

1. INTRODUCTION

1.1. The Community Law Partnership (CLP) is a firm of solicitors based in Birmingham which specialises in the law relating to Housing and Public Law. The firm was formed in 1999, and is committed to the provision of high quality legal services to those who would otherwise not have access to them. All of our work is legally aided, save for a tiny proportion of our work for Gypsies and Travellers. Since the pilot scheme started in 2002, we have operated the Housing Possession Court Duty Scheme ("HPCDS") at Birmingham County Court, which is the largest County Court hearing centre in the country by quite some margin. We also have experience of operating a small scheme in Dudley County Court until the introduction in the tender process of heavier weighting for a physical presence in the relative procurement area, and of providing temporary cover at Telford and Shrewsbury when the provider pulled out. One of our partners sits as a Deputy District Judge in the Midland Circuit and has witnessed the operation of Court Duty Schemes, from the point of view of the judiciary, in the County Court at Walsall, Dudley, and Nottingham. We possibly have the most experience of Duty Schemes in the country.

1.2. We have carefully considered the "*Housing Possession Court Duty Scheme: Commissioning Sustainable Services*" paper. Firstly, the consultation paper refers to a report on HPCDS schemes "*Information, Advice & Representation in Housing Possession Cases*" published in 2014. One of our partners is a member of the advisory group in relation to that research project and continues to work with its authors in this field. We welcome the findings in that report – which mirrors our own experience – in recognising the significant benefits of HPCDS schemes; in particular that:-

- HPCDS schemes are essential to accessing justice
- HPCDS schemes add value for Defendants and HM Courts & Tribunal Service;
- District Judges & court staff value the schemes;
- They should be available in all County Courts;
- Better results are achieved as a result of HPCDS advocacy.

2. OUR EXPERIENCE

2.1. The scheme in Birmingham County Court is well established and works effectively. The scheme is supported by court staff and the judiciary. We provide Advocacy on the Duty Scheme to all occupiers who face the possible loss of their home be it for Rent or Mortgage Arrears, anti-social behaviour related tenancy breaches, and to those who simply lack security of tenure. Everyday there is a possession list in Birmingham. The tendency of the Birmingham County Court is to list 6 rental and mortgage possession claims every 30 minutes. This yields 36 cases per court session per judge. It is not uncommon to have two rent lists running on a single half-day session, with a mortgage list listed before another judge, and applications to suspend warrants for evictions. Regularly, Claimant representatives find themselves splitting themselves across two lists, whereas we also ensure there is at least one Duty

Advocacy per list; even where the court has listed applications to suspend warrants as 'floaters'¹.

- 2.2. From April 2016 to February 2017 the scheme has delivered 3422 acts of assistance. There is an increasing pressure on the court service with diminishing resources to deal with this volume of cases. In order to manage the volume, cases have to be dealt with as efficiently as possible by qualified and experienced advocates who must be able to identify the salient issues in each case to save time in court dealing with irrelevant points that Defendants, and indeed some Claimants, will wish to pursue. This requires not just knowledge, experience & skill but also excellent organisational skills by all involved in the administration of the scheme – there must be an effective administrative infrastructure for a successful scheme to operate.
- 2.3. Over recent years the already complex law relating to defending residential possession proceedings has become even more so: the Government's welfare benefit reforms including bedroom tax, benefit cap and the roll out of Universal Credit have caused initial obstructions to the resolution of cases; Housing Benefit matters remain very complex; the law relating to public law defences including those under Equality Act 2010 remains far from settled and is a developing area of law; accelerated possession claims have become a legal minefield following changes to legislation and development of the common law, to the extent that a flow-chart is required to establish the validity of the proceedings. The government has introduced a number of new absolute grounds for possession against previously secure tenants and duty advisors needs to have at least some understanding of immigration legislation to ascertain if their client is entitled to welfare benefits and social housing.
- 2.4. We have a highly successful track-record of operating the HPCDS in Birmingham. In the first eleven months of this year we have seen 3422 defendants and achieved a successful outcome (no possession order in possession proceedings/no eviction in warrant cases) for 80% of those defendants.
- 2.5. In summary, we believe that we have the knowledge and experience to constructively inform the consultation process. We agree with the aims of the consultation, to ensure that sustainable, high quality legal services are available to those facing possession proceedings, but, as will be seen, do not agree that the proposals in the consultation paper will achieve that aim.

3. CONSULTATION RESPONSE

- 3.1. We now provide our replies to the questions posed in the consultation document as follows:-

¹ i.e. the court has not allocated the particular application to a particular judge or at a firm time because of the urgency of the application.

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

There are obvious dangers inherent in large schemes which cover a wide geographical area. The provision of follow up work, which is vital if the schemes are to be anything more than a hand holding exercise (and consequently a waste of public money in our view), becomes more difficult when the courts, and consequently the clients, are a long way away from the provider. Those in receipt of subsistence benefits cannot be required to spend up to half of their weekly income to visit a provider for a follow - up appointment. This question, which if unresolved may seriously reduce access to justice, is not addressed in the consultation paper. If there is no requirement to provide follow up services in a place which is accessible to clients, those in need are unlikely to keep follow up appointments in an office, many miles away, which would be expensive to keep. There must be a requirement to do follow up work because empowering defendants to help themselves in the future provides for better outcomes. If this is onerous on suppliers, there may be a financial pressure on that provider to avoid follow up work by securing a result at the first hearing which may not be in the client's best interest but will avoid the need to do follow up work (e.g. SPO rather than adjourn for follow up work)

The proposals are also potentially discriminatory as they will disadvantage small firms. Most BAME providers are small firms.

If the reason that providers have pulled out of existing schemes is that the scheme is unsustainable due to the small number of cases and low price per case making it uneconomical, (rather than, say, the loss of a supervisor/worker) coupled with the travel required to attend, that could be addressed by the LAA paying travel and/or waiting time for schemes covering geographically remote courts. Price competition is likely to exacerbate the problem of lack of viability of schemes if they go to the lowest bidder.

The further away a provider is from the court centre, the harder it will be to cover hearings that are only notified to a provider on the morning of the court session. In Birmingham, particularly with the 'floater' arrangement for warrant lists, we appreciate the value of having our duty advisors so close to the court. When an accelerated possession claim list is generated that we have not had notice of until the afternoon before, being only a 10 minute walk from the court, we can ensure someone is able to cover the list.

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

We think that the "one size fits all" approach is inappropriate. There may well be areas which lend themselves to consolidation due to geographical proximity and good public transport links, but this is certainly not so in relation to all of the proposed areas. It is difficult for us to comment specifically save in relation to those changes which affect our area, as we do not know whether the proposals in relation to other

areas in the country would put the schemes beyond the capability of high quality small providers due to their size and geographical spread.

In relation to our area, it is difficult to see why Birmingham should be consolidated with any other Court, given that the Birmingham Scheme is already huge. If the thinking behind the proposal is that Hereford and Worcester are small and would still be small if consolidated, and are on the same judicial circuit as Birmingham, then Birmingham may be the logical choice in terms of tacking them on to another scheme. However the Courts which would need to be covered by such a consolidated scheme would be Hereford, Worcester, Kidderminster, Redditch and Birmingham. We would be able to do this, but don't think that a small organisation would, given the sheer volume of cases in Birmingham, and the wide geographical spread of the other courts. If the proposed changes were to go ahead and we were to successfully bid for it, we would have to open an office in Worcester to be able to offer follow up appointments accessible to defendants. The LAA need to be aware of the following travel times by public transport (including walking) from our office to the court centres at:

- Kidderminster (19 miles or 49 minutes)
- Redditch (15 miles or 58 minutes)
- Worcester (30 miles or 56 minutes by quickest train)
- Hereford (56 miles or 1 hour 56 by quickest train)

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

No. There are a number of reasons for this:-

1. It is not necessary. There is no stated objective of cutting costs. The schemes are cheap already. The cost can be controlled by the LAA which fixes the price. The suggestion at paragraph 17 of the consultation document that the lack of price competition in previous tenders for HPCDS led to a lot of high cost litigation, appears to be incorrect. We are not aware of any litigation in relation to tenders for HPCDS in the past. The litigation which has occurred in relation to other tender processes arose from poor drafting of the tender documentation and/or inappropriate selection criteria, not the absence of price competition. There is no coherent justification for it in the consultation document.
2. It is one thing to set price as the determining criterion for tenders where the services required are routine and commoditised in nature and could be provided equally well by a wide range of providers. However, when operating a HPCDS, where the advice and legal services required demand specialist knowledge and extensive track record/expertise, a price based tender will not encourage the leaders in the field with the necessary

expertise to pitch. This drives down quality and produces negative outcomes for the users of the scheme and society generally.

3. There is a danger of a race to the bottom. We provide a high quality service in Birmingham. All of those who act as duty advisors are highly skilled, highly trained, experienced professionals and we routinely move on to full legal aid and successfully defend the proceedings. We are aware that the same cannot be said of other schemes in our general locality where SPOs are routinely "agreed" and little or no follow up work is done, and no cases are successfully defended under licensed work. It would be much cheaper to send an inexperienced, poorly trained paralegal to court but unless the LAA wants to pay for handholding the value of such a scheme would be nil and may as well be delegated to the Personal Support Unit Schemes that run at some of the larger courts.
4. There is a real value attributable to those firms able to offer experienced practitioners with a track record of delivering positive outcomes which would be overlooked in a purely binary pricing led tender process.

If the LAA is determined to introduce an element of price competition despite the complete lack of justification for it and the MOJ's less than auspicious track record in relation to services put out to price competitive tender, then the following considerations apply:

- i. In order to avoid a race to the bottom, a minimum price should apply, i.e. a sum per act of assistance below which an organisation cannot bid.
- ii. The services to be provided must be spelled out in great detail in the tender document and successful bidders audited against the specification both prior to and in the course of the contract, to avoid organisations being able to put in a low bid and then provide a substandard service.
- iii. There is no indication in the consultation paper as to the weight attached to 'price' and what percentage it will form as part of the tender scoring decision. Complete transparency is required to ensure fairness.
- iv. The provision of high quality services may cost more but produce savings to government in other areas, including the prevention of homelessness and family upheaval which have both financial and personal costs, especially to children.

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

We have no objection in principle to this. For the last 15 years, Birmingham CAB Court Welfare Office have acted as our agents in emergency warrant lists, as they have an office in Birmingham Civil Justice Centre which houses the County Court, with

staff who have many years' experience of warrant suspensions. Since the last round of contracting they have not had their own housing contract but have been authorised as our agents due to the extensive knowledge and experience of the personnel involved. We would however caution that:

1. A successful bidder should not be able to contract out the delivery of all services. They should cover a certain percentage of the sessions themselves to retain awareness of the developments in practice in their area and to ensure that they retain sufficient knowledge to be able to supervise appropriately the delivery of their services.
2. The agent/subcontractor must be competent to deliver the service and be adequately supervised by the main provider.

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

The most important criterion is quality. The role of duty advisor is complex and demanding. The importance of high quality follow up work in achieving positive outcomes cannot be overstated.

A successful duty advisor is able to:

- Swiftly assimilate information and spot the relevant issues
- Identify any technical deficiencies in claimants' paperwork
- Identify possible defences (there are lots of possible defences to be identified)
- Identify possible counterclaims
- Assess whether a social landlord/mortgagee has complied with the relevant pre-action protocol
- Assess whether a social landlord may have failed to comply with its own procedures (e.g. for non-successor or non-secure tenancies)
- Assess client's financial eligibility for legal aid
- Assess whether a client is receiving all of the benefit they are entitled to
- Assess whether a client might have issues in relation to capacity
- Elicit relevant information from individuals in a high state of stress
- Elicit information from and narrow the issues with the opponent
- Provide meaningful advocacy
- Advise as to follow up work/appeal
- "Manage" the court list in so far as the judge/court staff are amenable
- Interact with clients, opponents, court staff and Judges appropriately
- Have a respect for and awareness of equality and diversity

Successful bidders must be able to show that they employ staff competent to do this and have a proven track record of doing it. It requires excellent Landlord & Tenant,

Public, Homelessness, and Civil Procedure law knowledge, combined with great organisational and people management skills. Successful schemes can change lives for the better. One of our clients met at the Court Duty scheme wrote this week: *"I received so much of their time, empathy, their help changed my life literally and gave me a new start. The difference was from wanting to die to wanting to live – that's how much their help meant to me."*

For those organisations currently providing schemes the LAA has access to statistical information, which will show in what proportion of their cases, possession orders have been avoided. We have done this with our data and in 80% of cases dealt with at Birmingham a successful outcome was achieved, defined as the avoidance of **any form** of possession order where one was sought, and the avoidance of eviction in warrant cases.

For all organisations the LAA has access to data as to how many cases of possession proceedings they have dealt with and in how many cases a successful outcome has been achieved.

An organisation must be able to show that they will provide accessible follow up services to those who need them. The organisation should be required to spell out how they will do this.

An organisation should be required to show that they have the administrative infrastructure necessary to manage the scheme, and sufficient experienced staff (see above) to staff it. This is especially important if the schemes are to be merged, as there will be more courts to be covered.

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

We do not agree with the competition model. We believe it to be unnecessary and counterproductive. We think that travel and waiting time should be paid to those providing cover to remote courts as an alternative. We do not know what is meant by "conditions applied to pricing models to allow for the sustainable use of public funds" and this is not explained. We are grateful for the clarification given to LAPG that the unit price will be per act of assistance rather than "per individual".

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 the proposals are potentially discriminatory, in that they will have a disproportionate impact on small firms. Most BAME firms are small firms.

The accessibility of services to disabled people, who are heavily overrepresented in the schemes' users, has not been addressed in the consultation document. In our experience many users of the services that we provide at court are disabled within the meaning of the Equality Act, and most have health problems of one sort or another. In many cases those health problems form a significant part of the background to the bringing of the proceedings. The revised scheme must not make it more difficult for this client group to access appropriate follow up work to help keep them in their home.

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.

We think that there is a real risk that more families will be at risk of losing their homes if the government proceeds with these proposals as the availability of high quality advice and representation in housing cases may be reduced. This will increase homelessness and have knock on effects for other government departments. It is clearly better to properly fund a service staffed by skilled lawyers producing outcomes which avoid increased homelessness with the costs to the government associated with it, and the enormous stress it causes to families. Lack of effective representation will lead to:

- an increase in suspended and outright possession orders,
- an increase in the numbers of homeless households,
- an increase in street homelessness,
- a greater burden on Housing and Social Service departments,
- an increase in overcrowding as families move in with relatives,
- adverse impact on educational achievement and the welfare of children,
- adverse impact on health of both adults and children.

The importance of the retention of a roof over one's head cannot be overstated, and it is a misconception if the government believes it will save money by putting these schemes out to price competitive tender.

If the government intends to proceed with price competitive tendering it will need to consult further as to the detail.