

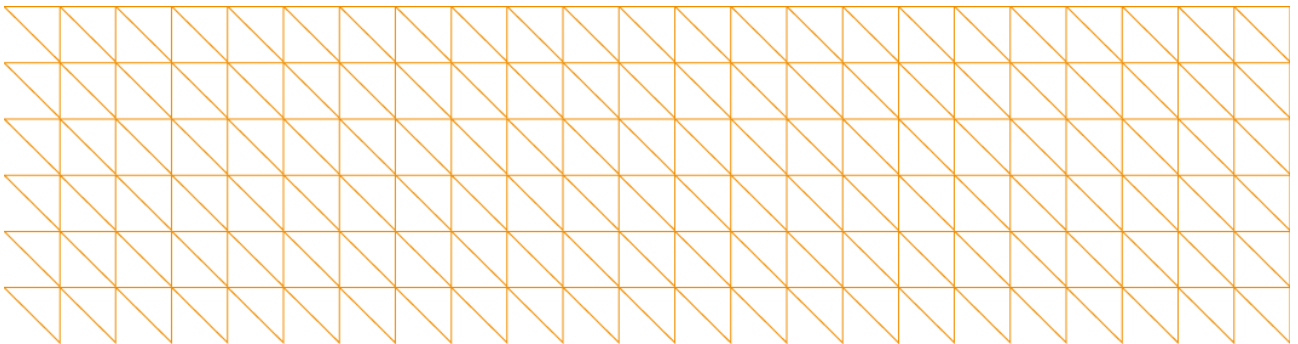


Ministry  
of Justice

# Housing Possession Court Duty Scheme

## Commissioning Sustainable Services

This response is published on Wednesday 16 August 2017



# **Housing Possession Court Duty Scheme**

Commissioning Sustainable Services

**Response to consultation carried out by the Ministry of Justice.**

**This information is also available at <https://consult.justice.gov.uk/>**

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## **About this Consultation**

Further copies of this report and the consultation paper can be obtained by contacting the Ministry of Justice at the address below:

### **HPCDS**

**Civil Legal Aid Policy  
Access to Justice Directorate  
3.32 3<sup>rd</sup> Floor  
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### **Complaints or comments**

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## Introduction

This document sets out the Government's response to the consultation 'Housing Possession Court Duty Scheme: Commissioning Sustainable Services' published on 20 January 2017.

The Housing Possession Court Duty Schemes ('HPCDS' or 'Scheme') offer "on-the-day" face to face advice and advocacy at court to anyone facing possession proceedings. Anyone in danger of eviction or having their property repossessed can get free legal advice and representation on the day of their hearing, regardless of their financial circumstances.

Civil legal services in respect of housing possession are within the scope of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'), and it is on that basis that funding is provided for many HPCDS's by the Legal Aid Agency ('LAA'). Delivery is by providers (under contracts with the LAA), with each contract aligned to a particular scheme and awarded following a competitive procurement process. There are other sources of funding for similar court based possession advice schemes.

The consultation set out the Government's view that the current provision of HPCDSs has become unsustainable. As of January, 13 schemes had been retendered in some way which had, whilst provision had continued, led to a concern about the ongoing stability and viability of the services provided under the contracts and had created an administrative burden and cost upon both the LAA and providers.

The consultation sought views on the Government's proposal to therefore consolidate HPCDS provision into fewer, larger contracts that would;

- be more sustainable for providers and;
- serve a wider geographic area aligned with the evolving court estate.

The consultation proposed a competitive procurement approach for the larger contracts which includes an assessment of both quality and price to allow the LAA to decide objectively between bids.

The Government was clear that HPCDS was the only area of face to face civil legal aid it was proposing to include an element of price competition in for the 2018 Civil Legal Aid Contract procurement. That remains the case.

The consultation period closed on 17 March 2017 and this document summarises the submissions to the consultation and sets out the Government's conclusions and next steps. A revised equality statement has also been included within this consultation response.

## Summary of responses

1. The Government is grateful to all of those who took the time to consider the Consultation.
2. A total of 61 responses to the consultation paper were received. The respondents included law firms, members of the judiciary, professional bodies and law centres. A list of respondents is provided at Annex A.

### Responses to Specific Questions

#### **Question 1: Do you agree with the proposal to consolidate the number of HPCDS schemes to provide for larger and more sustainable contracts?**

3. We received a total of 59 responses to this question. 7 respondents agreed with the proposal. 48 disagreed. The remaining 4 respondents did not agree or disagree conclusively, or agreed or disagreed with particular aspects.
4. The majority of respondents were of the opinion that extending provision to multi-court contracts would not result in increased sustainability for providers and result in a more disparate service for those seeking representation.
5. Respondents thought it conceivable that the proposals may achieve economies of scale in procurement areas where courts are relatively close and have good transport links between them. It was noted that these large urban areas are likely to have sufficient volumes to sustain existing schemes. Concern was expressed that sustainability issues were more likely to arise in rural areas where volumes remain low and providers would be expected to travel significant distances to service low volume courts.
6. Respondents stressed the importance of providers being located close to the court with one respondent noting that at least half of current suppliers are local agencies. The judiciary stressed that local knowledge, and the relationships built between providers and local benefit agencies, were essential to the effective functioning of the court listings.
7. The vast majority of respondents felt that increased travel time for providers would lead to a more disparate service for those seeking representation. It was felt that the disconnect between a provider operating in multiple courts and their client would decrease the likelihood of successful follow up work and increase the probability of the client ending up homeless.
8. Respondents noted the difficulty in arranging successful follow up meetings to resolve the issues that led to possession proceedings and that this would be exacerbated if the provider is not based in the same area. They felt that those requiring face to face advice would be obliged to make expensive journeys to the provider's office and that for the particular socio-economic group likely involved in possession proceedings this was not viable.
9. The fact that clients requiring ongoing housing advice would not necessarily have to be advised by the provider they saw at court was not reflected in the majority of responses.

10. Whilst respondents noted the availability of telephone advice, it was not thought to be an appropriate service delivery method as many individuals facing possession proceedings have poor literacy, lack English language skills and/or have no access to the internet or a limited ability to use it. As is currently the case, the clients requiring face to face follow up advice would still be able to choose a different provider to the one they saw at court who may be based more locally.

**Question 2: Do you have any specific comments on the changes proposed in Annex A?**

11. We received a total of 55 responses to this question.
12. Respondents queried whether the consolidation exercise had fully taken into account all known court closures as part of the reform of the HMCTS estate and considered whether there was a risk that any further closures could impact on the viability of contracts awarded on the basis of the stated procurement areas. Concerns were also expressed as to the size of the proposed procurement areas, in particular:
- North West Wales + North East Wales + Central Wales,
  - City of Stoke on Trent + Staffordshire + Shropshire,
  - Liverpool + Wirral + Cheshire
  - Birmingham + Herefordshire and Worcestershire.
13. CABs cited examples of staff undertaking five hour round trips by public transport in order to service courts with a very small number of cases and that incurring such travel costs could severely impact on the sustainability of the contract. Respondents noted that the use of agents could provide flexibility but that instructing someone suitable presented a challenge in rural areas.
14. Others pointed towards existing courts such as the Bristol group courts who have court duty days at the same time which makes attendance logistically difficult and increases staffing costs. It was felt this may render some schemes unsustainable for small local advice agencies. Only a provider with offices in each town could find any real economies of scale.

**Question 3: Should price be introduced as an objective criterion in addition to quality to distinguish between tenders?**

15. We received a total of 59 responses to this question. 5 respondents agreed with the proposal. 51 disagreed. The remaining 3 respondents did not agree or disagree conclusively, or agreed or disagreed with particular aspects.
16. Respondents noted it was difficult to answer the question based on the information provided by the Ministry of Justice.
17. Those who agreed with the use of price as a criterion for awarding a contract felt that they would be able to provide HPCDS at, or near, cost in order to attract the follow up work. This would allow a firm to develop and skill sets would be enhanced by the volume of work available.

18. Of those who agreed, they were of the opinion that a firm with the resources and desire to provide the service would be able to do so at or near cost in order to attract the workflow the schemes bring and so further develop a locally based housing practice. Skill levels would be enhanced and maintained by the volume of work and the consequent variety of legal circumstance encountered.
19. The vast majority of respondents were not in favour of using price as an objective criterion to distinguish between bidders. Many believed that the likely outcome of any tender using price would be an increase in unsustainable schemes that would fail within the duration of the contract. Others felt that the specialist knowledge and expertise needed to effectively undertake HPCDS work do not lend themselves to a competitive tender using price as a criterion.
20. Representative bodies expressed concern that the use of price would lead to a 'race to the bottom' and prevent organisations from securing contracts at sustainable market rates. The reasons given included providers being relatively unsophisticated in their ability to understand their own costs base and may unwittingly underbid. They felt that bidders would have to try to factor in unknowns, such as travel costs and the volume of work at multiple courts. Bidders would also have to try to distinguish between the costs of delivering their HPCDS services from their other services and overheads, when these aspects of their businesses are intrinsically linked. If bidders cannot accurately calculate the cost of the service they may price themselves out of the process if they bid too high or they might enter into unsustainable contracts if they bid too low.
21. Concerns were also raised as to how a bid would be assessed as realistic and sustainable. It was felt that such an assessment would require an in-depth analysis of the business model of each bidding organisation as the viability of being able to provide HPCDS work cannot be determined without it.

**Question 4: Should we allow the use of Sub-Contracting and/or Agents to deliver HPCDS?**

22. We received a total of 53 responses to this question. 42 respondents agreed with the proposal. 8 disagreed. The remaining 3 respondents did not agree or disagree conclusively, or agreed or disagreed with particular aspects.
23. The respondents who agreed felt that in light of the larger scheme areas, the ability to sub-contract or use agents would be a necessity. They stated that providers and agents are currently geographically close to each other and are able to work closely together, sharing knowledge and experience. Of those who supported sub-contracting or agency arrangements, they noted that current areas are sufficiently small that organising agents do not present an administrative burden. Some suggested that the sub-contracting or agency arrangements should therefore be confined to those who have previously worked under HPCDS thereby retaining skills and expertise of the current provider base.
24. Respondents were keen to stress that use of sub-contracting or agency arrangements would increase costs for the contract holder and that there would be no margin through which a lead provider could recover their costs. This might impact on the sustainability of the contract for that lead provider.
25. Those who disagreed with the proposal pointed towards the use of sub-contracting or agency arrangements promoting a lowering of quality and a lack of accountability with court users suffering as a result. They were of the opinion that sending agents without local



knowledge will lead to a lowering of standards, quality and lack of accountability. One respondent suggested that the requirement that the bidder can ensure attendance at the court in time for the first list of the day, the use of sub-contracting and/or agents would almost inevitably lead to less experienced advisers at court who may not be available when the matter returns to court.

26. Respondents also stressed that providers with a local proximity to the Court also participate in meetings with Courts, to improve the experience for defendants and claimants. They felt sub-contractor or agents are unlikely to be interested in participating in this experience.

**Question 5: What other criteria would effectively distinguish between individual bids?**

27. We received a total of 56 responses to this question. The majority of respondents believed that criteria based on quality and experience of delivering HPCDS services should be determinative in awarding a contract rather than price, including:

- familiarity with the area and its services, to make the best use of local reciprocal referral arrangements between appropriate advice agencies and solicitors.
- whether the bidder has built local relationships with the relevant Local Authority, thus assisting applications for DHP, welfare support and homelessness applications.
- Experience of negotiation and representation in possession cases.

28. A significant proportion of respondents felt that preference should be given to existing providers who are currently operating a scheme with positive outcomes for clients, including suspended possession orders, should be used as a measure of quality.

29. Two respondents advocated peer review as the only objective measure of quality. This would be on the basis of everyone holding a Housing & Debt contract being entitled to participate in the duty possession scheme with peer review showing whether they have the competence to do so.

30. Others felt that the capacity of the provider to be able to cover every court list, respond at short notice to changes in lists, respond to emergency applications and requests from court for an adviser to attend should be included as criteria. One suggestion also included consultation with the local Judiciary as to the most effective providers.

**Question 6: Do you agree with the proposed remuneration mechanism under the competition model?**

31. We received a total of 53 responses to this question. 5 respondents agreed with the proposal. 46 disagreed. The remaining 2 respondents did not agree or disagree conclusively, or agreed or disagreed with particular aspects.

32. The majority of respondents considered there was insufficient information provided in the consultation to judge whether the remuneration mechanism would support the sustainability of contracts.

33. A number of respondents felt that the complexity of the task of factoring in all the variables for several courts in order to quantify an economically viable fee might be a significant disincentive for some providers to apply for a contract.
34. Many felt that travelling to a court centre and undertaking no work and therefore triggering no fee would not be sustainable. One respondent suggested that the standard fee should be maintained and to provide an incentive for providers to cover less well attended courts the LAA could put in place provision for a nominal attendance fee to reflect that the provider has to be present at court.
35. Respondents also signposted that with changes expected in the court reform programme over the next 2-5 years, including yet more court closures and widening the form of delivery; a price fixed now may not be sustainable or may exceed the cost of delivery.

**Question 7: 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?**

36. Respondents noted that legal aid providers with the protected characteristics of age and disability would be negatively affected by having to travel further to court to represent clients. They raised a concern that providers whose disability means that they are unable to drive would be excluded from travelling between courts in many of the suggested wider areas.
37. Respondents agreed that certain groups are disproportionate users of court services, and this is particularly so in housing cases with one legal aid housing provider stating that 40% of clients they see have mental health issues. Respondents noted that larger schemes may impact users with protected characteristics, given that:
  - those with mental health and some physical disabilities have difficulties in travelling, particularly to unfamiliar places and large urban centres;
  - the needs of single parents, predominantly women, and their increased childcare needs due to additional travel time;
  - those on low incomes, including their ability to manage any increase in travel costs. Court users in possession cases are usually on low incomes and have little or no excess income.
  - Those in rent arrears are particularly at risk of not being able to meet the cost of having to choose between essential living expenses, accessing early advice from a more remote provider or travelling to court to see a duty provider.
38. The majority of Respondents believed that clients with the protected characteristics of age and disability would be negatively affected by having to travel further to see their duty solicitor for follow up work. They were concerned that clients whose disability means that they are unable to drive would be excluded from travelling to see their duty solicitor in many of the proposed areas.
39. Respondents also expressed concern that a reduction in the quality of service as a result of price competition and bids to run the HPCDS as cheaply as possible with little

communication between agents will impact disproportionately negatively on people with disabilities, women, and black and ethnic minority clients.

**Question 8: What do you consider to be the impacts on families of these proposals? Are there any mitigations the Government should consider?**

40. Respondents felt that the distance to the court in larger schemes would be disproportionately felt by poorer families who may not have the means to travel to see a solicitor whom they might want to instruct subsequent to being advised by them on the duty scheme.
41. Respondents believed that wider scheme areas might result in parents facing childcare problems if travelling to more distant providers if they are not able to make effective local referrals. One respondent commented that those outside the main cities were less likely to access services previously used.

## Conclusion and next steps

42. The Government has considered all the responses to the consultation very carefully. We understand and have had careful regard to the arguments set out by respondents and summarised in Chapter 2 of this Response.
43. In particular, we have had regard to views that consolidation coupled with price competition could lead to a diminution of quality with providers driven to reduce the quality of their offering and selected purely on the basis of price.
44. There is a clear concern that the move to larger service delivery areas, with the associated travel and administrative costs for providers, might adversely impact both the sustainability of the schemes and positive outcomes for users. We are also mindful that a number of respondents raised the impact of larger service delivery areas on “follow-up” work where providers may be prevented from assisting clients who need further advice because of the distances of travel involved.
45. We remain convinced that moving to larger service delivery areas is the appropriate course of action.
46. Throughout the term of these contracts there has been a need to re-procure services to maintain sufficient provision across all courts. Available data, which will be shared with those wishing to bid as part of the tender process, indicates many of the schemes have only small volumes of work and are not commercially viable for providers. This is leading to a lack of sustainability of these services which has been evident in the ongoing incidence of providers pulling out of contracts.
47. This presents an additional cost to the taxpayer and is an administrative burden to the Legal Aid Agency.
48. Larger contracts will be more commercially attractive, will better accommodate further changes to the courts estate whilst making sure that universal coverage for those needing advice is maintained.
49. After careful consideration of the feedback received through the consultation, the proposed procurement area groupings have been revisited and there are several schemes where the LAA intend to seek further input from local providers through the market engagement process before finalising scheme boundaries. From reviewing responses, we do not believe there is a compelling argument for widespread amendment to the proposed scheme areas.
50. The LAA are planning a series of market events to engage further with the profession to inform the proposed tender model prior to the launch of the procurement process.
51. We believe that by allowing sub contract/agency arrangements, many of the concerns raised about extensive provider travel and access to local ongoing advice can be overcome. This will allow SMEs to continue to participate in the delivery of HPCDS services either as the contract holder or as an agent. To maintain the quality of advice by agents,

we would require any agent to hold its own Housing and Debt contract. It will also mean that clients can access ongoing advice from the agent/sub-contractor closest to them if they wish.

52. As is now the case, clients requiring ongoing housing advice will be able to choose their provider. It is not a requirement for any follow up advice to be given via a provider who holds the HPCDS contract. This may be a face to face provider who holds a Housing & Debt contract or advice via the CLA telephone helpline.
53. Clients may therefore choose the most local provider or they may opt to remain with the provider that advised them via a HPCDS, even if based further afield. The HPCDS contract will include requirements for HPCDS providers to have regard to more local Housing & Debt providers for ongoing advice but where the client wishes to maintain continuity they and providers may take advantage of the increased flexibility in the Housing and Debt contract to deliver services digitally.
54. We are confident that this increased flexibility enables clients needing follow up advice to remain with the provider who advised them at Court if they so wish.
55. Consolidating the work into fewer, larger areas will increase the potential level of competition for this work, as there can only be one successful bidder per area. As set out above, the Government remains of the view that it would be beneficial to consolidate HPCDSs into fewer, larger areas.
56. No respondents argued that such consolidation would not require a degree of competition.
57. In the consultation, the Government proposed a model in which price would be included as an element for distinguishing between bids for each area, to be considered alongside a range of other measures, such as those relating to the quality of the service. This would include providers bidding for an HPCDS contract being required to have successfully bid for a 2018 Standard Civil Contract in Housing and Debt.
58. It is clear that the majority of respondents were not in favour of using price as an objective measure and a number of common arguments were advanced against the inclusion of price, not least the potential impact on quality of service. Respondents suggested a number of other qualitative criteria that could be used to distinguish between bids including proximity to the court where the services are to be delivered and for contracts to be awarded to those who operate existing schemes.
59. However, having considered the alternatives proposed by respondents, the Government is not persuaded that price should not be included as a criterion or that equally practicable alternatives have been proposed through consultation.
60. The inclusion of price in a tender process introduces an objective element for the award of contracts as there is to be only one successful bidder per scheme.
61. Price competition will also allow the market to set the rate according to the cost of delivering the service.
62. As set out in the Consultation, the tender process will use a wide range of quality measures which providers will have to meet including ensuring that all Housing providers that have a HPDCS contract are peer reviewed during the life of the contract.

63. Procurement law requires we operate a fair, open and transparent process which is available to any suitably qualified organisation. Whilst this means that we cannot lawfully proceed to award contracts only to existing HPCDS providers as suggested in feedback, we do plan to limit the pool of potential bidders to those holding a Housing & Debt contract. This will ensure both that we run an open procurement and that all HPCDS providers have expertise in delivering housing advice, are able to advise in court and conduct any necessary follow up work.

## Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<https://www.gov.uk/government/publications/consultation-principles-guidance>

## Equalities

### Equality duties

Section 149 of the Equality Act 2010 ('the 2010 Act') requires Ministers and the Department, when exercising their functions, to have 'due regard' to the need to:

- Eliminate unlawful discrimination, harassment, victimisation and any other conduct unlawful under the 2010 Act;
- Advance equality of opportunity between different groups (those who share a relevant protected characteristic and those who do not); and
- Foster good relations between different groups (those who share a relevant protected characteristic and those who do not).

Paying 'due regard' needs to be considered against the nine 'protected characteristics' under the 2010 Act – namely race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

### Policy Summary

The Legal Aid Agency (LAA) funds HPCDS throughout England and Wales to provide on-the-day emergency advice and advocacy to anyone facing possession proceedings and is accessed directly at the court. There are currently 118 schemes funded through civil legal aid with an annual spend of £3m.

The current contracts for HPCDS were introduced in April 2013 and throughout their term there has been on-going procurement activity required to make sure there is sufficient provision across all courts with 13 schemes being retendered or expressions of interest offered to providers in neighbouring procurement areas.

In the Government's view, the current approach to contracting with providers for each individual court for HPCDS is unsustainable. Available data indicates that many of the schemes have only small volumes of work and these are unlikely to be commercially viable for providers. In addition, following Her Majesty's Court and Tribunal Service ('HMCTS') reform of the court estate a number of schemes will no longer exist as courts will close and/or work will move to different courts.

We propose to consolidate the current number of schemes through joining courts allowing for larger and more sustainable contracts for providers. Around half of the current schemes have very low volumes of work, presenting low economic viability and attractiveness for the contract holders. Moving from individual court based contracts to procuring a single scheme formed around a group of courts will also accommodate the changes to the court estate as a result of the Government's reform programme.

In addition to quality, we also intend to introduce price as an objective criterion, this will allow for a provision to distinguish between individual bidders in light of the likely increased competition for larger contracts.



### **Available Data/Consultation Responses**

Respondents considered that legal aid providers with the protected characteristics of age and disability would be negatively affected by having to travel further to court to represent clients. Providers whose disability means that they are unable to drive would be excluded from travelling between courts in many of the suggested wider areas.

Respondents agreed that certain groups are disproportionate users of court services, and this is particularly so in housing cases with one legal aid housing provider stating that 40% of clients they see have mental health issues. Respondents noted that larger schemes may impact users with protected characteristics, given:

- those with mental health and some physical disabilities have difficulties in travelling, particularly to unfamiliar places and large urban centres;
- the needs of single parents, predominantly women, and their increased childcare needs due to additional travel time;
- those on low incomes, including their ability to manage any increase in travel cost. Court users in possession cases are usually on low incomes and have little or no excess income.
- those in rent arrears are particularly at risk of not being able to meet the cost or having to choose between essential living expenses, accessing early advice from a more remote provider or travelling to court to see a duty provider. This may impact more on positive sustainable outcomes for those with protected characteristics.

The majority of Respondents believed that clients with the protected characteristics of age and disability would be negatively affected by having to travel further to see their duty solicitor for follow up work. They consider that clients whose disability means that they are unable to drive would be excluded from travelling to see their duty solicitor in many of the proposed areas.

A reduction in the quality of service as a result of bids to run the HPCDS as cheaply as possible with little communication between agents would impact disproportionately negatively on people with disabilities, women, and black and ethnic minority clients. All of these groups are disproportionately represented at the duty scheme and would therefore be more affected by any reduction in the quality of service.

### **Equalities impact**

There is a clear concern from respondents regarding the move to larger service delivery areas, and the effect this would have on those with protected characteristics.

We believe that by allowing sub contract/agency arrangements, many of the concerns raised about extensive provider travel and access to local ongoing advice can be overcome. This will allow small or medium sized enterprises to continue to participate in the delivery of HPCDS services either as the contract holder or as an agent. To maintain the quality of advice by agents, we would require any agent to hold its own Housing and Debt contract. It will also mean that clients can access ongoing advice from the agent/sub contractor closest to them if they wish.

As is now the case, clients requiring ongoing housing advice will be able to choose their provider. This may be a face to face provider or advice via the CLA telephone helpline. Clients may therefore choose the most local provider or they may opt to remain with the provider that advised them via a HPCDS, even if based further afield. The draft HPCDS contract includes requirements for HPCDS providers to have regard to more local Housing & Debt providers for ongoing advice but where the client wishes to maintain continuity they and providers may take advantage of the increased flexibility in the Housing and Debt contract to deliver services digitally.

As such, we do not anticipate any risk in relation to unlawful discrimination.

## **Annex A – List of respondents**

Oliver Fisher Solicitors

Sheffield City Council

Moss & Co solicitors

Liverpool Community Advice

Cambridge House Law Centre

Hammersmith & Fulham Law Centre

Goldstones solicitors

Shearer and Co solicitors

Prime Solicitors

Wiltshire Law Centre

Avon & Bristol Law Centre

Better Leeds Communities Leeds

South West Law (Legal Services in the Community) Ltd

Stephensons solicitors LLP

Foundation

Better Leeds Communities Advice Service

Keoghs Nicholls Lindsell & Harris

Luton Law Centre

Minton Morrill Solicitors

Swain & Co Solicitors

VHS Fletchers

Nottingham Law Centre

Direct Help and Advice

WTB solicitors

Minton Morrill Solicitors

Gloucester Law Centre  
Greenwich Housing Rights  
Worcester Citizens Advice Bureau and WHABAC  
Islington Law Centre  
SSP Law  
Hopkin Murray Beskine  
Lambeth Law Centre  
Young Legal Aid Lawyers  
Resolutions  
Law-7 Limited  
Minton Morrill Solicitors  
Birmingham Civil and Family Justice Centre  
Gough & Co Solicitors  
Law Centres Network  
Cumbria Law Centre  
Housing Law Practitioners' Association (c/o Anthony Gold Solicitors)  
Citizens Advice  
Edwards Duthie Solicitors  
SNS CAB  
Legal Aid Practitioners Group  
Association of HM's District Judges  
The County Court and the Family Court, Birkenhead  
Northampton and County Community Law Service  
Community Law Partnership  
Community Advice and Law Service  
TV Edwards LLP  
Housing Team, Garden Court Chambers

The Law Society

Burt Ward Solicitors

Zermansky Solicitors

Shelter

Henry Hyams Solicitors

Please note we received 61 responses but this list only named organisations





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