



Response of Legal Aid Practitioners Group to:

20 January 2022

Ministry of Justice Consultation issued 25 November 2021

Deadline: 20 January 2022

Housing Legal Aid: the way forward

A consultation on the future of the Housing Possession Court Duty Scheme

1. About Legal Aid Practitioners Group (LAPG)

- 1.1 LAPG is a membership body for firms and organisations which 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 all areas of civil and criminal legal aid 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.
- 1.2 In preparing this response we have consulted with LAPG members and the LAPG Advisory Committee which is made up of legal aid practitioners, costs lawyers and practice managers. We have incorporated all views expressed, as far as has been possible. We have also encouraged LAPG members to respond directly to the Ministry of Justice (MOJ).
- 1.3 We have had sight of draft responses to this consultation from Shelter, the Law Centres Network, The Law Society and the Housing Law Practitioners Association. We note that the various responses all welcome both the MOJ's policy objectives and recognition of the considerable issues undermining the viability of HPCDS schemes. However we also note that all of the responses raise similar concerns about the proposed service structure and remuneration model and we would invite the MOJ to reopen dialogue with ourselves and our partner bodies to develop a model that will achieve the MOJ's policy objectives.

2. Framework and context of the consultation

- 2.1 This consultation represents a positive and constructive opportunity for providers, membership organisations and representative bodies to engage with the LAA and MOJ on the future delivery and viability of emergency housing possession services. These services have, for the most part, remained an exceptionally effective method of delivering publicly-funded advice services over recent decades and they 'do what they say on the tin'. HPCDS services are delivered by quality-assured housing law experts and act as a gateway for clients to receive ongoing legal assistance. Many of the clients assisted do not or cannot access services before court, so HPCDS services provide a crucial safety net to prevent homelessness.
- 2.2 We believe that the MOJ has a genuinely and reasonably held belief that these proposals will enhance the service on offer to clients and increase the funding available to providers. However the proposals represent a potential misunderstanding of the costs and risks associated with expanding services, of defendant behaviour, of the needs of social welfare clients, and of the most appropriate and effective point at which to deliver 'early legal advice'.
- 2.3 We are concerned that these proposals have been conflated with the MOJ's broader agenda of resolving legal issues through alternative dispute resolution mechanisms and of avoiding court proceedings where possible. To link this agenda to the provision of duty scheme services, which act as a safety net when claimant landlords *have already issued court proceedings*, seems specious reasoning at best. It is a misnomer to say that advice provided



to individuals subject to court proceedings is 'early legal advice'. While this seems like semantics, it is an important point because some of the outcomes anticipated by these proposals hinge on the assumption that clients will receive advice early enough to influence the outcome of possession claims. Some clients will benefit from these proposals, and some cases will be diverted from court. But, given the limited scope of and funding available for the service, we do not believe these proposals go far enough to enable providers to manifestly influence the outcome of the majority of possession claims.

- 2.4 While this consultation identifies some of the reasons HPCDS services are failing and why the Legal Aid Agency has had to undertake repeated and often unsuccessful tender exercises to identify new HPCDS providers, it does not adequately explain the impact on HPCDS services of providers withdrawing from their mainstream housing contracts. Until the MOJ is willing to address the fundamental issues of unviable legal aid fees and disproportionate bureaucracy across all civil legal aid contract areas, then it will not be able to address the viability of HPCDS services and ensure a consistent supply of duty scheme services.
- 2.5 The broader context in which this consultation sits is stark. Housing legal aid services have been significantly disrupted by the pandemic and the very necessary pause on possession and eviction processes. Providers are in steep decline and large areas of England & Wales have no or just a handful of legal aid providers as a direct result of stagnant or declining fees for over two decades. The Legal Aid Agency (LAA) is concerned about the existence of 'dormant' or 'inactive' contracts, where providers carry out little or no work. The existence of dormant contracts distorts our understanding of the actual availability of services. Providers are looking ahead with extreme and understandable trepidation at the advent of Fixed Recoverable Costs, which will undermine the ability of housing providers to recover their costs and will potentially lead to the closure of many departments and organisations. Possession processes, civil procedure rules, pre-action protocols and landlord behaviour are all in a state of reactive flux following the pandemic. The government seems intent on pushing more and more civil cases through ADR and digital processes, whether they are in client interests or not, let alone in the interests of justice. In this context, and with a yawning chasm between legal aid remuneration rates and the costs of delivering services, this consultation represents a potentially positive but ultimately minuscule step in the right direction towards sustainable services.
- 2.6 We do not agree with the MOJ's proposition at Paragraph 24 that 'the way the [HPCDS] scheme is currently structured misses the opportunity to help those facing possession proceedings at the earliest point, potentially avoiding the need for court proceedings altogether'. If clients are not assisted at the earliest point, this is not a failing of the HPCDS scheme, which has been set up for a particular purpose and achieves that purpose. If the government truly wants to ensure that clients facing possession proceedings can obtain advice at the earliest possible point, it will restructure housing legal aid contracts, increase fees to halt the decline of providers and encourage more providers back into the market, and introduce viable funding models to support specialist advice services to address welfare benefits, debt and employment issues.

3. Response to consultation questions

3.1 The delivery model for housing possession legal aid services

Question One. *Do you agree with our proposal to reform the way housing possession legal aid services are delivered and create the Housing Loss Prevention Advice Service, providing duty advice at court and early legal advice? Please provide reasons for your answer.*



We are encouraged that the MOJ and LAA are being proactive by seeking to find solutions to the problems of viability, client access and the delivery of services to resolve the underlying issues which trigger possession claims. It is refreshing to see the MOJ acknowledge these significant issues and we look forward to working with the MOJ and LAA to develop a robust, viable model to address these concerns. The ability of providers to address clients' interconnected legal issues was severely undermined by the counterintuitive scope changes introduced by LASPO. The capacity of the sector to provide effective services was diminished further by concurrent cuts to other forms of funding and the resolute unwillingness of the MOJ to address these issues in the following nine years. This combination of cuts and subsequent inaction is one of the primary reasons why the MOJ and LAA now find themselves faced with a rapidly declining provider base and difficulty maintaining the supply of HPCDS services.

The proposal at Paragraph 32 that 'the availability of this early legal advice should not be subject to the means test' is very sensible. The MOJ has, quite rightly, identified that clients will need to 'access this advice as quickly as possible in the short period before a housing possession hearing takes place and to encourage take up, with the aim of maximising the number of cases resolved as early as possible'. This is an encouraging step forward from the MOJ but, for the reasons set out below, we are concerned that this limited service may not enable providers to resolve the majority of cases and prevent them from going to court. However, the introduction of a means test here would inevitably lead to delays and some clients failing to receive a service in the time available. We strongly suggest that this non-means testing element be retained in whatever final form this scheme takes.

Rather than enabling substantive assistance with underlying welfare benefits and debt issues, it appears more likely that HLPAS Stage One will only allow providers to carry out a more detailed assessment of possession claims than they can currently carry out at court under the HPCDS. This could lead to earlier engagement with claimant landlords/lenders, and the potential for negotiated settlements. It should lead to an increase in signposting and referral to other support services (if indeed those other services exist and have capacity). It could also enable providers to identify and start initial work on preparing a defence and being better equipped to make reasoned and evidenced arguments at first hearings. It should also assist providers to identify clients who can move onto another form of legal aid funding (if they are eligible). However, without the ability to properly address complex debt and welfare benefits issues, those issues are likely to remain unresolved, creating a range of problems which we explore in more detail below.

As noted above, the MOJ's intention to enable providers to deliver some form of holistic early advice service is to be commended. However, we do not believe that the proposed delivery model will necessarily achieve the MOJ's objectives and they may, if implemented poorly, actually exacerbate the issue of viability and fail to reduce demand on the courts. To ensure that HPCDS services are viable the MOJ needs to take urgent action to address the viability of mainstream housing legal aid services, and civil legal aid services more generally. The delivery of viable and effective HPCDS services relies on the existence of a healthy and resilient civil legal aid provider base: HPCDS services do not operate in some sort of emergency court-based vacuum. Without addressing the system-wide issues undermining the viability of civil legal aid contracts, the proposals set out in this consultation are unlikely to have a long-term, positive impact on the viability of HPCDS/HLPAS services and the MOJ will not achieve the objectives set out in the consultation document.



However, acknowledging that this consultation is specifically about the introduction of the HLPAS model, and that the wider issues afflicting civil legal aid providers are well-documented and extant, we will seek to limit our responses to the concerns we have about the proposed model, which are:

3.1.1 The expertise of existing housing legal aid providers and potential HLPAS providers

As a direct result of the LASPO scope changes, many housing legal aid providers were forced to stop delivering specialist advice on issues such as welfare benefits and debt. While housing lawyers generally retain a working knowledge of these (and other) issues to ensure they can identify underlying problems and signpost or make referrals to other sources of advice, a significant proportion of providers will no longer have what could be deemed specialist, expert knowledge. To recover those skills takes time and investment to retrain staff, or the recruitment of specialists to provide advice in those areas. Providers will only take these steps if there is a strong business case to do so, and these proposals do not represent a strong business case. Quite the opposite.

Some providers, particularly those in the not-for-profit sector, have retained the expertise in-house to deliver broad social welfare advice services. However those services are generally delivered pursuant to grant funding arrangements, with their own targets and requirements. These restricted funding arrangements rarely, if ever, generate 'spare capacity' for organisations to apply to other services. It is unlikely that organisations with existing welfare benefits and debt services will have additional capacity to provide the advice anticipated under the HLPAS model.

Potential future bidders for HLPAS services will need to ensure that they have the expertise to deliver specialist housing advice and representation services and meet all of the other significant quality and compliance requirements of legal aid contracts. Along with this they will need to ensure they can deliver some element of welfare benefits and debt advice. It is difficult to imagine how, with the income generated by HPCDS/HLPAS services, these contracts will appear to be commercially attractive to new bidders, or viable in the medium- to long-term, even with the other changes to payment arrangements anticipated in the consultation document. This is likely to be the case whether or not HLPAS Stage One services are contractually aligned to mainstream housing contracts or operate as stand-alone services.

3.1.2 The cost of additional risk and compliance

Along with the concerns about whether providers have the expertise to deliver the specialist advice anticipated by this model, and the unlikelihood that the proposed funding model will support the development of that expertise, are concerns about additional risk and compliance costs. Debt advice is regulated and providers will need to be licenced and have systems in place to deliver specialist services. Welfare benefits advice is incredibly complex, and the processes in place to challenge DWP decisions are time-consuming and require a great deal of up-to-date working knowledge. Will the LAA build these issues into tender processes, with potential providers having to demonstrate they have a broader range of expertise and case-related experience than currently required by Housing & Debt contracts? Will there be a need for an expanded Housing & Debt supervisor standard, demonstrating knowledge of key debt and welfare benefits issues? Will it become necessary to employ staff who meet something akin to the previous welfare benefit and debt supervisor standards, and what would the cost of this be to providers? Would this even be possible given the widely acknowledged recruitment crisis affecting the sector?



If the MOJ does not envisage that providers will deliver specialist advice on welfare benefits and debt issues, then it seems unlikely that this service will have a great deal of impact on outcomes, either for the client, or in terms of reducing demand on the courts. If clients present with underlying welfare benefits and debt issues, it is unlikely that the limited amount of advice anticipated by this model will enable clients to resolve those issues. Even if providers have the expertise to provide specialist 'one-off' advice on these issues (or what the consultation document suggests will be a form of 'triage'), what many clients actually need is ongoing, substantive assistance to challenge DWP decisions, seek discretionary payments, organise and manage their finances, seek relief from debt (etc.).

3.1.3 The expectations created by the HLPAS model

The rationale for the proposed fixed fee without the possibility of an escape mechanism suggests that only initial advice and signposting will be possible through the HLPAS Stage One process. Providers will not have the resources, nor be incentivised to obtain the resources, to deliver the substantive assistance that clients will require. If this is the case, then it is hard to see how these proposals will either ensure the viability of HPCDS/HLPAS services, achieve better outcomes for clients, or reduce demand on the courts. We are also concerned that the development of an expanded service will create unrealistic expectations for clients and the courts about what housing providers will achieve.

It will be near impossible to communicate these service limitations to prospective clients and to judges hearing possession claims. Clients are desperate for someone to take responsibility for their case and provide ongoing assistance. Many have tried and failed to resolve underlying issues. Many do not have the capacity, ability or knowledge to take steps on their own or act on initial advice. Many require assistance at what is a relatively late stage (the issuing of a possession claim) because they have not been able to take action sooner, and/or have tried and failed to obtain advice. The availability of a few hours of advice, without any substantive ongoing assistance, is unlikely to resolve the complex nexus of issues that have led their landlord to issue proceedings. Similarly, where referral routes do exist (and these are limited), agencies able to assist with welfare benefits and debt problems are working to or beyond capacity. Many have very long waiting lists and, even if a referral is possible, may not be able to see clients before the housing matter is due to be heard in court. This will increase frustration for clients and potentially exacerbate referral fatigue. Providers will bear the brunt of this frustration, as clients will not understand that the MOJ has imposed a strict limit on the service on offer.

The development of a new service will also create an expectation in the minds of judges that assistance can and will be provided to defendants before the hearing. If this is not possible, and this proposed model appears so limited that it is unlikely to be possible, then HPCDS/HLPAS providers may face criticism from judges, and those judges may take a dim view on the reasonableness or otherwise of possession orders. It will be difficult for duty advisers to explain the limits of the service to judges, who may be critical of defendants who have not been able to act on the initial advice provided under HLPAS Stage One.

3.1.4 Managing demand and contractual obligations

An associated concern is whether providers will be able to manage demand created by the proposed model. It is unclear how the LAA and MOJ intend to publicise this service but we can expect, as a minimum, some sort of arrangement to be reached with HMCTS to advertise it



when notifying defendants of a possession hearing. Social landlords may also be encouraged to signpost clients for advice when they issue proceedings. However at present HPCDS providers can organise their staffing resources to attend court based on possession lists set in advance and notified by the court. While the system does not always work perfectly, there is an element of predictability which enables forward planning and resource allocation by providers (and their agents if applicable).

HPCDS providers are required by the terms of their contract with the LAA to attend court on all days set aside for possession lists and assist all those defendants who attend court and have a case that falls within the remit of the Scheme. It is difficult to see how HLPAS providers will be able to meet a similar obligation to assist all defendants who approach for advice following receipt of notice of a possession hearing. It will be very difficult for providers to manage such an unpredictable demand, particularly as history demonstrates many defendants will not contact the provider until shortly before the hearing date. Providers are generally already working to capacity, and many report to us that they cannot meet existing demand. The remuneration levels for HLPAS stage one, of just £157 + VAT per case, will be insufficient to enable investment in new staff to meet this demand.

For this reason we would suggest that HLPAS contracts do not oblige providers to assist all potential clients. We would suggest that providers should be able to rely upon Paragraph 3.51 of the Standard Civil Contract Specification (i.e. can decline to act if they do not have capacity to assist a new client). However, as providers will have difficulty managing demand, this will just feed into the concerns raised at 3.1.3 above.

3.1.5 Remuneration rates

Fundamentally, concerns about this model are based on insufficient remuneration rates, both for this scheme, and for the civil legal aid contracts that underpin court duty schemes.

If providers are expected to provide a limited 'one-off' piece of advice, as appears to be the case by offering a set and very limited fee, then many clients will not receive the service they need. If providers are expected to provide more substantive, ongoing assistance (which is what clients are likely to require) then it is difficult to see how they will be able to do so for a set fee of £157 per case, and where welfare benefits and debt issues remain out of scope beyond the delivery of HLPAS Stage One.

To provide a worked example, if a current HPCDS scheme in London sees 500 clients at court per annum, it generates £37,800 (500 x £75.60) of income. That income is unlikely to cover the staffing and other running costs of delivering the scheme, but the scheme will generate other income through Legal Help, certificated, grant-funded and, potentially, CFA or privately funded work that arises out of the scheme. Many providers see HPCDS services as loss-leaders, but the services generate certificated and other forms of work. Providers are also committed to HPCDS services because of their importance in reducing homelessness and acting as a gateway to other services. However the consultation makes no proposals to address the fact that HPCDS/HLPAS services are not viable because they are part of a crumbling ecosystem of services which is in decline and cannot meet client demand.

Given common behaviour patterns for many defendants, a high proportion of defendants will not avail themselves of the HLPAS Stage One service. The MOJ has some recent experience of this given that very few defendants sought advice at the Review Hearing stage of the Overall Arrangements. If half of those who would have attended court in the example above obtain



advice prior to the hearing (which we doubt) that would generate additional income of £39,250 (250 x £157). We would anticipate a lower income from HLPAS Stage Two fees as some Stage One cases will not proceed to the hearing if the adviser can negotiate an adjournment with the landlord. Additional income may be generated if a proportion of HLPAS Stage One clients move on to receive assistance under Legal Help or, more likely, certificated funding. However we are concerned that this level of income is insufficient to employ additional staff to cater for the extra work, to manage the systems required to deliver the service, and for the additional costs of compliance, staff training and recruitment. If these proposals do not generate a 'profit' when compared to the existing model, then they will not improve the viability of the organisations seeking to deliver them.

Concerns about the economic viability of this model seem to us to be even more acute for low volume schemes. It is often these scheme which have collapsed in recent years, leading to disruption in services, and requiring the LAA to incur the cost and administrative burden of either running tender exercises or finding creative solutions. If a small scheme generates just 50 HLPAS Stage One cases per year, it is difficult to see what any provider can do to deliver an additional, broader service with just £7,850 (50 x £157) of additional income.

As noted above, this new model also does little to address the wider issue of low, uneconomic fees, which have led to such a dramatic reduction in housing providers in the last decade. While it is possible that HLPAS Stage One will generate more contact from new clients, providers are reporting to us that they are already struggling or failing to meet current demand. The income derived from HLPAS Stage One fees is unlikely to be sufficient to employ the staff required to deliver that aspect of the service, let alone improve the overall financial viability of the providers delivering the HLPAS service and the mainstream housing contract. This is because the hourly rates claimable under Legal Help (and therefore under HLPAS Stage One) are less than it costs providers to employ the staff required to deliver the service, and meet the costs of regulation, compliance (etc.). While in some cases certificated work, CFA or private funding can subsidise Legal Help work, why should it be so that each aspect of a provider's service cannot be run on a commercially viable basis? And as we have raised repeatedly with the MOJ, such low or non-existent profit margins, and the need to cross-subsidise, create a highly fragile environment which many providers deem so risky that they relinquish their contracts. It also creates an environment in which providers have extremely low resilience and are vulnerable to changes such as the likely advent in 2022 of Fixed Recoverable Costs.

Put simply, we are concerned that it is likely to cost providers more than £157 to deliver a service for which they can only recover a maximum fee of £157.

3.1.6 Mediation and conciliation services

Paragraphs 34 and 35 discuss the potential link between the HLPAS model and alternative dispute resolution services, with Paragraph 34 noting that '[f]or others, access to this advice could act as a helpful triage, directing them to mediation or conciliation services where that is a suitable avenue for the client to resolve their housing possession issue, as we have seen already with cases being referred to mediation from the temporary review hearing.'

We continue to have serious doubts about the efficacy of mediation and conciliation services for the types of cases and clients who currently present to HPCDS services (and therefore those who are likely to present to HLPAS services). We understand that the recent Mediation Pilot saw a very low take-up and providers have explained to us that very few HPCDS cases



were appropriate for referral to mediation. We are concerned therefore that the consultation overstates the benefits of ADR because it states that cases were referred to mediation from the temporary review hearing but neglects not explain that virtually no cases were referred. The consultation also provides no evidence that mediation produced positive outcomes in those few cases that were referred. Low take-up also reinforces the concerns that we raised during the development of the Mediation Pilot: mediation is unlikely to achieve a positive outcome when introduced after a landlord or lender has initiated proceedings; there is a significant power and resource imbalance between landlords and tenants and between lenders and borrowers; housing law and possession/civil procedure is extremely complex and mediation is not designed to enable parties to resolve complex legal issues.

During the development of the Mediation Pilot we also explained that specialist housing providers seek to negotiate mutually beneficial outcomes with claimant landlords and lenders as a routine part of the advice and representation process. Most providers place a high premium on negotiated outcomes that avoid the need for expensive, time-consuming and stressful litigation. Many landlords and lenders don't want to evict/repossess. They use the possession process to force the tenant/occupier to take steps to address rent/mortgage arrears. Housing providers adopt an ADR approach of seeking to fulfil the claimant's objectives by negotiating time to address the underlying issues which triggered the possession claim. But they are doing so with the benefit of considerable housing law and litigation experience and expertise. Where litigation cannot be avoided this is often because of complex legal issues such as a counterclaim for disrepair (which is exacerbated by the reluctance of landlords to carry out repairs), or because the client is vulnerable and a potential defence arises out of the landlord's failure to adequately consider the client's vulnerability when initiating proceedings.

Rather than seeking to channel clients (many of whom are extremely vulnerable) and cases to ADR processes *after a landlord or lender has initiated proceedings*, the MOJ should acknowledge that housing providers will achieve better outcomes for clients if they are properly remunerated to do so and equipped by the funding model to address underlying issues. Mediation does not provide tenants/occupiers with the assistance they need to resolve underlying issues whereas ongoing assistance from a housing specialist does. Intervention by housing specialists reduces demand on the courts, decreases demand on statutory homelessness services, reduces arrears and other debt levels and improves tenancy sustainment, whilst at the same time ensuring that clients receive expert assistance with technical legal defences and counterclaims. ADR providers will not and cannot deliver the same service to tenants and homeowners facing the threat of losing their homes. We are yet to see any research to indicate that ADR services achieve better outcomes in possession claims than specialist housing providers, either for clients or for the courts.

3.2 Remuneration

Question Two. *Do you agree with our proposed approach to remunerating the new HLPAS service? If no, please suggest an alternative and provide supporting evidence.*

We agree with the proposals to allow providers to claim both the HLPAS Stage One and Two fees together.

However for a variety of reasons set out within 3.1 above we are concerned about the proposal to remunerate work carried out under HLPAS Stage One with a fixed fee of £157 with no opportunity to claim an escape fee. In practice, it may transpire that such a limited service is unlikely to generate sufficient work to meet an escape fee threshold of three times the fixed



fee. However, it is entirely possible that providers will need to undertake more than the 3 or so hours of work anticipated by the current fixed fee of £157. If providers cannot claim for this additional work how can they justify doing the work? Some providers will do the additional work because it is necessary to progress the case and they will lose money, further undermining their viability. For many, knowing that the client is not eligible for legal aid and also unable to afford to pay privately for advice will actually motivate them to do the work for free as the client will not be able to access alternative forms of advice and might lose their home as a result.

Once a solicitor or caseworker creates a relationship with a client, and provides some assistance, it is difficult for them to decline to provide the actual help needed when they know that failing to do so may undermine their client's case. Solicitors and caseworkers will also know that after assisting the client under HLPAS Stage One they will be representing the same client in court under HLPAS Stage Two. If the client is not financially eligible for legal aid, not only will the adviser be prevented from assisting with the housing issues in the intervening period, they will not be able to resolve other underlying issues, but they will still be expected to advocate for the client in court. Many will feel compelled to provide some form of pro bono assistance between first contact and the hearing, so this model potentially creates a perverse obligation for housing specialist to work for free in some quasi-unbundled and incoherent service offering.

For some providers the fee level will directly control the amount of work they do, which is simply a reflection of the commercial realities they face. The work will necessarily be limited, meaning it will have limited value for the client and have limited impact on the outcome of the case.

Paragraph 43 notes that '[i]n general, we would expect the level of advice to be delivered under Stage One of the HLPAS to be similar in nature to the level of advice delivered under Legal Help, albeit this enhanced service will be non-means tested and have wider scope than mainstream legal aid.' An analysis by the MOJ of pre-LASPO claim data on welfare benefits and debt cases will provide a clear indication of how much work is required to resolve these issues. Welfare benefits and debt advice has not become less complex in the intervening years. However under this proposal, the MOJ expects providers to cover welfare benefits, debt and housing issues, and potentially advise on the appropriateness of ADR, for fixed fee of £157. That is without factoring in the cost of compliance, training, resources/subscriptions, regulation and supervision of a broader service than is currently required of HPCDS providers.

Paragraph 45 notes that '[i]f a client needs further advice after this and their issue is currently within scope of LASPO and they meet the relevant means and merits test, a provider will be able to grant Legal Help and continue advising them, albeit on a narrower set of matters'. As noted above, our concern with this approach is that it is very likely clients will require ongoing assistance to resolve welfare benefit and debt issues and as these issues are out of scope no assistance can be provided even where the provider takes on the housing case under legal aid. This weakens their position and undermines the ability of the provider to resolve the housing issue. The assistance cannot be provided under HLPAS Stage One as the service and attached fee are so limited. So the client is left with initial advice on associated issues, potentially ongoing assistance with the possession claim (if they are eligible) but no ability to resolve the issues that triggered the possession claim. Providers will be left with dissatisfied clients, who they either cannot help, or will feel duty bound to help as part of their overall commitment to the client, but they will have to do that work for free, further undermining the viability of their practices.



This model seems overly complex, distorts the nature of the service provided via the HPCDS, and is fraught for providers in terms of managing client and court expectations.

We are also disappointed that the consultation does not address the issue of travel costs, which seem to us to be a particularly relevant factor undermining the viability of HPCDSs in rural areas. The introduction of travel costs was identified in the 2019 HPCDS consultation as a sensible proposal to improve viability, with the Impact Assessment noting this would cost as little as £0.3-£0.6m per annum. Although we did not agree that travel costs should be introduced using a price competitive mechanism in the tender process, we were encouraged that the MOJ acknowledged that introducing reasonable travel costs would 'make it more financially viable for legal service providers delivering the Scheme. It will allow providers to more accurately reflect the cost of delivering the Scheme and be beneficial for the overall sustainability of the service' (2019 IA at P7, Policy Option 4). We would strongly encourage the MOJ to reconsider introducing reasonable travel costs to improve the viability of HPCDS services.

3.3 Introducing an in-court attendance fee

Question Three. *Do you agree with our proposal to introduce an in-court attendance fee in place of the existing nil session fee? If no, please suggest an alternative and provide supporting evidence.*

Yes, we agree with this proposal, but we are concerned that increasing the fee to the equivalent of seeing two clients in court still does not adequately remunerate providers for the time taken to attend court and the potential associated travel costs. Even the lowest current guideline hourly rates for solicitors range from £177-£270 per hour, so the proposed attendance fee represents less than an hour of lost fee generation on other forms of work. Given that many forms of legal aid work are loss-making, and require cross-subsidisation from other sources of funding, we are concerned that a failure to adequately remunerate providers will dissuade potential bidders for these contracts and lead to further disruption to services in the future when providers withdraw.

The Impact Assessment estimates that Policy Option 3 will cost around £0.3m to implement. Increasing the minimum attendance fee will therefore have very little impact on the overall cost of these proposals but may have a significant impact on the viability of the contracts and on whether potential bidders consider the contracts to be attractive, commercially viable propositions.

Question Four. *Do you agree that this attendance fee should be equivalent to the fee payable if the provider had seen two clients during the session? If no, please suggest an alternative fee and provide supporting evidence.*

Please see our response to Question Three.

3.4 Fees for follow on work

Question Five. *Do you agree with the proposal to allow providers to claim the fee for any follow up Legal Help matter in addition to any fees claimed under the HLPAS? If no, please suggest an alternative and provide supporting evidence.*



Yes, we agree with this proposal. However, we query whether this will be taken up to any significant degree in practice. If a client is assisted under HLPAS and requires ongoing assistance after the hearing, that assistance will be limited specifically to the housing matter as the welfare benefits and debt issues (and many other underlying issues) will no longer be in scope. Ongoing assistance on the housing matter will be limited to those clients with a defence and/or counterclaim to the possession claim, and that work will (or should) move on to a legal aid certificate.

3.5 Approach to contracting

Question Six. *Should the HLPAS be under a separate contract like HPCDS?*

This question needs to be addressed in two parts, and similar issues arise both here and in relation to Question Seven.

For organisational, logistical and contracting purposes we agree HLPAS Stage Two should continue to be contracted directly with one lead provider who holds a mainstream Housing & Debt contract, as a separate but connected contract. We also believe that the use of agents should continue to be permissible where necessary.

We doubt whether HLPAS Stage One will be a large enough service in many areas to be contracted out separately from HLPAS Stage Two, but it is theoretically possible. Whether or not there could be more than one HLPAS Stage One contract awarded for each court will depend on the final model adopted by the MOJ. We can anticipate, for example, that legal aid housing providers who do not deliver the HLPAS Stage Two service in court will add value to local service provision if they are empowered to deliver HLPAS Stage One services concurrently with their quality-assured, expert housing legal aid services. However, for this model to work significant changes would need to be made to the way HLPAS Stage One operates, most notably in terms of the funding available and the service on offer.

We believe that only organisations with the ability to provide mainstream housing legal aid services should be allowed to bid for these contracts as they will provide the full range of expert services that clients require.

3.5 Geographic areas

Question Seven. *Do you agree with our proposed approach to tender for individual courts? Should there be just one HLPAS contract awarded for each court? If no, please suggest an alternative and provide supporting evidence.*

We agree with the proposed approach to tender for individual courts for the reasons set out in Paragraphs 71 and 73. For the proposal in Paragraph 74 to be practicable, we believe that providers will need to be able to demonstrate an established presence and connection to each court for which they bid, so as to maximise the benefits set out in Paragraphs 71 and 73. While we are not convinced that the mitigation factors set out in Paragraph 75 will eventuate (such as the ability to undertake early advice remotely) we still think the benefits of local provision outweigh the risks.

The real question is whether the proposals are attractive enough to ensure that local providers bid for this work and retain their contracts. As we have noted elsewhere, we believe this raises a much broader question about the financial viability of housing and other forms of civil legal



aid contracts, and as this is not addressed by this consultation it is unlikely that these proposals, in and of themselves, will ensure the viability of HPCDS/HLPAS services.

This leads to the connected question of what the LAA should do if there are no or insufficient providers within a court area to resource a HLPAS service (a concern which is demonstrable from [The Law Society's heat maps](#)) or where none of the local providers are willing to bid. While we believe that preference should always be given to local providers, in these circumstances the LAA will have little choice but to allocate contracts to providers based outside of the area. We understand that in these circumstances the LAA already does what it can to ensure HPCDS providers create links with local services to ensure some form of continuity of service for clients. However the need to take these steps is just another indication that more substantial action must be taken by the MOJ to address the unviability of civil legal aid contracts more generally.

As noted above at 3.4, it is possible that more than one HLPAS Stage One contract could be allowed in each court area, but we reiterate our caveat that structural and remuneration issues need to be addressed for this to be effective and viable.

Question Eight. *Do you agree that ensuring providers are located in close proximity to the court where they are contracted will ensure a better service for clients?*

Yes, we agree that ensuring providers are located in close proximity to the court ensures a better service for clients. Experience has shown that client benefits from accessing services delivered by local providers who are able to utilise their knowledge of local services and systems and are part of local advice networks.

3.6 Impact Assessment

Question Nine. *Do you agree with the assumptions and conclusions outlined in the Impact Assessment? Please provide any empirical evidence relating to the proposals in this paper.*

We do not agree with the assumptions and conclusions outlined in the Impact Assessment.

The Consultation and Impact Assessment set out that '[t]he overarching policy objective behind these proposals is to ensure that these services are as sustainable as possible and that there is continuity of this vital service for the clients who need it. An additional policy objective is to ensure that, in the longer-term, the delivery of this scheme aligns with the way housing possession proceedings will be heard into the future, and that the scheme is designed to ensure individuals can resolve their legal problems as early as possible, out of court where that is possible and appropriate.'

The Consultation and Impact Assessment do not address the broader issues undermining the sustainability of housing and other civil legal aid contracts. They therefore simply cannot claim to address the sustainability of HPCDS services which can only function effectively if delivered by viable specialist housing providers as part of a properly resourced advice ecosystem.

The Impact Assessment estimates that Option 1 will result in increased costs to the legal aid fund of approximately £7.1m. However it goes on to note that it 'is assumed that all HPCDS claims (based on 2019 volumes) would also receive early legal advice. In practice, we would not expect all HPCDS claims to also receive early legal advice, and we would expect some claims which receive early legal advice to be resolved before court, which would offset some



of the costs.’ The vast majority of defendants who attend court for possession hearings have not obtained legal advice prior to the hearing. Many defendants who attend also have no awareness of the existence of HPCDS services, so they are directed to duty advisers by ushers, or duty advisers approach them and offer the service in the waiting room of the court. And as far as we are aware, there is no research to suggest that the existence of a HPCDS scheme leads to increased defendant attendance, even in areas where efforts are made to publicise the existence of a scheme. In fact, HPCDS services exist, and are effective, because they are designed to provide ‘door of the court’ assistance to defendants who are unlikely to seek assistance prior to court, and act as a gateway for those defendants to receive ongoing, expert assistance from quality-assured housing providers. As a result we believe that many if not most defendants will not avail themselves of HLPAS Stage One services as it is the compulsion to attend court which triggers interaction with a HPCDS provider.

Given known and understood defendant behaviour patterns, we do not believe that anywhere near 37,700 clients will approach providers for assistance under HLPAS Stage One. We are concerned that this assumption creates an unrealistic expectation that providers will benefit from an additional £7.4m of funding as a result of this service, and that this additional funding will go some way to improving the financial viability of the provider base. The impact assessment does not seek to estimate the costs for providers of delivering the new service, but it is entirely possible that the service, as currently envisaged, will cost more to deliver than providers recoup in fees.

As acknowledged by the Impact Assessment, not all HPCDS claims (or defendants who attend court) will access HLPAS Stage One services. We entirely accept that some defendants who were not planning to attend court, possibly because of a feeling of hopelessness or fear due to the absence of advice, might be encouraged by the existence of this enhanced services to seek assistance. However we would expect this number to be extremely low. Even if courts and landlords could be encouraged to extensively promote this new service, and if logistical and capacity issues for providers could be overcome to enable them to deliver a substantial volume of HLPAS Stage One cases, we would expect take-up of this service to be considerably lower than the 37,700 anticipated. That figure also assumes a return to 2019 case volumes, which is unclear based on the latest [Mortgage and Landlord Possession Claim statistics](#) (published November 2021) which, notwithstanding the dramatic reduction in 2020 because of pandemic response measures, indicate a general reduction in claims over time.

3.7 Equalities Impacts

Question Ten. *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 paper? We would welcome examples, case studies, research or other types of evidence that support your views.*

People with protected characteristics are over-represented in legal aid statistics. It is therefore crucial that all legal aid policy development carefully considers potential impact on the ability of clients with protected characteristics to access services and whether those services will be effective. Women (and particularly lone parents), those from a BAME background, and people with disabilities and long-term health issues are all heavily over-represented. For the reasons set out above we are concerned that the proposed model will not improve the viability of housing duty services or the overall viability of the organisations delivering those services. Nor are we convinced that the proposals will enable providers to take any substantive action to resolve underlying issues and achieve better outcomes for clients. If services continue to be



disrupted by the withdrawal of providers, and if these proposals do nothing to address the continued reduction in housing supply across England and Wales, people with protected characteristics will be disproportionately and adversely affected.

Conversely, if the MOJ is willing to work with providers and representative bodies to remodel these proposals, then those with protected characteristics are likely to benefit from a new and expanded service offering.

Question Eleven. *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.*

As noted above, if these proposals fail to improve the viability the housing duty services, and fail to enhance the service on offer to clients, there will be a significantly adverse equalities impact given the profile of clients who access these crucial 'safety net' services for those facing possession proceedings.

We would suggest that to mitigate against this impact the MOJ should expand the funding on offer to both HPCDS/HLPAS providers and increase remuneration levels of mainstream housing contracts. While the proposals are, in theory, welcome, they do not go far enough to remedy decades of damage to the provider base caused by stagnant and declining fees. We would also suggest that the MOJ works with providers and representative bodies to remodel these proposals to ensure that clients receive ongoing, specialist assistance to resolve the underlying issues that trigger possession claims. This assistance must be remunerated at a commercially viable rate.

3.8 Family Test

Question Twelve. *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.*

A high proportion of clients who access current HPCDS services are tenants and mortgagors who occupy the property in question with their families. As a crucial safety net service, and one that acts as a gateway to other forms of support, a failure to address the viability of housing duty services (and the providers who deliver those services) will have a significant and adverse impact on families. This extends to the other forms of advice and support that families in rented and owner-occupier accommodation routinely require from housing providers – tackling repairs, accessing statutory homelessness and rehousing services, dealing with harassment and antisocial behaviour, and access to advice to resolve the related legal issues identified by this consultation. The availability of specialist advice on all of these issues has decreased in the last decade, and we are concerned that these proposals will not address this decline in the supply of the specialist support that families and those with protected characteristics require. This is of particular concern given the economic impact of the pandemic and the current cost of living crisis, both of which will increase financial pressures on families and are likely to lead to an increase in rent and mortgage arrears.



Appendix One – Suggested amendments to these proposals which should help the MOJ to achieve its stated objectives

1. Empower HPCDS/HLPAS providers to deliver ongoing, specialist assistance to resolve the legal issues that generate possession claims, without creating undue risk for providers

As of November 2021, there were 103 HPCDS schemes. If the Impact Assessment is correct, each scheme stands to generate an average of approximately £69,000 of additional income each year from delivery the HLPAS Stage One service. There will of course be substantial variations between schemes due to factors such as case listing practices and case volumes, client take-up, and the interaction between HLPAS fees, Legal Help and certificated work. Actual additional income for providers will vary greatly, particularly in areas where there are agency or partnership arrangements and between large metropolitan schemes and low volume, rural schemes. Any additional income will be welcome, as long as it does not lead to unintended negative consequences for clients, and is not off-set by increased risk and cost for providers. For some low volume schemes, we would anticipate that the additional income derived from the proposed model will be vanishingly small.

If the Ministry expects to invest an additional £7.1m in early advice linked to existing HPCDS contracts, with an average increase of £69,000 per scheme per annum, it may want to consider directly funding providers to employ the staff required to achieve the stated objectives. This would be preferable to the current proposals, which shift the risk onto providers by expecting them to employ new staff or retrain and expand the capacity of their existing team in the hope that they will generate sufficient income from the HLPAS model to recoup their costs.

We would invite the MOJ to speak to Law Centres Network and specific law centres who employ 'crisis navigators' to attend court and support housing specialists to provide a more holistic service to defendants. An expansion of these relatively inexpensive services may generate more effective outcomes than the model proposed by this consultation, without putting the onus on providers to incur costs that they may never recoup.

It appears that there is sufficient anticipated spend from the HLPAS proposals to cover the costs of directly funding HPCDS providers to expand their staffing resources. Some providers will require more funding than others because their HPLAS services are likely to generate greater demand, but it seems possible to categorise schemes into bands based on volumes, with high volume schemes receiving more funding than low volume schemes.

The MOJ may also wish to consider funding an element of local network co-ordination, similar in scope to the funding made available in the past to support the development local community legal service partnerships. Network co-ordinators could work with their local courts, landlords, lenders and other stakeholders to encourage take-up by defendants of early advice and develop local referral networks.

2. Reimbursement of reasonable travel costs

Reimbursing travel costs seems to us to be a relatively inexpensive way to ensure that HPCDS/HLPAS contracts are commercially viable. As noted at 3.2 above, the MOJ has already assessed that this could cost as little as £0.3-£0.6m per annum, whilst at the same time reducing the time and cost that the LAA spends on having to re-tender for failed schemes. The ability to recover travel costs should also encourage more potential providers to bid for contracts.



3. Increase the attendance fee to better reflect the costs of attending court

We believe that this is another relatively inexpensive way to off-set some of the costs of delivering HPCDS services, particularly for low volume schemes. Ensuring that providers can recover a minimum fee for attendance at each session, regardless of client take-up, reduces risk and enables greater certainty in financial planning and management. This will increase the commercial viability of the contracts and should encourage more potential providers to apply for contracts. Doubling the current proposal to the equivalent of four clients (London £302.40/Non-London £286.20) would only cost another estimated £0.3m and still represents just 1-2 hours of billable time for a relatively junior lawyer applying the current guideline hourly rates.