

# **Shelter submission to Ministry of Justice consultation**

## **Housing Possession Court Duty Scheme: Towards a more sustainable service**

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### **Introduction**

Shelter welcomes the opportunity to contribute to this consultation ***Housing Possession Court Duty Scheme: Towards a more sustainable service.***

Shelter's legal services team operates from 15 offices in England, providing legal advice, assistance and representation in the areas of social welfare law: primarily housing, homelessness and public law. We are involved in court duty schemes, either as provider or agent, in each of the areas served by our offices.

The consultation rightly recognises the vital role duty schemes play in ensuring that people facing possession proceedings receive emergency legal advice and advocacy on the day of hearing. Advisers have to work quickly and skilfully to secure either an adjournment or avoid an outright possession order for defendants. Many cases would result in an outright possession order, and the eviction of the defendant, but for the intervention of the duty advisors in securing a better outcome. There is no doubt that each individual scheme makes the difference between people becoming homeless and keeping their homes on a daily basis.

The work of the duty schemes is clearly also of enormous benefit to the courts. Duty advisers will often deal with difficult and vulnerable clients and may be able to negotiate a resolution with the landlord before the hearing, resulting in a substantial saving of court time in what would otherwise be a contested matter. Judges will often specifically take time to acknowledge the work of the adviser.

The Foreword to the consultation paper states: "For many faced with the loss of their home, the fear of having to engage with the legal process means that it is common to attend court without seeking legal advice or representation beforehand." In our experience, while some people do fear engaging with the legal process, the main reason why people attend court without having obtained legal advice and assistance is simply because legally aided early advice services do not exist in many areas of the country, and where they do exist, they are over-subscribed.

## ***A sustainable service***

In relation to remuneration, the consultation paper states that 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 future, and that better remuneration would make them more likely to bid. This statement is undoubtedly true, but it is just one part of the general sustainability problem, which is that many existing providers whose expertise is vital to the continuation of the service are likely to withdraw in the future unless remuneration rates are increased to an economic level.

The Ministry of Justice indicates in the paper that it aims to make the new Scheme more financially viable for providers so as to ensure its sustainability. But while the increases proposed are welcome, the actual rates of payment are still too low to ensure sustainability. The current fees for court duty representation are simply not proportionate to the degree of skill involved and the nature of the work. Fee rates are insufficient to cover the costs of employing staff to operate them, especially when the dependence on numbers that attend and the overhead costs of running the scheme are factored in. As against the hourly rate of basic legal aid work, the schemes very often result in our incurring a loss against what we would expect a solicitor to generate in income if not at the scheme.

The current fees, like legal aid rates generally, are based on the prescribed fees set 25 years ago, which were actually reduced by 10% in 2011. On our last analysis of duty scheme work, we calculated that for each act of assistance we make a loss against the fixed fee paid. Since that time, the costs of running the scheme and the administrative burden following court closures have increased, significantly so where necessitated by court closures/groupings and particularly the use of agents. While we strongly welcome the Ministry's direction of travel and its wish to ensure this vital legal service is healthy and sustainable, the core issue must be addressed. **We therefore call on the Ministry of Justice to reassess the actual rates of payment: a problem fundamental to the sustainability of the service.**

Although not strictly within the scope of this paper, we would also stress that while duty schemes perform an invaluable function in staving off the immediate threat of possession, many people will need ongoing assistance to tackle the root cause of their problems which have led to the possession claim, such as benefits problems causing rent arrears. Others will need active help in complying with court directions given at the initial hearing, such as to file a fully pleaded defence and counterclaim. The excellent work of the duty advisers needs to be complemented by a legal aid system that is capable of providing this ongoing service. However, matters such as welfare benefits are out of scope, and there are not enough legal aid providers – or any providers in some areas – to take on those cases that are in scope. It is vital that people have access to early legal advice in order to prevent a minor problem escalating into a full-blown catastrophe.

**Q1 Do you agree with our proposed approach to tender for individual courts? If you do not agree, please give reasons for your view and set out any alternative options.**

We agree with the proposal to tender for individual courts. If rates of remuneration are adequate, this will make it more feasible to maintain and manage schemes and will enable people to obtain follow-up advice and support in the local area. For all the reasons given in paragraphs 35 and 36 of the consultation - particularly travel, administration, familiarity with local courts and follow-up work with clients – there can be no doubt that the correct approach is that of contracting for individual courts.

**Q2 Do you agree that we should continue to allow the use of agents to deliver the Scheme in the same way we do now?**

We agree that the Scheme should continue to allow the use of agents in the same way that it currently does. It would not be feasible for providers to run duty schemes in many areas unless they were able to use agents to assist in delivering the service.

**Q3. Do you agree with our proposal to introduce an attendance fee in place of the existing nil session fee?**

Currently, the fixed fee is £75.60 in London and £71.55 outside London for each client seen. If no clients are seen, the provider receives a payment for their attendance which equates to the fee for a single client. The proposal is to introduce a minimum attendance fee which would be equivalent to the rate for seeing two clients, ie £151.20 in London and £143.10 outside. If the provider sees more than two clients, they would be paid an additional fee for each client over and above the two-client amount.

We welcome the principle of a higher attendance fee. The duty adviser will have spent most of a morning or afternoon session in attending court, together with travel time, and the current award of a one-client fee is wholly unsustainable.

However, this is a relatively small contribution to sustainability. Even with the improved attendance fee, an adviser is likely to be kept waiting all morning or afternoon for £150. Schemes will still not be viable without significant increases in the payment rates.

**Q4 Do you agree that his attendance fee should be equivalent to if the provider had seen two clients during the session? If no, please suggest an alternative and provide supporting evidence.**

In principle, we would also accept that the attendance fee should be based on double the single client rate. But, as stated, this will not ensure the continuing viability of the schemes without a significant increase in the rates of payment themselves.

An alternative could be that the provider should be paid **either** (a) the time spent in attendance/travel engaged in the court duty session (plus associated costs) at standard LAA remuneration rates; **or** (b) the 2 x nil session figure, whichever is higher. Anything less than this will mean that the provider is running the scheme at a loss.

**Q5 Do you agree with the proposal to allow providers to claim the Scheme fee in addition to the fee for any follow up Legal Help matter?**

We strongly welcome this proposal. The present rule that if the provider subsequently assists the client under the Legal Help scheme, they cannot claim both the fixed fee for the help given at court and the Legal Help fixed fee for subsequent work, has always been detrimental to legal providers and we strongly welcome its reversal.

**Q6 Do you agree with the proposal to introduce reasonable costs for travel as part of the competition bid?**

This is certainly a welcome proposal. The current system, whereby travel time is not paid for, makes providing services to some courts (especially, but not only, rural courts) unviable as a model for the future. By way of example, it is necessary for the adviser from our Plymouth service to travel up to one hour to one court and up to two hours to the other court, and yet for the loss of staff time and the cost of travel, the organisation receives only £71.55 per client seen.

In addition, given the rural nature of some of the courts and difficulties for clients in attending, there is a high proportion of poorly attended or nil sessions, meaning that remuneration is consistently poor and the scheme operates at a significant loss. Even as a relatively large organisation, we need to consider whether or not to re-tender for courts where we know we will be running the scheme at a loss if remuneration rates are not increased.

**Q7 Do you agree with the proposal to tender for contracts on a quality competitive basis, with travel costs factored in on a price competitive basis?**

We welcome the introduction of travel costs, but we have considerable doubts that travel cost should be a price competitive element of the tender.

By way of clarification, we assume that 'travel costs' includes both payment for time expended and fares or other disbursements.

No specific mechanism is stated for how travel costs would factor into the bids. It is not clear whether the intention is that the competitive element would only come into play if this is a

deciding factor between two organisations scoring equally on quality assessment, or otherwise.

As the relevant Impact Assessment confirms, a primary reason for proposing a competitive aspect to the travel costs element of bids is that, other things being equal, bids from providers local to the courts are to be preferred. This is a justifiable motive, and one which we would be inclined to support, but we envisage that larger providers will seek to absorb travel expenses within their overall bids. We are not convinced, therefore, that a competitive element for travel will achieve the desired outcome.

The consultation paper notes that bids for multiple courts could still be made. There should be no preference for organisations making multiple bids, as this is likely to favour larger organisations over smaller local ones.

Additionally, there is one issue which is especially relevant in those areas where courts have been closed and people have to travel further in order to get to the court where their hearing can take place. That is the case not only in rural areas where one court now serves a larger area, but also in urban areas such as Greater Manchester where people have to travel into Manchester now that their local court has been closed and in London, where, for example, people in Lambeth now have to travel to Clerkenwell and Shoreditch County Court. People need access to ongoing advice and representation in their local area following the hearing, but the travel costs of the supplier who is most local to them will be higher than those of the provider in the central court area, which would put the former at a disadvantage. A tenant may accordingly face not only a longer journey to court, but may also find it more difficult to obtain the further assistance they need.

In cities, or other areas where there is likely to be competition for schemes, few organisations will actually include travel in their bids if this might lead to the bid losing out, and so the benefit of the travel cost provision will be lost. It is likely to be used only in more remote areas where there is only one potential provider.

We therefore unreservedly welcome the provision for travel costs, but we recommend that there should not be a price competitive element to this, in view of the unintended consequence that this will favour the larger provider and diminish the opportunities for ongoing advice to be given by providers in an area local to the client.

**Q8 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.**

**Q9 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.**

**Q10 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.**

The separate impact assessments conclude that as the proposals will improve the schemes there will be no adverse impact. Subject to the fact that the proposals simply do not go far enough towards ensuring sustainability, the general tenor is obviously one of improvement. We therefore have no observations to make on the impact assessments.

**Q11 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.**

Clearly, any improvements in the existing court duty Scheme would be beneficial to families in so far as they ultimately enable families to keep their homes in circumstances where they are facing eviction. It would promote the interests of families further still if duty schemes were placed on a properly sustainable basis by an increase in payment rates to a genuinely economic level, and if legal aid were available for early advice and for ongoing assistance, particularly with benefits issues, which are currently out of scope.

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