the viability of that local provider and add to the advice desert problem rather than reduce it.
6. Increasing the risk of post code access to justice. This has already been compounded by the court closures. There are unintended consequences, namely, of making some providers financially non-viable because they lose their local duty scheme.
7. Cost is a factor but should not be determinative, as quality is likely to suffer. Skilled solicitors/advisers are a prerequisite of an adequate court duty scheme. Competitive

tendering could result, in the cities at least, in a race to the bottom and a loss of quality.

Questions

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

Currently the location of the provider close to the court enables greater accessibility and continuity of service for those facing homelessness. By their very nature, duty schemes are a vital service for those who have been unable to obtain advice prior to a possession hearing. This may happen for a number of reasons which are often linked to the vulnerability and low income of the person facing possession. It is vital then that further barriers are not put in the way. Removing the link between local providers covering local courts creates such a barrier. It means that clients requiring face to face advice and further representation will be obliged to make longer and more expensive journeys to the provider for follow up work that often has to be done to tight deadlines. There is also a greater risk of requests for adjournments, which would impact on the efficiency of the court service.

Legal aid procurement does not follow traditional market principles in that many providers deliver HPCDS work as a service to those in need of representation despite the fact that it is not an economic undertaking in its own terms. legal aid for other reasons than solely meeting cost or making a profit. Currently around 64% of the schemes are operated by the NFP sector (Citizens Advice, Law Centres, Shelter). We note that providers have commented on the need to have to subsidise the delivery of legal aid. For example, many providers rely on the delivery of certificated work and the ability to obtain inter partes costs to subsidise fixed fee work. Others rely on other funding that can often be used to support and advise those in housing need outside the legal aid scheme. This adds to positive sustainable outcomes that reduce cost to local authorities. It may be that larger, more commercial providers enter the market and undercut on price in a way that is not sustainable for the traditional legal aid sector. The effect would be to reduce the quality of the work, as well as

the ability to be responsive to local needs. Recent feedback from the courts has highlighted the importance of high quality, locally engaged providers who understand and work with the needs of all parties, including the smooth running of the courts lists.

Each court duty matter is delivered at a loss. On average it costs Shelter an additional £10 per matter to deliver the contract. This varies widely. The cost of delivery decreases where travel is minimised and the number of people helped per session is increased. As a consequence, then, reducing the number of providers to group smaller, less busy courts with larger busier ones increases travel time and does not make the contract more viable, but less so. Barnstable court is a good example where it takes over two hours each way to travel to the court from the closest Shelter office in Truro and often only one or two defendants are able to attend.

While the proposals may give smaller providers and/or providers in rural locations the opportunity to expand into busier city centre courts, the courts are grouped around larger city/urban centre locations. The result would be increased travel time for providers and a more disparate service for clients. In larger urban and city areas there tend to be more providers and those facing possession may be able to obtain advice before the hearing.

In rural areas clients may not live near court or any provider and may have to prioritise on a limited income whether they can journey to see a solicitor as well as to court. For example, Shelter is the only provider in Cornwall and to make delivery more costly puts at risk our ability to provide a service at all. Costs are likely to increase due to greater travel costs and/or administrative costs in co-ordinating rotas, contracting with agents, and engaging with the court. The proposed groupings intensify this situation and put at risk otherwise well-functioning and active court schemes.

As there are fewer providers in rural areas then the risk of providers pulling out increases as it places a wider group of courts at risk. We have already seen this in Cornwall, Devon and Kent. The onus in ensuring delivery at these smaller courts thus moves from the LAA to providers who are already stretched.

We understand that the LAA are aware of these challenges and considers that this gives providers an opportunity to bid at cost. However,

- a. Cost per matter depends on a number of factors including local knowledge, knowledge of the size of the court, knowledge of how the court and regular claimants operate in practice, and how many defendants turn up and want representation.
- b. Providers with a commitment to access to justice and provision of legal aid are concerned that PCT will mean speculative bidding with a potential impact on quality and a higher likelihood of pulling out.
- c. The proposal to continue to exclude travel and waiting from the cost calculation makes delivery of court schemes at a distance from providers and those with small lists unsustainable. These are the very courts that are at the nub of this problem. Including travel costs and increasing the minimum attendance fee (from 1 fixed fee) would go some way towards addressing this issue.

The ability of local providers to deliver a court desk means that they can reach people who have otherwise fallen through the net and that they are more likely to maintain a sustainable service in the provision of ongoing legal representation. The ability and willingness to provide ongoing legal representation is a cornerstone of a quality and sustainable service. This includes more positive and long term outcomes for vulnerable people.

For these reasons, the stark consequence of the proposals are likely to be that more people, including vulnerable and disabled people, lose their homes in circumstances where it could have been avoided and with knock-on costs to the taxpayer.

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

As stated above, the larger the grouping, the less viable the provider is, and the more at risk of not being able to sustain the contract. More importantly, it makes accessing legal services even more difficult for those who are at risk of losing their homes. We already know that marketing legal aid provision effectively continues to be a challenge for providers and the LAA, partly due to the complexity of the system.

The larger groupings potentially reduce the pool of local providers still further. Bidding per court rather than per grouping would be more likely to maintain viability. The court groupings of particular concern are the ones which cover a large geographical area. We have knowledge of the potential issues created in

- Bedfordshire, Cambridgeshire, North Herts, South Herts
- Berkshire, Cambridge, Herts
- Birmingham, Herefordshire, Worcestershire
- Bristol, Gloucestershire, Somerset
- Devon and Plymouth
- East and West Lancashire
- Liverpool, Wirral and Cheshire
- Kent grouping
- West Sussex, East Sussex, Brighton and Hove, Slough,

Some of the Bristol group courts, for example, have court duty days at the same time, which makes attendance logistically more difficult and increases staff costs. Attendance would necessitate travel times of over 1.5 hours each way.

We welcome the flexibility to be able to work with agents. However, finding suitable agents is often a real challenge in rural areas. In large urban areas the quality of the local networks can be easier to sustain and there are a number of networks of providers who work well together, thus improving referral pathways.

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

No

Please give reasons

We believe housing duty possession schemes are vital for preventing homelessness for those who are unable to obtain legal representation before the hearing. Legal representation for tenants makes a vital difference in housing cases, particularly where a landlord is represented. On housing duty possession schemes, facts need to be gathered quickly and a

case needs to be put succinctly and persuasively with knowledge of the law and potential outcomes. An experienced duty solicitor will know what is relevant, when to defend, how to seek the most appropriate outcome and directions and, if there is no defence, advise on obtaining more time and how to obtain alternative accommodation.

Price should not be a distinguishing factor. It is difficult to see how this can be measured objectively without some transparent return on investment criteria being established along with a threshold cost and standard. In a broad sense, price is aligned to quality. So a pure solicitor service will be more expensive but (everything else being equal) is likely to be higher quality due to the ability of a lawyer to conduct litigation and delegate functions at court. As one court commented of a solicitor "The most competent by a long way, this is not unexpected as she is a qualified solicitor as opposed to caseworkers." That is not to say that there are not some experienced HDPS advocates who are not solicitors, but quality should be a defining criterion that includes access to a lawyer and a demonstrable ability to be able to carry out ongoing litigation.

It is, then, extremely difficult to answer this question without further information from the MOJ/LAA. A number of housing providers and representative bodies did request a meeting with the MOJ to clarify many of the points and assumptions made in the consultation. Unfortunately, the MOJ declined to meet and so we are left in the position of having to respond without a clear understanding of the objective to be achieved and standards expected, and little time left in the procurement timetable to resolve issues.

New providers without local knowledge are more likely to bid speculatively. If contracts are won by such providers, then it puts further strain on local providers and increases the risk of closure, such as we experienced after LASPO. We can further see from the Crime tender that this has happened with the newer providers pulling out and leaving even less provision than before, with fewer providers left to fill the gap.

Consideration should be given to focusing on court duty schemes that the LAA already know are unprofitable. The LAA should also publish numbers of acts of assistance delivered, numbers of certificate cases and Legal Help cases, where providers have pulled out, together with reasons given for their withdrawal.

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

Yes

Please give reasons

This is vital for sustainability and ability to meet fluctuating external and internal conditions. Having one provider covering such a wide area places too high a reliance on the continuing viability of that one provider. This risk is particularly acute when price is a factor, risking bidding at below cost and not being able to sustain the service. Moreover, there are external factors in play, such as other funding and delivery of parallel services that may not be within the provider's control. The ability to use agents or sub-contractors (with safeguards in place) thus improves the sustainability of the whole market. However, administrative / co-ordination costs should not be underestimated and should be paid as an addition to the fixed fees.

Q5. What other criteria would effectively distinguish between individual bids?

Please give examples.

We believe that minimum standards should be expected and preference should be given to other factors. Price should not be a factor.

- If price is a factor it should not be a deciding factor.
 - In addition clear objective criteria should be included in the costings and there should be a requirement to provide evidence with the bid that can be objectively measured.
 - The minimum cost be set at the current fixed fee
 - Cost to include sustainability and how costings are to be measured and evidenced.
 - Travel and increasing the minimum fee for attendance should be included
- Quality should be a defining factor to include ability and track record of providing ongoing legal representation with positive outcomes
- Preference should be given to local providers

- Preference should be given to those who have a track record and a proven ability to work with partners.
- Preference should be given to those who have established positive working relationships with the court service to assist in the smooth running of the service.
- Preference should be given to those with established referral routes into housing benefit (HB) advice services, since problems with HB are the most common reason for rent arrears.

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

No

Please give reasons

Please see our answers above and the difficulties in establishing cost without further information. In addition, with the court reform agenda, review of LASPO and changes to legal aid funding, there are likely to be further imminent changes that will impact on cost, delivery and viability soon after the contracts are awarded. This increases the risk of speculative bids as outlined above. We cannot see how the MOJ will be able to establish or compare true cost and viability in any meaningful or effective way

It is hard to reconcile the logic to extend areas to be covered without including the cost of potentially wasted time spent. In rural areas it is less likely that there will be providers to sub-contract to or appoint as agents to reduce these costs.

Time includes travel and the time spent at court, and not purely cost per matter. This can fluctuate at each session and also with time and circumstance. We know, for example, that court closures have had an impact on numbers (see for example Tameside and Altrincham). With changes expected in the court reform programme over the next 2-5 years, including yet more court closures and widening the form of delivery; a price fixed now may not be sustainable or may exceed the cost. This is not therefore the right time to introduce a competition model.

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.

We are concerned that an impact assessment has not yet been carried out. Impact should be assessed in relation to the ability of those who are about to lose their home to travel to providers for follow up casework, together with the ability of providers at a distance to adequately represent people when they are based some distance away. The assessment should take into account the likely lack of sustainability for local providers whose service is dependent on the ability to have a HPDS locally.

It is highly likely, and should be assumed, that certain groups are disproportionate users of court services, and this is particularly so in housing cases. Shelter clients, for example, are more likely to have a mental health, other disability or health problem (40% of Shelter clients who visit our services). The MOJ should gather data to better measure the impact on the groups who are disproportionately more likely to access court duty services. The type of court case and potential outcome should also be taken into account, such as loss of home or children taken into care. We note that the MOJ's impact assessments have been criticised before, due in part to lack of detail and inadequate assessment of the wider impact. (see LASPO National Audit Office and Justice Select Committee Enquiry).

The severity of the impact in duty possession cases where clients have not been able to access legal advice prior to the hearing is particularly marked, since the defendants concerned are often the most vulnerable people. The risk of homelessness makes it especially important that an adequate impact assessment has been conducted before any measures are introduced. Failure to do so could lead to later outcomes research concluding that the changes have had a disproportionate impact on certain protected categories under equalities legislation, with some serious individual outcomes.

The impact assessment should cover not just duty representation alone, but also the ability to access the same provider for further work (which is a highly likely outcome in a number of cases). It should take into account the impact on:

- those with mental health and some physical disabilities which create difficulties in travelling, particularly to unfamiliar places and large urban centres;
- the needs of single parents, predominantly women, and their increased childcare needs due to additional travel time;
- those on low incomes, including their ability to manage *any* increase in travel cost. Court users in possession cases are usually on low incomes and have little or no excess income. No account is taken of increased likelihood of hidden costs such as loss of earnings due to increased travel time. Those in rent arrears are particularly at risk of not being able to meet the cost or having to choose between essential living expenses, accessing early advice from a more remote provider or travelling to court to see a duty provider. This makes it more difficult to obtain positive sustainable outcomes.
- the ability to comply with court timetables if providers are at a distance from the court. This problem goes hand in hand with the effect of court closures having taken place without increasing
 - accessibility in urgent cases;
 - the methods available to make applications;
 - the ability to provide documents electronically;
 - confidential spaces in court to deliver services; and
 - the ability to delegate functions outside the office, including electronic signatures.

An impact assessment should first examine the impact of LASPO 2012 itself, alongside that of duty possession schemes. It is essential to improve the ability to carry out follow up work without the need for the client to travel to the provider's office and to extend the ability to delegate functions at court where appropriate. This also ties in with the ability to make and hear urgent applications through alternative access methods. The additional impact on vulnerable people, including those on low incomes and with disabilities, should be measured.

The MOJ should take into account the findings of the NAO, the Public Accounts Committee and the Justice Select Committee post LASPO in relation to;

- the quality of the impact assessments in relation to wider government costs; and

- access to justice and advice deserts.

Any assessments should be fully addressed and consulted on.

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.

Parents who lack local support, perhaps because they have been rehoused out of their home area, could face childcare problems if travel time to more distant providers impinges on dropping and collecting children from school. The impact of travel costs should be taken into account when considering the availability of follow-up access to providers in a wider area. As we have stressed, follow up access is vital to sustainable outcomes for those who are at risk of homelessness. We have already seen that where some courts have closed, those outside the main cities are less likely to access services previously used (for example, there has been a marked drop in single people and families travelling from Altrincham and Tameside to Manchester).

Many housing cases involve emergency injunctions or applications to suspend warrants of possession. Where an individual's home is at risk, it is vital that the opportunity to make and hear applications is not curtailed. If there are fewer providers local to the court, those in need will find it harder to access legal services in urgent cases, notably those cases which rely on tenants making the initial application to court, such as applications to suspend a warrant of possession. The outcome would be a significantly increased risk of homelessness for families.

Finally, it is imperative to consider improvements in the use of technology and remote access, and their effects on the conduct of court proceedings. Even with such improvements, however, the ability to establish follow on face-to-face services and local partnership arrangements is vital to the sustainability of the sector and by extension to enabling the widest possible access to those who are most in need.