



Ministry of Justice Consultation

“Housing Possession Court Duty Scheme: Commissioning Sustainable Services”

Response from the Law Centres Network

About us

The Law Centres Network (LCN) is the national membership body for Law Centres. Each Law Centre is a not-for-profit legal practice that is also a charity. They specialise in social welfare law and target their services at the most disadvantaged people in their communities. The first Law Centres in the UK were set up in 1970, and LCN has been their co-ordinating body since 1978. Currently there are Law Centres in 43 permanent locations across England and Wales.

Law Centres have been longstanding legal aid practitioners. Nearly all Law Centres hold civil legal aid contracts and together they make up over a third of not-for-profit civil legal aid providers. Currently, 15 Law Centres hold Housing Possession Court Duty Scheme (HPCDS) contracts, operating 20 duty schemes across 27 court sites. Additional Law Centres, while not holding an HPCDS contract, take part in delivering duty schemes as well.

Responses to consultation questions

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

No.

The Law Centres Network is opposed to consolidation as proposed. While some consolidation would be required as a result of the court closures programme, we believe that a drop of 69% in the number of schemes is going too far, too fast and on questionable assumptions. The Ministry of Justice (MoJ) claims that proposals are driven by concerns about the viability of the scheme; however, having fewer and larger contracts would increase and concentrate the risk of any one scheme failing. Certainly the assertion (in para. 5) that fewer, larger contracts “would be more sustainable for providers” seems overconfident given the additional travel and administration associated with managing the larger contracts.

It is clear that the duty desk schemes have changed over the course of the current contracting period and that this needs to be accounted for in planning ahead. Case volume has been decreasing across most of the local schemes, as para. 24 of the consultation paper acknowledges. In addition, our members report that duty desk case volumes have become

more uneven (some days quiet, others inundated), and cases have become more complex, not least due to the expansion of Universal Credit. It is not clear whether the Legal Aid Agency (LAA) has examined the drivers of the drop in duty desk acts of assistance; if it has done so, it has not disclosed the information. As court closures affect duty desk provision even before the proposed changes, new factors such as longer travel distances for disadvantaged clients come into play and may lead to a reduction in people appearing to defend possession claims. However, the LAA's forecasts for scheme volumes following consolidation seem to assume all conditions remaining equal. We believe this assumption is misguided and will impact on the next contracts.

Another driver for consolidation is the need to reduce administrative burden and cost of managing contracts by LAA. The consultation paper notes (para. 15) that 13 schemes have so far had to be retendered; it does not, however, explain the reasons behind these retendering instances, which may or may not reflect systemic weaknesses in the current HPCDS regime. In an era of frequent policy changes, in particular on public provisions for disadvantaged people, there are many changes that can, alone or in combination, lead providers to conclude that delivering an HPCDS contract is no longer viable for them. Ensuring a critical mass of acts of assistance is important for contracts' viability; but larger-because-fewer contracts are not the solution when taking into account the much higher cost – in time, administration and money – of delivery.

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

The consultation paper touches all too briefly (para. 24) on factors that have informed LAA in drawing up the new HPCDS procurement areas. Still, as the move from the current to the proposed system would be a dramatic leap, more evidence is needed in order to understand how groupings were arrived at, such as the model for predictions about the volume of cases in remaining courts. Moreover, as HPCDS providers would be expected under the proposals to hold a face-to-face housing legal aid contract, it would be important to know how many of the proposed procurement areas are what the Law Society terms 'legal aid deserts', meaning that there is no local housing legal aid provider – information that is currently missing. LAA should account for local particularities that have previously challenged provision, and larger procurement areas would not mitigate them by sheer size.

Indeed, with some of the new procurement areas, their size is a problem in itself. The North West Wales + North East Wales + Central Wales area covers seven courts over large expanse of land where transport connections are not great. In other schemes, the geographical expanse makes for long travel times between court sites: on a good day in the Sussex scheme, it would take an hour and a half by car to get from the Hastings duty desk to that in Horsham; in the Lincolnshire and Humberside scheme, it would take nearly two hours to get from Hull to Boston; in North Yorkshire, it would take even longer to get from Skipton to Scarborough. For clients as well, to travel to their solicitor's office for follow-on advice would become prohibitively expensive and time-consuming, which might put some of them off it – creating, in practical terms, a hurdle to their access to justice.

Rural areas in particular pose providers with considerable challenges, including the cost and time of travel, which legal aid does not remunerate, and co-ordination and administration across multiple sites that are quite far apart. This runs contrary to MoJ's contention in the consultation paper, that the proposed scheme would offer economies of scale: in fact, the opposite is more likely – an increase in providers' overheads, which cannot be recovered. It is hard to see how providers can make such schemes work if they are not located at the geographical centre of the procurement area. It is tempting to see the use of agents as a solution to the coverage challenge, but in effect the time and cost of travel would likely be a disincentive to both lead bidders/contract holders and agents.

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

No.

The Law Centres Network is opposed to price-competitive tendering, which we believe will result in a race to the bottom in terms of quality. However, the current situation is also not sustainable, so we call on LAA to opt instead for reviewing current fee levels, which do not provide full cost recovery, especially in rural settings. The consultation paper implicitly admits this problem: para. 20 says that a price element "will allow rates to be set closer to the cost of delivering the service", which suggests that the current fee rates do not meet the cost of delivery, despite official statements to the contrary.

As before, LAA want only larger providers of more complex housing contracts, or those holding higher face-to-face matter start lots, to bid for HPCDS. They think that there would be economies for providers in urban areas, and that in rural areas bidders would simply need to bid at higher costs as required. This is sensible, but we remain concerned about mercenary undercutting bids from commercial providers, which could absorb lower remuneration by lowering quality of delivery. Therefore, we would need clarifications in advance from the LAA about the relative weight of the price element in the competition, as compared with quality considerations.

The consultation paper suggests that bidders would need to bid 'at cost' but it is unclear how this would be calculated, given that HPCDS is now run differently. Bidders are asked to bid for serving courts they have not served before and do not know fully what this would require of them; there are too many variables and too little data to rely on in modelling bids. There is also the element of uncertainty: LAA expects providers to undertake all of this significant preparatory work before knowing whether they have been awarded a face-to-face contact, which is a prerequisite for bidding for an HPCDS contract.

Overall, we do not share MoJ's conviction that a price criterion would improve the HPCDS tendering process or the resulting delivery. Price competitive tendering was abandoned in criminal legal aid tenders over three years ago. Similar reasons apply for abandoning it in HPCDS legal aid tenders now. Primarily, the widely held concern is that a competition on price would start a 'race to the bottom' on service quality. Just as importantly, driving down prices also runs contrary to the stated aim of making contracts more viable. Therefore, we

strongly urge MoJ to abandon price competition, for the benefit of providers, the HPCDS scheme and ultimately people at imminent risk of losing their homes.

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

Yes, but the Law Centres Network considers that consortia or partnerships are preferable to agents. We do not have a general objection to the use of agents: this helps keep smaller providers in this area of practice, allows all involved to retain competencies, is work that in our experience providers find interesting and it helps identify, at the point of crisis, more complex cases to be helped through face-to-face housing legal aid. We do believe, though, that legal aid contracts and the tendering for them should encourage established partnerships and ongoing relationships, rather than more contingent, at times casualised work.

Some of the proposed procurement areas would be virtually impossible to cover without some sub-contracting. However, that would bring its own burdens, of managing subcontractors and ensuring quality throughout the delivery. This would generate additional administrative costs that LAA makes it clear would not be remunerated. In effect, reliance on agents to deliver the proposed larger HPCDS contracts would mean delivering at scale – benefiting LAA – but without the attendant economies for providers. Worse yet, this would result in poorer service for clients in distress.

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

We consider that previous tender rounds can offer several useful criteria for distinguishing between bids. One key criterion would be familiarity with the type of work involved: demonstrating past and current experience of negotiating and representation in possession cases, and in delivering a duty desk scheme sustainably. Another criterion would concern the bidder's local presence and knowledge: of local sources of advice and support for clients, and of local social housing providers.

The consultation document is preoccupied with the sustainability and commercial viability of the duty schemes. However, we are unclear about just how LAA proposes to tell – at tendering stage or in contract management – whether bidders and bids are economically viable, beyond compliant delivery of a legal aid contract recently or currently. If an ultimately unsustainable bid is successful in tendering stage, the contract awarded is at increased risk of default or provider withdrawal – just the outcome that MoJ would like to avoid.

Furthermore, we are concerned to maintain the quality of the service provided at duty desks but remain unclear as to how LAA would ensure it if price is to be given a key role in selection. Currently there is no prohibition on using paralegals on the scheme and they do have rights of audience in chambers. This goes to the heart of our concerns about price-sensitive tendering: larger, commercial bidders could be tempted to treat HPCDS contracts

as loss leaders and bid at unsustainably low prices, delivering services at the minimum specified level, thereby driving down standards and not adequately resolving people's problems.

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

No.

Even though ostensibly the proposed fee mechanism is largely similar to the current remuneration, competitive pricing would drive fees further down. Already there is no financial benefit in operating a duty scheme on its own, except alongside a face-to-face contract. We are concerned that the proposals would either drive away certain current providers or compromise contractors in trouble procurement areas over time. This would be because certain providers are committed to working on possession cases as part of their mission or ethos, and would not be as ruthless about commercial viability of HPCDS contracts – to their detriment.

Para. 33 of the consultation document encapsulates some of the problems in the proposed remuneration mechanism. Firstly, it is unclear about which fee should be claimed for duty scheme cases that are then picked up in controlled or certified work. Secondly, MoJ writes that prices would cover all costs associated with delivery - but excludes travel, which in the proposed much larger procurement areas will be significant (a point made above). In addition, MoJ promises that tendering on price would allow providers to ask for fees that reflect the cost of delivery. However, then it explains that the unique fixed fee will be only “based on the provider’s bid price”, and MoJ will apply conditions (unspecified) to safeguard public funds. This does not reassure us that the costlier-to-deliver contracts would get selected; if they do not, it would only be cheaper, lower quality service that is available.

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 note that no risk assessment, impact assessments or equalities impact assessment have been issued with the consultation. This makes it very difficult to consider proposals comprehensively, or to gather whether MoJ has duly considered the expected effects of such a major change in the commissioning and delivery of HPCDS. Along with other relevant concerns raised above, we worry that tendering HPCDS as proposed could threaten the viability of the other face-to-face contracts held by the same provider by adding an excessive burden of delivery. This would have knock-on effects on the public’s access to justice, disproportionately affecting people with protected characteristics, who are overrepresented among beneficiaries of civil legal aid.

More directly, proposals would put hurdles in the way of people with protected characteristics – such as people with disabilities – due to the cost, time and physical and

mental effort required to travel further out to the fewer proposed duty scheme sites and/or to providers' offices for follow-on legal assistance. Frazzled and anxious at the possibility of imminently losing their homes, people – and especially ones with protected characteristics – should benefit from a service that anticipates their vulnerable situation and makes it easier for them to access HPCDS. As a growing body of socio-legal research tells us, the more burdensome their access becomes, the more likely they are to lose confidence and ultimately drop out, with adverse consequences to them.

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

As discussed above, we are concerned that, far from increasing competition, the proposed measures will effectively exclude providers currently delivering duty desk and face-to-face housing contracts. The price-competitive element would drive down the quality of provision. We believe that this would lead to several problems for individuals and families using HPCDS. Firstly, it will worsen the inadequacy of the current scope restrictions, buying clients some time without using it to solve the underlying problems in debt, welfare benefits or employment law, meaning that before long the client faces possession proceedings again. Secondly, price competition would also reduce the quality of representation in court, eroding success rates and driving an increase in possession, evictions and consequently homelessness – putting families under considerable pressure.

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