



## **YOUNG LEGAL AID LAWYERS**

### **Response to the Ministry of Justice Consultation on the Housing Possession Court Duty Scheme: Commissioning Sustainable Services**

**16 March 2017**

#### **About Young Legal Aid Lawyers**

1. Young Legal Aid Lawyers (YLAL) was formed in 2005 and has over 2,800 members. We are a group of lawyers committed to practising in those areas of law, both criminal and civil, which have traditionally been publicly funded. YLAL's members include students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers based throughout England and Wales. We believe that the provision of good quality publicly funded legal help is essential to protecting the interests of the vulnerable in society and upholding the rule of law.
2. YLAL's objectives are:
  - a. To campaign for a sustainable legal aid system which provides good quality legal help to those who could not otherwise afford to pay for it.
  - b. To increase social mobility and diversity within the legal aid sector.
  - c. To promote the interests of new entrants and junior lawyers and provide a network for likeminded people beginning their careers in the legal aid sector.
3. This is YLAL's response to the Ministry of Justice (MoJ) Consultation on the Housing Possession Court Duty Scheme: Commissioning Sustainable Services. We have also had sight of the responses to this consultation by Legal Aid Practitioners Group and Garden Court Chambers, and we endorse those responses.

#### **Introduction**

4. The Housing Possession Court Duty Schemes ('HPCDS' or 'the Schemes') provide emergency, on the day face-to-face legal advice and representation to anyone facing housing possession proceedings, free of charge and regardless of their financial circumstances. The consultation paper proposes that the contracts with providers for HPCDS work be consolidated into a smaller number of larger contracts serving a wider geographical area and that a new competitive tender model based on price and quality be introduced.
5. The proposed new competitive tender procurement model for HPCDS based on price and quality with a consolidated number of larger schemes is intended to provide a better service for those needing advice and increased sustainability for providers delivering the services.
6. Our responses to the consultation questions are set out below. In summary, YLAL considers that the proposals in the consultation are likely to undermine both the sustainability of the

Schemes and the quality of service provided to those in need of advice. A smaller number of larger contracts for HPCDS work could undermine the provision of housing advice across the country by forcing small firms out of business. Furthermore, the proposal to award contracts on the basis of price – i.e. to the lowest bidder – is, in our view, highly likely to reduce the quality of service provided to people in need of housing advice.

7. YLAL also considers that the proposals may have a detrimental impact on the sustainability of the profession at present and in the future, given the challenges faced by legal aid providers in reacting to fee changes, changes to contracting arrangements and fee cuts. This will inevitably have an impact on future generations of junior and aspiring legal aid lawyers, in housing, social welfare lawyers and other publicly-funded areas of law.
8. We therefore urge the MoJ and the Legal Aid Agency to reconsider these proposals and to work with representative bodies considering in particular:
  - a. the sustainability of firms providing housing and social welfare advice;
  - b. the need to address emerging gaps in provision of housing and social welfare advice;
  - c. the sustainability of the profession as it is and its ability to react to fee changes, changes to contracting arrangements and fee cuts; and
  - d. the sustainability of the profession in future if legal aid work continues to be poorly remunerated and new lawyers cannot be recruited, and the impact of this on future generations of junior and aspiring legal aid lawyers.

**Question 1: Do you agree with the proposal to consolidate the number of HPCDS schemes to provide for larger and more sustainable contracts?**

**No**

9. We do not agree that consolidating the number of HPCDS schemes into a smaller number of larger contracts will, in and of itself, provide greater sustainability for providers. The consultation paper acknowledges that a number of providers have withdrawn from their contracts under the current schemes, resulting in the contracts having to be re-tendered to fill gaps in provision. There is growing evidence of ‘advice deserts’ around the country: areas where advice on housing law is not available. This is the context in which the consultation proposals should be considered.
10. We are concerned that the proposal to consolidate the number of HPCDS schemes to provide for larger contracts will result in smaller firms and Law Centres either going out of business or moving away from publicly-funded housing law work. This in turn may lead to there being more areas of the country where housing advice is not available.
11. 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. The MoJ appears to have overlooked the fact that HPCDS services do not operate as entirely discrete elements of a provider’s business.
12. It is not clear why the MoJ believes that it is necessary to consolidate contracts that are already operating well and, by the MoJ’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.

13. Paragraph 12 of the consultation paper states:

*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.*

14. 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 that in fact 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.

**Question 2: Do you have any specific comments on the changes proposed in Annex A?**

**No**

**Question 3: Should price be introduced as an objective criterion in addition to quality to distinguish between tenders?**

**No**

15. We object to the introduction of price as a criterion to distinguish between tenders on both principled and practical grounds. We do not believe that price competitive tendering is compatible with the provision of good quality publicly-funded legal advice and representation which the MoJ should be seeking to ensure through the legal aid scheme. We endorse and agree with the response to this question by Garden Court Chambers, which begins as follows:

*Similar proposals have been put forward on numerous occasions under the last three Governments since Lord Carter of Coles' review of legal aid in 2005 and our response to this proposal is the standard response which has been put forward consistently and forcefully by the legal aid sector since that time: we are opposed to any system which awards contracts to the lowest bidder. Such a proposal is wholly at odds with the notion that it is the quality of legally aided advice and representation which is available to those that lack the means to pay, that should be the determining factor.*

16. In practical terms, 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. The introduction of a price criterion is, in our view, likely to have the opposite effect than that intended by the MoJ if contracts are less sustainable and further tenders are required to plug gaps in provision.

17. Furthermore, it seems highly unlikely that any provider that is genuinely interested in the quality of service provision will bid at lower than the current rates as those rates are already too low to cover costs. We note that the feedback from Legal Aid Practitioners Group 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.

18. We also share the concern, expressed by Legal Aid Practitioners Group, as to how the MoJ intends to assess whether a particular bid price is, in fact, realistic and sustainable. To do so the MoJ 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 MoJ 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 MoJ as to whether a particular business can, in fact, deliver the service at a particular, unique fee.

19. It is also not clear, and no reasons are given in the consultation paper, as to why the MoJ 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 MoJ believes this to be the case.
20. In these circumstances, it is difficult to understand how the MoJ can justify the inclusion of price as a criterion in determining which providers should be awarded contracts for HPCDS work. In our view, it would be far more sensible for the MoJ 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 MoJ 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.
21. Given the principled and practical objections to this proposal outlined above and expressed in more detail by Legal Aid Practitioners Group, YLAL considers that it would be grossly irresponsible for the MoJ to proceed with this proposal and we urge the MoJ to reconsider.

**Question 4: Should we allow the use of Sub-Contracting and/or Agents to deliver HPCDS?**

22. N/A. YLAL does not express any view on this question.

**Question 5: What other criteria would effectively distinguish between individual bids?**

23. Providers should be required to demonstrate that the service will be sustainable in all the circumstances, including by demonstrating that they:
  - a. have the staffing capacity and are located close enough to the court(s) to cover every list, respond to changes in lists, response to emergency applications and requests and cater for fluctuations in demand;
  - b. ensure that the service is only provided by suitably qualified and experienced staff;
  - c. ensure that services delivered at court are subject to the same quality assurance systems as their mainstream housing work;
  - d. 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;
  - e. 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; and
  - f. have a demonstrated track record of providing services in the contract area

**Question 6: Do you agree with the proposed remuneration mechanism under the competition model?**

**No**

24. We do not believe that the MoJ 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.

25. 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.
26. 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 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.

**Question 7: 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?**

27. Possession claims tend to be triggered by one of 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.
28. 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.
29. The Impact Assessments that preceded the Legal Aid, Sentencing and Punishment of Offenders Act 2012 suggested that measures that impact disproportionately on smaller firms will impact disproportionately on BAME practitioners. We are concerned that this may also be the case in respect of these proposals.

**Question 8: What do you consider to be the impacts on families of these proposals? Are there any mitigations the Government should consider?**

30. The failure to procure sustainable services, and the potential for the subsequent collapse of contracts and resulting loss of provision, will inevitably have an adverse impact on 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. 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.
31. In our view, these proposals are therefore 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.

## **Conclusion**

32. YLAL considers that the proposals in the consultation are likely to undermine both the sustainability of the Schemes and the quality of service provided to those in need of advice. A smaller number of larger contracts for HPCDS work could undermine the provision of housing advice across the country by forcing small firms out of business. Furthermore, the proposal to award contracts on the basis of price – i.e. to the lowest bidder – is, in our view, highly likely to reduce the quality of service provided to people in need of housing advice.
33. YLAL also considers that the proposals may have a detrimental impact on the sustainability of the profession at present and in the future, given the challenges faced by legal aid providers in reacting to fee changes, changes to contracting arrangements and fee cuts. This will inevitably have an impact on future generations of junior and aspiring legal aid lawyers, in housing, social welfare lawyers and other publicly-funded areas of law.
34. We therefore urge the MoJ and the Legal Aid Agency to reconsider these proposals and to work with representative bodies to develop a new approach to securing sustainable HPCDS services.

**Young Legal Aid Lawyers**

**March 2017**

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