



YOUNG LEGAL AID LAWYERS

Response to the Ministry of Justice's consultation on the Housing Possession Court Duty Scheme (HPCDS)

3 January 2020

About us

Young Legal Aid Lawyers (YLAL) was formed in 2005 and has over 3,500 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.

This is our response to the Ministry of Justice's (MoJ) consultation on proposed changes to the Housing Possession Court Duty Scheme.

1. Do you agree with our proposed approach to tender for individual courts?

Yes.

Although we agree in principle, the proposed approach does not take into account court closures. According to the Parliamentary Briefing on Court Closures and Access to Justice (18 June 2019), 90 county courts out of 240 were closed between 2010 and 2019.

Any future scheme should take into account court reform which necessitates the operation of more than one HPCD scheme in one court. This includes consideration of the fact that, for an increasing number of HPCD schemes, the provider in closest proximity to the court will not necessarily be the provider with local knowledge, the importance of which is rightly recognised at paragraph 36 of the consultation document dated 4 October 2019 ("the Consultation Document") and also reflected in the policy objective to ensure that the Scheme is as sustainable as possible, and that there is continuity of this vital service for the clients that need it.

YLAL has been told, for example, that there are at least three HPCD schemes run out of the Manchester Civil Justice Centre, including the areas of Rochdale and Oldham which are a considerable distance from the Court. Without more detail on the criteria for tender, it is not clear how the proposed approach will ensure that clients are served by practitioners with the requisite local knowledge to enable those clients to benefit from continuity of service in their local area. Each social landlord will have their own policies on possession proceedings and approach to negotiation. An individual would be significantly disadvantaged if their representative did not have this local knowledge.

In addition, the proposed approach does not take into account the number of HPCD schemes operated by Not for Profit (“NfP”) organisations and the consequent impact on NfP organisations and their clients. It was recorded in the case of *R (Law Centres Federation Limited t/a Law Centres Network) v The Lord Chancellor* [2018] EWHC 1588 (“the LCN case”) that 64% of HPCD schemes were operated by NfP organisations prior to the decisions taken in 2017 to reduce the number of HPCD scheme areas and to introduce price-competitive tendering [§24].

Although YLAL does not hold its own data on the number of NfP providers affected by the proposed approach, it would be reasonable to assume from the figures in 2017/2018 that NfP providers continue to form a significant proportion of HPCD scheme providers. As such, current data ought to be included and considered in any proposal.

2. Do you agree that we should continue to allow the use of agents to deliver the Scheme in the same way as we do now?

Yes, although data on the impact on NfP and local providers would, again, be useful. It was recorded in the LCN case that a number of Law Centres lacked security of tenure as a result of the 2018 tender because they had to operate as agents in order to operate at all [§64]. It was also recorded that the affected Law Centres saw a significant fall in their income [§65]. The possibility of this ought to be addressed in any proposal but is not presently addressed in the Consultation Document.

3. Do you agree with our proposal to introduce an attendance fee in place of the existing nil session fee?

Yes.

We note there is no proposal to increase the Scheme fee to remunerate professionals for the exceptional competence, skill and expertise required at court.

The Scheme covers the following types of proceedings at the court which are set out in the HPCDS Specification category specific rules:

- (a) Private rented possession proceedings;
- (b) Public/registered social landlord rented possession proceedings;

- (c) Mortgage possession proceedings;
- (d) Applications to stay/suspend execution of warrants of possession; and
- (e) Clients with charging orders relating to property whereby the client is at immediate risk of losing their home through a forced sale.

As observed by the late Sir Henry Brooke in his analysis of the evidence for the Bach Commission Report on Access to Justice [Appendix 5, September 2017]:

“Housing law is a very technical and complicated area of law. The Encyclopaedia of Housing Law print version runs to over five loose-leaf volumes. There are numerous different types of tenancies (assured shorthold, assured, secure, introductory, flexible, demoted, non-secure) and each is governed by a different legal regime. Social landlords are always represented in court by lawyers, or by experienced housing officers. Private landlords may not always be represented, but as a rule they can afford legal representation.” [p.21]

Not only is the work legally complex, it has to be undertaken with exceptional speed given that 40-50 cases may be listed in any given day at some courts [the *LCN* case at §12]. In addition, it is clear from the Equalities Impacts section of the Impact Assessment dated 4 October 2019 (“the Impact Assessment”) that women, people from a BAME background and clients with disabilities are disproportionately represented within the Scheme. From YLAL members’ experience, it is truly the most vulnerable who arrive at court in need of representation through the Scheme. As such, an additional layer of expertise is required in order to deliver the Scheme with the necessary care and skill.

Furthermore, regard ought to be had to the cuts to legal aid generally and particularly early legal advice in housing matters. As stated by Professor Susan Bright and Dr Lisa Whitehouse in their report on Information, Advice and Representation in Housing Possession Cases published by the University of Oxford in 2014,

“While it seems undeniable that HPCDS are of great benefit to both occupiers and the courts, there is the potential for such schemes to be used by government as a ‘fig leaf’ to hide the lack of more substantial and expensive legal advice and representation. In particular, it would seem that, following the changes made recently to legal aid, specialist housing and debt advice is dwindling, leaving HPCDS as the last and only source of advice for occupiers.” [p.65]

We agree that the twin aims of ensuring the sustainability of the Scheme and continuity of service are important, but access to justice cannot be effectively or efficiently delivered without adequate recognition of the expertise required in operating the Scheme.

4. Do you agree that this attendance fee should be equivalent to the fee if the provider had seen two clients during the session?

Yes, but see response to question 3 above.

5. Do you agree with the proposal to allow providers to claim the Scheme fee in addition to the fee for any follow up Legal Help matter?

Yes.

As stated in response to question 3, the work undertaken by professionals operating the Scheme requires exceptional skill and speed. It involves taking instructions quickly, checking documents, negotiating with landlords and representation in court. It is a discrete area and separate to any follow-on work, and both justify separate remuneration.

6. Do you agree with the proposal to introduce reasonable costs for travel as part of the competition bid?

Yes, but not as part of the competition bid.

We agree that travel costs should be paid but do not agree with the introduction of a price competitive element to the tender for three reasons.

Firstly, there is insufficient evidence for the assumption that price-competitive tendering is likely to ensure the sustainability of the system. It does not appear that any travel cost data was obtained prior to or during the consultation and no explanation is provided for the assumption in either the Consultation Document or the Impact Assessment.

Secondly, there needs to be adequate investigation into the impact of the proposed approach, given that price-competitive tendering is an entirely novel approach in civil legal aid. Without such investigation, the proposed approach may be open to a similar legal challenge to that in the *LCN* case. The proposed approach fails to consider the impact of court closures, the particular impact on NfP organisations and the potential for an increased use of agents.

Thirdly, it is not clear how price-competitive tendering would lead to any savings. If travel costs were awarded at the rate of £25.71 (as stipulated in Table 7(b), Para 1, Schedule 2 Civil Legal Aid (Remuneration) Regulations 2013/422), it is likely to cost £0.3m or £0.6m per annum based on a 30 or 60 minute journey, which is equivalent to the amounts estimated in the Impact Assessment for price-competitive tendering [p.7]. It is unclear how the implementation and ongoing processing costs of price-competitive tendering would lead to savings; on the contrary, it appears to add an additional layer of administrative scrutiny.

If quality will take precedence over price in any event [§54, Consultation Document], there is arguably no point in introducing price-competitive tendering for savings that are almost invisible on the current evidence.

Additionally, we disagree with the notion that only 'reasonable' travel costs should be paid. Providers already run HPCDS services at a loss and they should be paid for the actual costs involved in travel time and the cost of travel (in terms of travel time this would have to be on an hourly rate basis). There should not be a subjective element introduced to the assessment of travel claims. It is unclear from the proposals what reasonable costs will mean and how that element will be adjudicated.

7. Do you agree with the proposal to tender for contracts on a quality competitive basis, with travel costs factored in on a price competitive basis?

No, we agree with the proposal to tender contracts on a quality-competitive basis. For the above reasons, we do not agree that there is sufficient evidence or that there has been sufficient enquiry to assess travel costs on a price-competitive basis.

8. Do you agree with the assumptions and conclusions outlined in the Impact Assessment?

Yes, in part.

The Ministry of Justice should use this opportunity to outline its approach to tendering over the medium term, not just in light of the changes to the legal aid provider base and the nature of the caseload, but also in light of other systemic factors that the consultation paper acknowledges, including further court closures. We would like the MoJ to commit to ensuring that existing schemes continue to operate at new courts on the same basis and with the same provider following court closures.

9. From your experience are there any groups or individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this consultation? We would welcome examples, case studies, research or other types of evidence that support your views.

We agree that, save for the proposal on price-competitive tendering for travel costs, the proposed approach could lead to better outcomes for clients facing possession proceedings in England and Wales. This could lead to beneficial outcomes for groups with protected characteristics who are over-represented among HPCD scheme users: women (62%), particularly single women with dependent children; people with disabilities (31%); people with mental health difficulties; and BAME people (figures: LAA).

However, as noted in response to question 1, the Equalities Impacts section fails to address the specific impact on NfP organisations and their clients. Although Equality Impact Assessments (EIA) have been completed for each policy option, they are superficial and general. The EIA on price-competitive tendering for travel costs merely repeats the EIA of the other policy options and insufficiently analyses the impact on clients of a price-competitive model (Consultation Document, pp.25-27, policy option 4).

The implications of increased travel costs for clients was considered during the parliamentary debate on Court Closures on 20 June 2019. During that debate, Richard Burgon MP spoke at length about the devastating impact on clients of having to travel long distances to court:

“The Law Society notes how Her Majesty’s Courts and Tribunals Service’s definition of a day’s travel to court impacts on those with caring responsibilities, the elderly and disabled people. My hon. Friend the Member for High Peak (Ruth George) has told me about the devastating impact of the closure of Buxton court on her constituents facing eviction. Now facing a journey to Derby without any direct train, many of her constituents are simply unable to defend themselves...

The first commissioned academic study into the impact of the court closures, by the University of Suffolk, found that costs for some defendants, witnesses and advocates to attend magistrates court had doubled. New research by Dr Daniel Newman and Dr Roxanna Dehaghani found that the high cost of transport in Wales can be prohibitive. For those who think that that is far-fetched, here is an example from the Law Society: a young person in the Greater Manchester area would have to spend almost all their universal credit daily allowance of £8.30 on a £7 tram fare from Bury to central Manchester.”
[Hansard, 20 June 2019, column 432]

The EIA fails to consider the impact of price-competitive tendering on clients in the event that their local provider is not able to compete with a private provider and/or a provider who is closer to the relevant court. In such a situation, clients will incur the cost of travelling to court, which is already prohibitively expensive for some, and the additional cost of travelling to the provider operating the scheme for follow up advice. The EIA does not consider what safeguards, if any, are required to mitigate such an impact, which may include travel vouchers.

10. What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposals? Are there any mitigations the government should consider? Please give data and reasons.

We consider that the overall impact of the first three proposals on people with protected characteristics would be neutral or beneficial as it would be easier for smaller, local providers to deliver the HPCDS. However, this effect would be largely cancelled out if travel allowances are only paid out following price-competitive tendering.

The proposals must give due regard to the impact of the court reform programme on accessibility to the courts for people with protected characteristics. Individuals attending court to defend possession proceedings are disproportionately women, BAME and people with disabilities who are likely to find it difficult to pay travel expenses. To expect them to travel unaided to a court further away because their local one has shut, and then possibly again to access follow-up casework support, is unrealistic without financial assistance.

11. 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.

Many families that YLAL members represent are in financially precarious positions. The root causes of their financial difficulties are complicated but it is important to highlight that failings in Universal Credit are a significant cause of rent arrears and possession proceedings

These families are unlikely to be able to afford to travel far to attend court. As stated above, we consider that the introduction of travel vouchers would go some way to mitigating the impact of travel costs.