



## **Response of Legal Aid Practitioners Group to:**

### **Proposed amendments to the 2013 Standard Civil Contract Specification Category Specific Rules (Housing Possession Court Duty Scheme)**

#### **1. About us**

Legal Aid Practitioners Group (LAPG) is a membership body for firms and organisations with a contract to carry out legal aid work in England and Wales. Our members are private practice firms, not for profit organisations, barristers and costs lawyers. Our members carry out civil and criminal work and cover the whole range of business models from smaller, niche and/or sole principal firms to many of the largest providers of legal aid services.

In preparing this response, we have consulted with LAPG members who have direct experience of delivering HPCDS services and the LAPG Advisory Committee which is made up of legal aid practitioners, costs drafts people and practice managers. We have incorporated all views expressed, as far as has been possible.

#### **2. Framework of this consultation**

The Legal Aid Agency (LAA) is consulting on changes to the HPCDS contracts. These are to reflect the changes that will be introduced to the way that possession hearings are listed and heard once the stay on possession hearings is lifted.

These amendments are made to support the *Overall Arrangements for Possession Proceedings* published this week by the Master of the Roll's Working Group on Possession Proceedings.

The proposed amendments are to the 2013 Standard Civil Contract Specification Category Specific Rules (Housing Possession Court Duty Scheme).

The table of amendments is largely accepted as reflecting the necessary changes intended to be brought in by Overall Arrangements for Possession Proceedings in terms of remote provision. We have identified a number of drafting issues within the Table of Proposed Amendments which we think could be improved upon and clarified and these suggestions have been annotated within that separate document.

However, we also think it is extremely disappointing that the Ministry of Justice (MoJ) is not using this opportunity to introduce some of the very welcome and sensible proposals that formed the basis of the recent HPCDS consultation which closed on 3 January 2020.

#### **3. Sustainability measures contained within the previous HPCDS consultation**

When the MoJ launched the last HPCDS consultation in 2019 there was clear recognition that these services were unsustainable and urgent change was necessary to ensure the future viability of HPCDS work and the providers who deliver these vital services. Given the complete cessation of housing possession work due to Covid-19, and the changes that will be introduced moving forward, the viability of these services is now even more uncertain.



We are extremely concerned that once the stay on possession proceedings is lifted on 23 August 2020, and cases resume, housing providers will find that these services are not financially viable under the current arrangements, leading to further gaps in provision when providers decide to return contracts, do not accept schedule extensions and/or do not tender to fill the existing gaps in provision.

Whilst the LAA is facilitating remote provision of duty advice via this consultation process, no additional flexibility has been shown by the MoJ/LAA despite recent recognition that these services are not sustainable under current contracting and remuneration arrangements. This is a missed opportunity that could undermine existing contracts and lead to further gaps in provision. Ultimately this will cost the LAA additional resources when trying to plug gaps through tender activity and, almost certainly, the need to consider new and creative measures to fill the void left by providers who exit the market. This does not, of course, include the considerable harm done to clients who are unable to access advice due to a lack of provision.

We propose that three specific elements of the previous consultation should now be reconsidered and integrated into HPCDS contracts moving forward in an attempt to make these services/contracts more commercially viable and therefore sustainable:

### **3.1 Fees for follow up work – clause 10.24**

The previous HPCDS consultation proposed the following:

#### *Fees for follow on work*

*47. Under the current Scheme, if a provider sees a client under the Scheme and then subsequently opens a Legal Help matter, they are only allowed to claim the Legal Help fee, despite having also done some work under the Scheme.*

*48. Respondents to our survey said that after the court hearing a significant amount of follow up work is often necessary, but that under the current contractual arrangements a decision has to be made as to whether to claim the Scheme fee or a Legal Help matter start.*

*49. Generally, the number of cases which progress to Legal Help is extremely low across all Schemes. It is not clear from the data available what the reasons for this are. Respondents to the survey said that the ability to claim for the Scheme fee in addition to opening a Legal Help matter start would make delivering the Scheme more attractive and would make them more likely to bid. It could also lead to a better service for clients by increasing the availability of follow up advice. Therefore, we propose changing the current contract so that providers can claim the Scheme fee in addition to any follow up Legal Help fee. We believe this will make delivering the service more attractive, therefore making the Scheme more sustainable and ensuring continuity of service for clients.*

We fail to see why has this proposal not been adopted to facilitate the new working model proposed in the Overall Arrangements? There are even greater imperatives to do so now in terms of commercial viability, practical arrangements and maintaining standards of client care and continuity of service. Contracting arrangements should support not undermine



good practice and ensure that providers can actually provide the assistance required to resolve their client's legal issues. The model proposes two hearings; the Review Hearing and the Substantive Hearing 28 days later. There is no doubt that follow up work will be required between the hearings under the Legal Help scheme to resolve the underlying causes of rent arrears (for example). However, under the new proposal, no follow up work can be carried out under Legal Help until three months after the first HPCDS hearing fee has been claimed. This leaves the provider in the unenviable position of only claiming one fee despite the need for ongoing assistance between the Review and Substantive hearings. In many circumstances providers will feel compelled to provide that assistance pro bono as the alternative is to leave the client without any assistance at all ahead of a looming court date.

If the MoJ recognised the difficulties created by the current contractual provision as part of the previous consultation, why has the sensible proposed remedy not been incorporated into future contracting arrangements?

It must be noted here that the MoJ estimated as part of the Impact Assessment that accompanied the previous consultation that this proposal would cost as little as £30,000 per year to rectify. That is approximately equivalent to the government's own estimate of the cost of a local housing authority assisting just one family in accordance with their statutory homelessness obligations, something that will increase exponentially if the MoJ does not make adequate provision for in relation to HPCDS and accompanying services.

### **3.2 Paying for Travel and Face to Face by default**

The previous consultation proposed the following:

#### *Travel*

*50. Under the current model, providers are not compensated by the LAA for travel time to deliver this work. However, the time taken to travel to deliver this work, and the cost of this travel, was a theme raised frequently in our survey. Respondents were concerned that certain areas of the country present a greater challenge in respect of time, cost and distance in respect of travel, whilst also wasting valuable time that could be better utilised advising clients.*

*51. We recognise that due to the nature of the Scheme, and unlike most other categories of law, there is a necessity to travel, which was made very clear in the responses to the survey. As such, we believe that adapting the Scheme so that providers are paid reasonable costs for their travel might assist in creating a more sustainable and attractive service.*

There is no question that paying providers appropriately for travelling to and returning from court would make a significant difference to the sustainability of these contracts. It has become clear that there are now further gaps in provision, with the LAA tendering for seven courts in areas where the provider has handed back their contract. It is likely that any provider wanting to deal with any of the courts in question (and other potential gaps in provision that may emerge) will have to travel from outside the immediate area. They might also need to utilise agents to deliver the scheme who may also have significant distances to travel. Under any other circumstances, the LAA would pay for the time spent travelling to court and for the costs of that travel. There is not reason why HPCDS work should be



treated differently. We would therefore strongly urge the MoJ to agree to allow all HPCDS providers to make travel claims when the contracts are extended.

The Overall Arrangements anticipate that duty advice and representation should be face-to-face by default. Refusing to reimburse travel costs, but agreeing to pay disbursements to facilitate remote provision does not support the position proposed by the Working Group. In fact, it encourages the opposite approach. All of those involved in planning and delivering HPCDS services agree this is not in the best interest of the clients, which must be the primary concern driving policy development from the MoJ.

### **3.3 Remuneration**

The previous consultation proposed the following:

#### *Remuneration*

*41. A high proportion of respondents to the survey said that remuneration was a key consideration in whether they would bid to deliver the Scheme in the future, and that better remuneration would make them more likely to bid. Linked to this, many respondents said that the wider issues such as the cost of travel to court to deliver the Scheme and low volumes of work in certain courts impacted on the financial viability of delivering the Scheme.*

*42. We have considered these concerns and developed several proposals which we believe will address them and make the Scheme more sustainable, ensuring access to justice for those that rely on it.*

#### *Introducing an attendance fee*

*43. Under the current Scheme, where no clients are seen during a Housing Possession Court Duty Scheme session, then the provider receives a nil-session fee. This is equivalent to what the provider would have been paid had they seen just one client during the session – the fee is currently set at £75.60 in London and £71.55 outside of London. It is paid on the basis that despite not having seen any clients, providers have attended court and made themselves available and therefore should be remunerated in some way for their time.*

*44. Respondents to our survey said that it was difficult to successfully deliver the Scheme at courts with low volumes, because the payment for low volumes of work did not always adequately cover the costs of delivering the service. Given that the courts with the lowest volume of cases tend to be in rural areas, particularly rural Wales, the cost of delivering the service is also likely to be higher in these areas due to travel costs. This issue has the potential to lead to coverage gaps, leading to a worse service for clients.*

*45. We have considered the best way to respond to this issue, and we propose introducing an attendance fee in place of the existing nil session fee. We propose that this attendance fee would be set at £151.20 in London and £143.10 outside of London, the equivalent of what a provider would receive having seen two clients under the current Scheme. Under our proposed new approach to remunerating for the Scheme, providers would receive this fee if they saw one or two clients during a single session, or if they attended court for a nil session.*



*46. For each client a provider saw beyond the two clients covered under the attendance fee, they would receive a single client fee on top of the attendance fee. So, if, for example, a provider outside of London saw three clients during a session, they would receive a payment of £214.65 and a provider in London would receive £226.80. We believe that this is a fair and equitable approach to ensure that delivery of the Scheme is financially viable regardless of the court in which it is being delivered.*

This proposal was a welcome step towards providing a more sustainable service for court users. That is particularly the case now that the volume of hearings will be drastically reduced due to social distancing. It would have gone some way to addressing the fluctuating workloads on HPCDS and the low fees paid per act of assistance.

We accept that the MoJ has said that they are reviewing HPCDS services again in light of Covid-19 but this is not the time to carry out another review, or to delay making necessary changes to an already struggling service on the assumption that changes may be introduced in the future. The financial situation has deteriorated since the previous consultation and there can be no justification for failing to bring these measures forward at speed in light of the current circumstances.

We would also again urge the MoJ to consider increasing the rate per act of assistance in line with inflation. The rate has not increased for many years and does not reflect the current cost to providers of delivering the service. It should also be understood by the MoJ that, unless there is a wider assessment of civil legal aid remuneration, providers will continue to decide not to tender or give up their HPCDS contracts as they are intrinsically linked to unsustainable Housing & Debt contracts. There is a problem with recruitment of housing supervisors throughout the sector due, in part, to the low rates of pay, and that will impact on an organisations' ability to bid for HPCDS work and to maintain these services.

It is also noted that there is no proposal to consider a regular review of and uprating of fees paid per act of assistance going forwards, which will mean that these services become ever less sustainable as time passes. We would suggest an annual uprating of fees in line with inflation, such as that generally applied by other government departments such as the DWP when it considers annual increases in social security benefits.

### **3.4 Likely financial impact of introducing these proposals**

The MoJ published an Impact Assessment as part of the previous consultation which demonstrated that introducing the measures outlined above (apart from the suggested annual uprating of fees) would have relatively little impact on the overall legal aid budget. When the measures outlined in the previous consultation were combined, the estimate at that stage was that the financial impact would be between £0.63-0.93m per annum of additional expenditure. This appears to be a small price to pay to improve the sustainability of contracts that underpin such critical services. This is particularly important given the significant reduction in overall legal aid spend in 2020 due to the pandemic (with the LAA expending absolutely nothing on HPCDS services since lockdown measures were introduced) and the resulting loss in income for legal aid providers.