Statement made on behalf of the Claimants
Statement of William Waddington
First Witness Statement
13 June 2014

Claim No. CO/2426/2014

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

BETWEEN:

(1) LONDON CRIMINAL COURTS SOLICITORS ASSOCIATION
(2) CRIMINAL LAW SOLICITORS ASSOCIATION

Claimants

and

THE LORD CHANCELLOR

Defendant

WITNESS STATEMENT OF WILLIAM WADDINGTON IN SUPPORT OF THE CLAIMANTS' APPLICATION FOR JUDICIAL REVIEW

I, William Ogden Waddington, of Williamsons Solicitors, 45 Lowgate, Hull, HU1 1EN, state as follows:

1. I am the Chair of the Criminal Law Solicitors Association ('CLSA'), a claimant in the above proceedings. The CLSA is a national association whose membership is open to any solicitor and legal adviser involved with, or interested in, the practice of criminal law. The CLSA currently has a membership of over 1,000 solicitors. The membership is drawn from diverse sizes of firms covering the whole spectrum from the very large firm to the sole practitioner.

2. Due to the unprecedented challenges facing legal aid practitioners, the CLSA has in recent times formed a close working relationship with our sister organisation, the London Criminal Courts Solicitors Association ('LCCSA') as we have many overlapping areas of concern. It would be right to say that our two organisations

have increasingly fulfilled a leadership role in the profession in the area of criminal law. During the course of the two recent consultations on changes to criminal legal aid, the two organisations have worked closely together. Where I refer to correspondence sent or received by the LCCSA below, this is because the CLSA has been provided with a copy of this correspondence.

3. I am a Director of Williamsons Solicitors and the head of the firm's Defence Advocacy department specialising in crime. I am a duty solicitor in both the court and police station and a higher rights advocate. I have practised in criminal law for more than 30 years and have dealt with all nature of cases within the criminal justice system.

4. My firm could best be described as a typical High Street firm, providing a full range of legal services, including crime.

5. Save where I indicate to the contrary, the facts and matters contained in this witness statement are within my own knowledge. Where the facts are not within my own knowledge, I have identified the sources of information or belief.

6. At exhibit "WOW1" to this statement are copies of the documents that I refer to herein. Page references are in the form WOW/x/y/p z, where [x] is the file number; [y] is the tab number; and [z] is the page number.

7. In this statement:

   (a) I set out the communication and action taken by the CLSA, the LCCSA and other practitioner groups specialising in criminal legal aid work, along with the Law Society, in response to the Government's proposed reforms of the criminal legal aid system set out in its consultation papers "Transforming Legal Aid: delivering a more credible and efficient system" (April 2013, 'the first consultation', [WOW/1/A1/p 1]) and "Transforming Legal Aid: Next Steps" (September 2013, 'the second consultation' [WOW/2/A7/p 419]).

   (b) I will explain the serious rift which has developed in the relationship between the specialist practitioner groups and the Law Society over this period in light of the Law Society's failure properly to represent the interests of these groups in its negotiations with the Ministry of Justice and the Lord Chancellor.

(c) I explain that while I was aware over the second consultation period that two reports had been commissioned jointly by the Law Society and the Ministry of Justice from Otterburn Legal Consulting LLP ('Otterburn') [WOW/3/A13/p 891] and KPMG [WOW/3/A14/p 993], I did not see either report until they were both published by the Ministry of Justice on 27 February 2014 at the same time as its response to the second consultation [WOW/3/A12/p 798]. Neither CLSA nor the LCSSA had any opportunity to consider these reports or respond to them as part of the second consultation exercise.

(d) I explain the significance of both the Otterburn and KPMG reports to the proposed reform to the criminal legal aid system.

(e) I detail the additional matters which specialist practitioner groups such as the CLSA and LCCSA would have included in their responses to the second consultation had they been provided with a copy of the Otterburn and KPMG reports prior to the deadline for responding.

Background

8. The Legal Aid Agency currently contracts with over 1600 separate organisations to deliver services under 2010 Standard Crime Contract. The client can choose any firm that has a contract or can use a duty solicitor who will belong to a firm that has a legal aid contract. Fees are fixed administratively for each element of the work. The profit levels within the fixed fees are limited.

(a) Police station fees are fixed but vary from police station to police station and are calculated on the basis of a historic average claim for that police station. An example would be £240 for a London police station which would be paid however long the police station took whether it was 1 hour or 5 hours (apart from with respect to particularly long attendances when an hourly rate will be applied).

(b) Magistrates' Court fees are paid for cases that conclude in the Magistrates' Court. If the case is simply allocated and sent to the Crown Court, the Crown Court fee absorbs the element of the work completed in the Magistrates' Court. If the case is dealt with in the Magistrates Court, there are a range of

fixed fees depending on what type of case ie. Not guilty plea and trial or guilty plea and sentence. Within each type of case, there is a "lower standard fee." However, if you do a certain amount of work, you may receive the "higher standard fee." If you do an even greater amount, you may claim a "non-standard fee," which is assessed on hours and work completed.

(c) For Crown Court work, there are a range of fixed fees which are calculated by applying certain criteria: the type of charge; whether there was a guilty plea, not guilty plea or cracked trial; page count of evidence; and if there was a trial, how long it was.

9. There has been a history of cuts to criminal legal aid rates. The depth of the legal aid cuts can be illustrated by a comparison of legal aid rates over time. For example, the hourly rate as at 1 April 1992 for attendance and preparation in the lower Court was £43.25 per hour and the advocacy rate was £54.50 per hour. All these years later, as at 20 March 2014, the current hourly rate from which standard fixed fees are calculated are: £45.35 per hour for attendance and preparation and £56.89 per hour for advocacy. The rates from 1992 are therefore not significantly different to the rates available in 2014 given that solicitors were paid travel and waiting in all cases in 1992 (and are now paid travel and waiting time in only a minority of cases). Greg Powell, a former President of the LCCSA, recently referred to a case file for an affray case that involved the tracing of witnesses that he billed for £470. Under the new proposals, he would get £258.71. Mr Powell then revealed that his bill was done in 1978 – meaning that under the vagaries of the fixed fee system he was paid more in 1978 than under the current proposals.

10. Cuts to criminal legal aid rates have continued apace in recent years. I have set out below a summary of the cuts in rates since 2008:

(a) Until 2008, police station work was remunerated at hourly rates. Duty Solicitor and Own Client rates for day time attendances in London were claimed at £56.20 per hour (£52 per hour outside London), with an uplift to £69.05 per hour for a duty solicitor attending, travelling and waiting out of hours. A London duty solicitor attending clients in respect of serious matters was remunerated at £65 per hour for in office hours or £80 for out of hours. An additional fee of £31.45 was claimable for any telephone advice given. In 2008, a fixed fee regime was introduced, with a fixed fee in London

areas ranging from £322 - £345 inclusive of VAT (in the areas covered by my firm, Hull, Beverley and Goole the range was £202.69-£270.62. These fees did not include time for travel or waiting which had previously been claimable at the above hourly rates. The fixed fee was payable regardless of time spent or number of attendances on the case. In 2011, a further cut reduced these fees to £291.60 - £312 per case (£201.60 - £240 in the areas covered by my firm.

(b) Prior to 1993, defence work in the Magistrates' Court cases was paid on the basis of an ex post facto calculation of the work done at a set hourly rate. In 1993, fixed fees were introduced by the Government in an effort to cut legal aid expenditure in three categories, as outlined above – lower standard fees, non-standard fees and higher standard fees. In 2008, the Ministry of Justice removed payment for travelling and waiting whilst at court as it was felt that fewer solicitors were needed at court and that economies of scale would prevail. The lower standard fee in London was within a range of £284.35 - £484.60 (exclusive of VAT) (£221.59 - £357.87 outside London) and the higher standard fee in a range of £611.15 - £1005.49 (£477.41-£734.56 outside London). In 2010, the fixed fees were reduced. Cases that were sent to the Crown Court attracted a standard fee for the work done in the Magistrates' Court, of £404.86 - £888.85. However, these fees were removed as a discrete payment and then committal proceedings were abolished altogether.

(c) Prior to January 2008, work in the Crown Court carried out by solicitors as litigators was paid on an ex post facto basis for the work that needed to be done. Fixed fees were then introduced in respect of all proceedings. This meant that often cases would be run at a loss, unless client care was compromised. A defendant accused of residential burglary would require at least two visits to prison if contesting the matter. An average fee for litigating such a case to trial in the Crown Court would be £340.00 plus certain limited "add ons" depending on trial length etc.

11. Whilst there have been many consultations and many cuts to legal aid fees over recent years, what differentiates the proposals at issue in the present case is that the Government's avowed objective is to reduce substantially the number of criminal legal aid firms. This is referred to as consolidation of the market but in plain English

means that it is intended that smaller legal aid firms will be forced out of business. Beginning with the first consultation and consistently thereafter, the Government has made it clear that its intention to is to achieve "consolidation" – which in reality means that the aim is for a significant number of smaller firms to be put out of business. In the first consultation (albeit in the context of the PCT model then being considered) it was said "Our aim is to encourage more cost-effective delivery of criminal legal services, which in our view can only be achieved through consolidation of the market, with fewer and more efficient providers accessing greater volumes of work" (WOW/1/A1/ p53). Subsequently, when he appeared before the Justice Select Committee on 3 July 2103, the Lord Chancellor, in answer to a question whether part of his underlying intention was to reduce the number of firms, said "We and the Law Society think there are too many organisations out there to sustain the kind of financial challenges that we have" (WOW/2/A6/ p385). In the second consultation, what was said was "It has confirmed our view that the market for criminal defence litigation services needs significant consolidation and re-structuring if it is to function effectively at a lower cost (WOW/2/A7/ p427) and "the Government is convinced that steps are needed to support re-structuring and consolidation of the market (WOW/2/A7/ p436) and " ...significant consolidation of the market is required..." (WOW/2/A7/ p446). In its response to the second consultation, the Government said " Yet we have maintained our principal objective, to deliver a sustainable service through encouraging consolidation of the provider base" (WOW/3/A12/ p806) and "The Government continues to believe that consolidation is needed" (WOW/3/A12/ p830).

12. Throughout this period, the Ministry of Justice has frequently worked closely with the Law Society to try to agree changes to criminal and civil legal aid which can then be presented by the Ministry as having been agreed by "the profession" as a whole. The Law Society is a body which represents solicitors across the spectrum of all legal activity. The maintenance of a close functional relationship with Government is important to it so that it can attempt to influence Government policy across that spectrum, including in areas such as commercial law, family law and conveyancing. Specialist professional associations, like the CLSA and LCCSA, have been focussed on the remuneration of criminal legal aid lawyers and the survival of a strong, professional, independent criminal legal aid service. Our working knowledge of the criminal law system and our different relationship with government has, on a number of occasions, led us to profoundly disagree with the approach taken by the Law Society. I believe that this would have been well known to the Ministry of Justice.

13. A particular example of that profound disagreement has been the proposed introduction of Price Competitive Tendering ('PCT'). The Carter Review (in 2006) came to the broad conclusion that there should be a severe reduction in a number of legal aid firms and a consolidation of the market, following which cuts to fees would be possible as firms would have gained an economy of scale. The cuts would have been implemented through PCT to establish a "market rate." Whilst the professional associations such as the CLSA and LCCSA opposed PCT in principle, the Law Society stated that it was not opposed to PCT in principle (although argued that it could not envisage a working model).

14. Since the Carter review, there has been a large number of consultations, including the Best Value Tendering for Criminal Defence Service contracts in 2010. The response of the LCCSA and CLSA to those consultations was significantly different to that issued by the Law Society.

History of the current consultation process: April 2013 – March 2014

The Government's first consultation: "Transforming Legal Aid: delivering a more credible and efficient system"

15. On 9 April 2013, the Government published the first consultation paper (WOW/1/A1/p1-161). The first consultation, which dealt with both civil and criminal legal aid, was presented as being against a backdrop "of continuing financial pressure on public finances" and the Government estimated that the proposals set out in the consultation would, if implemented, save £220 million per year by 2018/19.

16. One aspect of the proposals consulted upon was the procurement of criminal legal aid services through the introduction of PCT (Chapter 4 of the first consultation) [WOW/1/A1/p 40]. It was proposed that tenders would be invited for all criminal legal aid services (with the exception of Crown Court advocacy and Very High (Cost) Crime cases). The Government acknowledged that this would require a major structural change in the market, but asserted that competition was the best way to promote value for money, innovation and efficiency. The Government's proposed model was based on the belief that access to greater volumes of work and control of the case from end to end would encourage providers to "scale up" to achieve

economies of scale and provide a more efficient service (see paragraph 4.7 at WOW/1/A1/p 40).

17. The Government proposed to invite tenders for all criminal legal aid services, with the exception of Crown Court advocacy and Very High Cost (Crime) Cases ("VHCCs"). Therefore, for four areas of work - police station attendance, police station attendance (Armed Forces), representation in the Magistrates' Court and Crown Court (non-VHCC) litigation) - it was proposed that the rates of pay would be subject to price competition, with a price cap set at 17.5% below the average current rates of pay for those areas of work. In relation to all other work delivered pursuant to the proposed tenders, the rates of pay were to be fixed administratively, by reducing the then current rates of pay by 17.5%. Client choice was to be abolished, as clients would have a provider allocated to them at the point of requesting advice, and would be required to stay with that provider for the duration of the case (subject to exceptional circumstances).

18. Under the proposed model, publicly funded work would be exclusively available to those who had been awarded competitively tendered contracts within the applicable procurement areas. "Procurement areas" were to be very largely based on existing Criminal Justice System Areas, with some relatively minor adjustments). One of the key issues identified was the number of contracts in each procurement area. The proposal was that applicants would be allowed to deliver services in more than one procurement area but could only bid for one contract in each area. In order to determine the optimum number of contracts in each procurement area, four general key factors were identified:

(a) "sufficient supply to deal with conflict of interests" (enough providers in each area to cover most, if not all, cases in which a conflict arises);

(b) "sufficient case volume to allow fixed fee schemes to work" (some of the work undertaken as part of the tendered contracts would be at fixed fees and increased case volume was intended to ensure a balance between loss making and profit making fixed fee cases);

(c) "market agility" (the extent to which current providers would need to scale up in order to take on increased volumes of work); and

(d) "sustainable procurement" (the need to ensure the market would be competitive in future tendering rounds).

19. Taking these factors into account, what was proposed was a tender of approximately 400 contracts (to be seen against the existing position of legal aid contracts with over 1,600 separate organisations) (see paragraphs 4.58 to 4.66 of the first consultation, WOW/1/A1/ p 52-56)

The Response of the Profession: the role of the Law Society's Practitioner Group and the roles of CLSA and LCCSA

20. The Law Society set up a Practitioner Group to address the proposed criminal legal aid reforms after the first consultation was published in April 2013 because of concern that the proposed financial cuts were so severe that they would irreparably harm access to justice. The Practitioner Group was generally chaired by Richard Atkinson, Chair of the Law Society Criminal Law Committee (and also attended by Joy Merriam, Chair of the Law Society Access to Justice Committee), and was attended by representatives from the following specialist practitioner groups representing the interests of solicitors: the CLSA, LCCSA, Solicitors' Association of Higher Courts Advocates (SAHCA), Big Firm Group (BFG), Society of Asian Lawyers and Legal Aid Practitioner Group (LAPG).

21. The bar was represented within the Practitioner Group by the Bar Council and the Criminal Bar Association (CBA), also a specialist practitioner group. There was a common belief across the whole profession that the criminal justice system was in danger of collapse and hence these unprecedented co-operative meetings were arranged in order to present a united front against the removal of client choice, the introduction of PCT, the reduction in the number of contracts and the depth of the proposed cuts to legal aid. A representative of the CBA and Bar Council attended the inaugural meeting of the Practitioner Group.

22. The Practitioner Group met frequently. The meetings took place at the Law Society and those who were not able to attend in person would attend by telephone. The meetings discussed in some detail how to raise the profile of what all the groups recognised was a deeply serious threat to access to justice with the public, the media and politicians, all of who seemed sadly unaware at that time as to the depth

of the problem (if they were aware of it at all). It was also felt necessary to counter the constant misleading information issued by those in favour of the proposals. Although through the Practitioner Group, the Law Society has made efforts to consult solicitor members of the specialist practitioner groups such as the CLSA, LCCSA and LAPG, the Law Society nevertheless maintained a strict policy of exclusion of these groups insofar as its face to face negotiations with the Lord Chancellor and Ministry of Justice were concerned. This was, we were told, at the insistence of the Lord Chancellor.

23. The CLSA submitted its response on 4 June 2013 (WOW/1/A2/p162-197). In summary, the response dealt with, *inter alia*, the following points made in the first consultation:

(a) The misleading statistics deployed by the Ministry of Justice which has consistently failed to acknowledge recent substantial reductions in the criminal legal aid spend;

(b) The inaccurate international comparisons made – one of the reasons given for the need to make savings was that our legal aid system "was one of the most costly in the world". However the National Audit Office had reported in February 2012 that the budget in England and Wales for the criminal justice system (courts, prosecution, legal aid) was at the European average.

(c) The attack on client choice for all but the very rich (making defence unaffordable for anyone with a joint disposable income over £37,500);

(d) The Government's position that price would be the key determinant of entitlement to provide criminal legal aid services so that there was no need for high quality of legal services for ordinary people when facing a State funded prosecution as work would be 'above the acceptable level specified by the LAA' (Legal Aid Authority);

(e) The CLSA pointed out that the average criminal legal aid lawyer earns an average of £25,000 per year for long unsocial hours doing difficult work which involves dealing with challenging clients; and

(f) The damage to our international reputation for quality in the conduct of criminal law that would result from the proposal.

In the response, the CLSA put forward sensible detailed alternatives to cuts through savings and accessing alternate income streams (for example, the replacement of legal aid by legal loans, in which the loan would be repayable on conviction).

24. The LCCSA submitted a response to the first consultation on 4 June 2013 (WOW/1/A3/ p198-228).

25. The Law Society submitted a response, accompanied by a report it had commissioned from Otterburn, on 4 June 2013 (WOW/1/A4 p229-361). In summary, the Law Society stated in its response:

(a) The Government's proposals for introducing competition in the criminal legal aid market present unacceptable risks to the administration of the criminal justice system;

(b) The abolition of client choice of solicitor will remove one of the key drivers for quality and the existing market will be unable to adjust to the new provisions without risking serious detriment to quality and availability of services;

(c) There were serious concerns about proposals that will further erode legal aid provision for civil and prison law matters.

The research by Otterburn submitted alongside the response, and broader market analysis from Deloitte, were said to vindicate the Society's grave concerns that the approach proposed by the Government was economically unviable [WOW/1/A4/ p272]. The Otterburn survey found that just 25% of firms would remain profitable after a cut of 17.5% to their fees under existing conditions. This raised obvious questions as to the viability of the market if the proposals were implemented.

26. The first consultation closed on 4 June 2013.

Dealings with the Law Society, July- August 2013

27. On 1 July 2013, the Law Society submitted "Transforming Legal Aid – Law Society alternative to Price Competitive Tendering" ('the Law Society's alternative proposal') to the Lord Chancellor and Ministry of Justice (WOW/2/A5/ p362-380). This set out its proposal for a "market driven by a Quality and Capacity Framework" in which client choice would be preserved but the contracting system, duty solicitor scheme and wasted costs orders would be reformed to secure high standards whilst incentivising efficiency. In summary, what was proposed was a system of rolling contracts (awarded on the basis of the existing 245 police station procurement areas) subject to two conditions: (i) a willingness to fulfil the contract at the Legal Aid Agency set price and (ii) adherence to the conditions of a Quality and Capacity Framework.

28. The Law Society's alternative proposal had been developed with the Practitioner Group. All the member groups supported the proposal, including the CBA and the Bar Council. It set out a managed and sensible method of restructuring the profession, allowing for reduction in expenditure without the threat of collapse to the criminal justice system that the present proposals involve.

29. At the meeting of the Practitioner Group when these proposals were finalised, Lucy Scott-Moncrieff, the President of the Law Society at the time, made it clear that she wanted the document to be finalised so that she could show it to the Lord Chancellor at a meeting he had brought forward to take place ahead of his appearance before the Justice Select Committee on 3 July 2013.

30. At the beginning of his evidence to the Justice Select Committee on 3 July 2013 (WOW/2/A6/ p381-418), the Lord Chancellor referred to his recent discussions with the Law Society, which he described as being constructive. Presumably referring to the new alternative proposal, he noted that agreement had been reached on a number of principles, including moving away from limiting client choice and reviewing the time frame for changes. In contrast, he commented that he had been disappointed in the less constructive response of the Bar to his proposals.

31. On 11 July 2013, Nick Fluck was appointed as the new President of the Law Society. The next Practitioner Group meeting took place on 19 July 2013, which I was not able to attend. However, as I knew that discussions concerning the Law Society's

alternative proposal would continue, I wrote to Mr Hudson (the Chief Executive of the Law Society) by email on 18 July 2013 (WOW/3/B/ p1057-1060) to express the concern felt by many in the Practitioner Group in relation to the timing of the publication of the Law Society's alternative proposal. We considered that publication by the Law Society immediately prior to the Lord Chancellor's appearance at the Select Committee was "unfortunate" in that this had enabled him to praise the Law Society whilst criticising the Bar Council and the Criminal Bar Association for not having submitted similar proposals. The Lord Chancellor seemed unaware that that both these bodies and other (solicitors) representative bodies had been involved in discussions concerning the Law Society's alternative proposal and that this had been a joint effort. There was an immediate backlash following the Law Society's publication of its alternative proposal as many jumped to the incorrect conclusion that the Law Society had made some concessions on behalf of the solicitor's profession to the disadvantage of the Bar.

32. In this letter, I stated "TLS [the Law Society] must, I believe accept that its relationship with the profession is very finely balanced. There is unfortunately (and unjustifiably, given the hard work and effort by all at TLS) a great deal of mistrust on the part of the profession of TLS." I pointed out that one of the underlying problems was that the Law Society acceded to the Lord Chancellor's demands to only meet with the President of the Law Society who did not have any specialist criminal experience. The confidence of the Practitioner Group and the criminal profession would be restored if the President were, in this case, accompanied by the Chair of the Criminal Law Committee (who was Richard Atkinson) in the meetings with the Lord Chancellor. On behalf of the CLSA and with the support of the LCCSA and the LAPG, I asked Mr Hudson to agree to this proposal at the meeting the next day.

33. At a meeting of the Practitioner Group on 19 July this issue was raised by Robin Murray, the vice Chair of the CLSA, on our behalf. At the request of the Law Society discussion of the point was deferred.

34. Robin Murray attended a further meeting of the Practitioner Group on 24 July 2013 on my behalf and our proposal with respect to Law Society representation at meetings with the Lord Chancellor and Ministry of Justice was agreed. This meant that Mr Atkinson (Chair of the Law Society Criminal Law Committee) or Joy Merriam, (Chair of the Law Society Access to Justice Committee) would attend all Law Society meetings with the Lord Chancellor or Ministry of Justice in future. Both of these

individuals were also experienced criminal solicitors and therefore well regarded by the profession. Although Ms Merriam is a member of the CLSA (and I believe Mr Atkinson may be a member) their roles at the Law Society are not as representatives of the organisation.

35. A further Practitioner Group meeting took place on 30 July 2013, which I attended. Richard Miller, Head of Legal Aid at the Law Society, summarised a meeting which had taken place the day before with the Ministry of Justice and the Legal Aid Agency. He explained that the Ministry of Justice had made it clear that PCT was still being considered (with or without an element of client choice) alongside the Law Society's alternative proposal. With respect to its alternative proposal, the Ministry of Justice asked the Law Society to consider a revised "two tier" approach with separate contracts for "duty work" and "own client" work ('the dual contract approach'). Duty work is all criminal legal aid advice, litigation (except VHCCs) and magistrates' court advocacy services delivered to clients who choose the Duty Provider at the first point of request. Own Client Work is all those services delivered to clients who choose their own provider at the first point of request. I believe that this was the first occasion that I became aware of the dual contract approach. I believed then, and I still believe now, that a dual contract approach was unworkable. I set out the reasons for this at paragraphs 59 - 62 below. The practitioners at the meeting believed that a one tier system, as set out in the Law Society's alternative proposal, whereby all firms meeting quality standards could provide duty solicitor services if they wished, would be preferable. Mr Hudson agreed with this view.

36. Mr Miller explained that it was believed that the Ministry of Justice had in mind 400 duty contracts to start with and that the geographic areas across which these contracts would reflect Criminal Justice System ("CJS") Areas. Concern was expressed at the meeting that the CJS Areas were too big and various alternatives were discussed. In the end, it was generally agreed that local justice areas, were probably the best option. I believe CJS Areas are more or less the police force areas and local justice areas are the old petty sessional divisions (but with mergers). The Practitioner Group met again on 13 August 2013. There had been no further meetings between the Law Society and the Ministry of Justice since 29 July 2013 and therefore, the Law Society had little to report, other than that it believed that a further consultation paper would be issued sometime in September. It was believed that PCT was still under consideration and it was unlikely that the Law Society's

alternative proposal was being considered. I recall that the opposition of those present to a two tier system was again expressed.

37. Another Practitioner Group meeting was arranged to take place at the end of August but was later cancelled on the basis that there were no further developments to discuss

38. Mr Hudson of the Law Society called me on 4 September 2013, the day before the second consultation was published, to tell me about a meeting which had taken place between the Ministry of Justice and Law Society in which an "agreement" was reached with respect to the dual contract approach. Mr Fluck formally reported back to the Practitioner Group about this meeting, as I detail below.

The Government's Second Consultation: "Transforming Legal Aid: Next Steps"

39. On 5 September 2013, after receiving more than 16,000 responses to the first consultation, the Government published its response in the form of the second consultation document (WOW/2/A7/ p419-699). The Lord Chancellor stated in his Ministerial Foreword that he had agreed with the Law Society on the proposals for criminal legal aid which were set out in the document. I do not know whether there had indeed been agreement on all of the proposals or only on their basic structure but I do know that there had been no agreement on the part of the specialist Practitioner Group, or its constituent members, nor indeed any consultation by the Law Society with these groups as to whether or not it should reach agreement with the Lord Chancellor. Nor had there been agreement on the part of Mr Atkinson or Ms Merriam, whom the Law Society had agreed to accept as appropriate representatives of the views of criminal legal aid lawyers.

40. In relation to PCT, the Government decided, in the light of the responses received to the first consultation, to consult on a modified model of procurement for criminal legal aid. Two reasons in particular were given as to the need for this:

    (a) the consultation responses received which had pointed out that client choice was fundamental to the effective delivery of criminal legal aid; and

(b) the consultation responses which had pointed to the flaws in having price as an award criterion for the tendered contracts (see WOW/2/A7, p496, paragraphs 2.27-2.28)

41. The proposal was that any provider which met certain standards could undertake Own Client Work and that what was to be tendered for was a limited number of contracts for Duty Provider Work, i.e. services across all police stations and Magistrates' Courts for those individual clients who do not have their own provider. The Government proposed to reduce the number of contracts to deliver Duty Provider work by running a competitive tendering process for the services to be provided in each geographical area. The expressed aim was to deliver Duty Provider contracts that were large enough in volume to be sustainable in their own right at the rates of pay on offer, which would be a 17.5% cut on average from the present regime. Criminal legal aid fees would continue to be fixed administratively, rather than determined by tenders to provide services. The second consultation also stated that the proposal in the first consultation for the 17.5% fee reduction was to be modified - instead of being introduced as a one off cut, it was to be introduced in two stages, 8.75% in early 2014 by amending the 2010 Standard Crime Contract **and** 8.75% in spring 2015 to be applied to both Duty Provider Work and Own Client Work under the new criminal legal aid contracts (WOW/2/A7/ p 428, 458, paragraph 1.19, 3.53).

42. Details of the proposed modified model were set out in Chapter 2 of the second consultation (WOW/2/A7/ p 433). At paragraph 2.31, the Government stated that in determining the number of contracts, they proposed to have regard to the same "four key factors" identified in the first consultation, in addition to one further factor – that the duty solicitor contracts would be large enough in volume and value to be sustainable in their own right. Paragraph 2.31 went on to state that:-

"In order to help inform our final decision on the number of contracts for Duty Provider Work, we intend to jointly commission with the Law Society a further piece of research exploring the size of contract necessary for it to be sustainable."

43. Part 2 of the second consultation paper then set out the issues for further consultation. Chapter 3 considered the detail of the proposed procurement of criminal legal aid services [WOW/2/A7/p 446]. The proposal was that new duty contracts would be for a four year term, with the option for the Government of

extending the contract term up to one further year. The geographical areas were to be based on the 42 CJS areas, with some modifications. Paragraphs 3.27 to 3.36 discussed the number of contracts to be awarded, which was a key issue in terms of how great an impact the new proposals would have. Under the modified model, the number of contracts for Own Client Work would be unlimited. For determining the number of contracts for Duty Provider Work, the Government reiterated that the four key factors set out in the previous consultation should still be taken into account (see paragraph 3.31):

(a) "sufficient supply to deal with conflict of interests" (the Government stated that data from the Legal Aid Agency confirmed that the vast majority of cases had four defendants or less, so there should be a minimum of four contracts in each procurement area).

(b) "sufficient case volume to allow fixed fee schemes to work" (need to offer sufficient volume of work in order to cope with variations in case mix. The Government stated that it would be reasonable to expect providers to absorb up to a 3% change in revenue, in any one year, relative to what they would have received on the same mix of cases in the previous year);

(c) "market agility" (the extent to which current providers would need to expand their businesses in order to take on increased volumes of Duty Provider Work. The Government stated they would have to consider those who had to scale their businesses down, and would need to consider the extent to which this could be mitigated by enabling such providers to maintain access to Own Client Work); and

(d) "sustainable procurement" (the need to ensure the market would be competitive in future tendering rounds).

44. Paragraph 3.33 and 3.34 set out how the Government intended to reach a final decision on the number of contracts for Duty Provider Work. They state that:-

> "3.33 *In order to help inform our analysis of sustainability and the final decision on the number of contracts for Duty Provider Work, we intend to jointly commission with the Law Society a further piece of research to get*

more detailed information for this purpose. It would also be necessary for such work to take into account the proposed size of procurement area.

3.34 *Therefore, we propose to determine the appropriate number of contracts for Duty Provider work on the basis of the four factors set out above and the outcomes of the further research. We would welcome consultees' views on these factors and whether there are any others that we should consider."*

45. At the end of Chapter 3, the Government set out the further consultation questions [WOW/2/A7/p 465]. Five questions were posed:-

"Q1. Do you agree with the modified model described in Chapter 3? Please give reasons.

Q2. Do you agree with the proposed procurement areas under the modified model (paragraphs 3.20 to 3.24)? Please give reasons.

Q3. Do you agree with the proposed methodology (including the factors outlined) for determining the number of contracts for Duty Provider Work (described at paragraphs 3.27 to 3.35)? Please give reasons.

Q4. Do you agree with the proposed remuneration mechanisms under the modified model (as described at paragraphs 3.52 to 3.73)? Please give reasons.

Q5. Do you agree with the proposed interim fee reduction (as described at paragraphs 3.52 to 3.55) for all classes of work in scope of the 2010 Standard Crime Contract? Please give reasons."

46. I would note at this stage that the Ministry of Justice asked consultees whether they agreed with the methodology for determining the number of contracts for Duty Provider Work, but had only sketched out the broad outline of that methodology, in the four key factors. The detail of the methodology remained to be filled-in and it appeared that a report was being jointly commissioned – it later became clear, from Otterburn - in order to enable that to be done.

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Response to the Second Consultation

47. The first Practitioner's Group meeting after the second consultation was published took place on 17 September 2013. I recall that it was a tense occasion. The President of the Law Society, Mr Fluck, reported to the meeting how it had reached an agreement with the Ministry of Justice on dual contracts. I, and I believe the other representatives of the specialist practitioner groups were extremely surprised and disappointed by what had happened. Mr Fluck stated that the Government still required savings to be made and commented that they had achieved the best result possible in the circumstances – even if it was not ideal, it was better than any alternative. He explained that the Ministry of Justice considered that the Law Society's alternative proposal fell foul of procurement law and was anti-competitive and that therefore the dual contract approach was raised by the Ministry of Justice to resolve this issue. After the dual contract approach was unanimously rejected in the Practioner Group meeting on 13 August 2013, the Law Society reported back to the Ministry of Justice that it would not support this approach.

48. In response to the Law Society, the Lord Chancellor subsequently let it be known that PCT remained a real option which was under consideration. The Law Society then met with the Lord Chancellor on, I believe 27 August 2013 and he confirmed that he would remove PCT on two conditions: that the Law Society agreed the dual contract approach and would not make a public statement about the Lord Chancellor doing a u-turn on PCT. Mr Fluck explained that this meeting was highly confidential because there was concern that if the Law Society had consulted the Practitioner Group at that stage, the information conveyed by the Lord Chancellor may have got into the public arena, thereby jeopardising negotiations to avoid PCT being imposed (and also, as I recall, to avoid jeopardising the Law Society's relationship with the Ministry of Justice, with whom it had many dealings, not just about legal aid).

49. Mr Fluck confirmed that Joy Merriam and Richard Atkinson had been consulted after the meeting on 27 August 2013 had taken place. Both had expressed their opposition to the proposed agreement. The Law Society subsequently referred the matter to its Legal Affairs and Policy Board ('LAPB') by way of separate telephone calls to three of its members. The views of Richard Atkinson and Joy Merriam, the experienced criminal practitioners and specialist criminal and legal aid committee chairs, were made clear to these members, who all agreed nonetheless that

agreement with the Lord Chancellor on the dual contract approach was the best option in the circumstances.

50. Mr Fluck made it very clear during the meeting that in his view the Practitioner Group was never a negotiating committee but rather a consultation group. I found this most extraordinary as what the Law Society had agreed was such a radical departure from what had been discussed with the Practitioner Group as to make that whole consultative process completely worthless. The agreement reached was in direct contradiction to the views expressed during those meetings and furthermore, a breach of the Law Society's agreement not to negotiate with the Ministry of Justice without one of the experienced committee chairs, Ms Merriam or Mr Atkinson, being present.

51. In relation to the second consultation, the Law Society confirmed that it did not feel able to argue against the imposition of the dual contract approach, although it still intended to argue about the number of duty solicitor contracts which would be tendered. I said that I would ask for the consultation period to be extended, given the near impossibility of making any meaningful response to questions about capacity and capability whilst the jointly-commissioned Otterburn research was ongoing. I cannot recall whether the Law Society agreed to support this request. It did however ask those present to encourage their members to respond to Otterburn's request for financial information. (Otterburn were commissioned jointly by the Law Society and the Ministry of Justice in September 2013 to undertake the further piece of research referred to in the Government response (see paragraph 44 above)).

52. There was some discussion at this meeting about the Law Society's public acceptance of the inevitability of cuts. Mr Atkinson commented that the Law Society did not want to accept that there would need to be cuts, but did accept there needed to be savings. Paul Harris, a former President of the LCCSA, and I both made the point that we wanted the Law Society to be "shouting from the rooftops" that it was against cuts and doing otherwise would send the wrong message to the membership. By contrast, the CLSA's response to the first consultation had recognised the need for savings to be made and had made constructive suggestions as to how that should be done, which did not involve further cuts to fees.

53. On 20 September 2013, the Legal Aid Agency sent an email to contract holders inviting them to participate in a survey in connection with the research being conducted by Otterburn (WOW/3/B/ p1061).

54. As I indicated at the meeting on 17 September 2013, I was very concerned about how the CLSA or any other body with an interest in this matter could respond to the crucial points raised in the second consultation regarding the fee cut and the tendering of contracts for duty solicitor services without seeing the joint research that was being commissioned from Otterburn. Without this information, no one could know what the impact of these proposals would be on the financial viability of firms. I wrote to the Lord Chancellor about this issue on 23 September 2013 (WOW/3/B/ p1062-1063), I asked that the second consultation be delayed until after the research that was to be jointly commissioned by the Government and the Law Society was published. The letter said, materially:

"The duty solicitor contract is clearly far more complex. The paper talks about 'capability and capacity'. It explains that the MoJ and The Law Society will jointly instruct Otterburn to analyse the financial viability of firms but that the outcome of his research will not be available, it seems, prior to the first tranche of cuts being implemented. This means that the impact on firms will not be known in the absence of Otterburn's evidence. It also means that any firm trying to respond to the consultation on a topic which is going to have such serious implications for the future of all providers is going to be working very much in the dark.

Is the two tier system a good way forward? I am afraid that I simply do not know the answer to that question. No one else can know it either until the outcome of Otterburn's research. It is quite possible that no own client only contract firm could withstand the first 8.75% cut (let alone the full 17.5% cut proposed) and that no firm owning a duty contract could withstand the 17.5% cut. I would respectfully suggest that the response to consultation be delayed until the outcome of Otterburn's research is known.

This is after all, not a race. The future of our much respected Criminal Justice System is at stake. Surely, Lord Chancellor, that is worth just a few more weeks for proper consideration after the Otterburn report is available to enable an informed response?"

55. In the Lord Chancellor's reply dated 8 October 2013 (WOW/3/B/ p1064-1065), he refused to delay the second consultation until after the publication of the Otterburn report. He said "The consultation paper clearly sets out the factors we propose to use to determine the number of contracts for Duty Provider Work and invites views on those factors. One of these factors is the sustainability of the Duty Provider Work contracts. We will carefully consider all of the responses we receive (including any views or evidence on sustainability) as well as the independent research being conducted by Otterburn to help inform our assessment of the number and size of Duty Provider Work contracts that would be awarded". However, as explained below, knowledge of those factors did not enable the CLSA, or any other body representing criminal legal aid lawyers, to understand the proposal put forward by the Lord Chancellor or to be in a position to respond to it.

56. I wrote a further letter to the Lord Chancellor on 21 October 2013 on behalf of the CLSA (WOW/3/B/ p1066-1070) warning of the consequences to the criminal legal profession of continuing with the proposed cuts and reform and attaching a joint statement of the CLSA, CBA, LCCSA and LAPG setting out the collective view of the members of these groups that the "cuts are unsustainable and make it impossible for the profession to provide a proper prosecutorial and defence service."

The CLSA response to the second consultation

57. The deadline for response to the second consultation was 1 November 2013. The CLSA and LCCSA both responded by that date. The CLSA response was dated 10 October 2013 (WOW/3/A8/ p700-729).

58. Our response noted that the cost of criminal legal aid is falling, and had been for the last 10 years. Our figures suggested that by April 2015, the legal aid spend would be substantially below the £1.5 billion spend figure that the Ministry of Justice wished to achieve. The savings were already being made, due to factors such as reducing crime rates, arrest rates, charging rates and recently implemented fee reductions, the effects of which had not yet been fully felt. We welcomed the fact that the Government had listened to consultation responses on client choice and PCT, and recognised the political courage shown in reversing major aspects of the first consultation. We urged them to listen again: it was the view of the CLSA that to impose financial cuts of the levels proposed would trigger the collapse of the criminal justice system. The level of the proposed cuts, on top of the drastic reductions

imposed over the last 20 years, would be a tipping point, which no amount of consolidation could ameliorate.

59. The two tier system raised great concerns. Our members were not convinced that the proposed model was viable, and we stated that further evidence had to be obtained. We urged the Government to proceed cautiously with an untried and untested model, and we noted that economies of scale would not work if the fees were so low and geographical distances within areas covered by the duty solicitor contracts so vast as to prove uneconomic.

60. We noted that the proposed 8.75% fee reduction in early 2014, without any compensating increase in volume or any opportunity for the market to adjust and consolidate was, while preferable to an instant 17.5% average cut, a very disturbing plan, given the present parlous state of firm finances (paragraph 3.53). It was our view that the introduction of an immediate 8.75% cut without prior consolidation would push most firms over the edge and they would not be in a position to survive to apply for Duty Provider work the following year. The full effect of the cut has not yet been seen, since it applies to new cases taken on after the cut was introduced. But I am aware, anecdotally, of criminal legal aid firms that are closing. Hardly a week goes by without the Law Society Gazette reporting that yet another criminal / legal aid firm closing or being closed. I attended a professional event in March after which two solicitors came to tell me that they were closing down their firm if there was nothing that could be done to prevent the cut.

61. In our response, we tried to address each of the four "factors" identified by the Government that would determine the number of Duty contracts to be awarded. However, as we had no information about the Government's plans other than these very broad factors, there was inevitably a limit to what we could say. We stated that:-

(a) Most firms believed that if they did not succeed in obtaining a Duty Provider contract, they would ultimately lose their own client work. This is for the obvious reason that all firms rely on duty work to replenish their own client base - as old clients fade away, duty clients are converted into an own client. New Duty Providers would not have the immediate increase in volume to compensate for the reduction in rates if the own client firms remained for any prolonged period. Two undesirable outcomes would follow – (i) the death of "own client only" firms through the drying up of fresh clientele replenishing

their practices from the duty schemes; and (ii) the "successful" duty firms dying from lack of promised volume by the non-duty own client firms clinging to life.

(b) Sufficient supply to deal with conflict of interest: we raised concerns that this would not be sufficient. There was a very real risk of conflict of interest with so few firms remaining in duty work. We queried what would happen if there are more than four defendants or more than one or two firms are not in a position to act for professional reason for a particular client or clients (see paragraph 3.31, WOW/3/A8/ p721).

(c) Sufficient case volume to allow fixed fee schemes to work: We noted that the cuts proposed were so large that a 3% reduction in any one year could be the difference between the survival of a firm and disaster. The profit margins are so tight that even this superficially minor variation would lead to collapse of some firms.

(d) Market agility: we were not opposed to consolidation in principle, but considered it absurd that under the proposals, some firms would have to scale down their businesses.

(e) Sustainable procurement: we noted that market forces would be substantially offset by the loss of duty work which keeps even the best firms "ticking over". It would be next to impossible for those providers without duty contracts to build enough scale to compete in a future round of procurement. Once firms lose their duty work, none of them would survive to bid in the next procurement round.

(f) Delivering duty provider work in sufficient volume and value to be sustainable in its own right. We did not know what the Government meant by this. Was it envisaged that the duty work should be sustainable independently of additional own client work? We stated that we were skeptical that duty contracts could ever be sustainable in their own right without own client work. Having lots more (duty) work to do on an almost entirely uneconomic basis simply meant that firms with greater volume would do more work at a loss. The rates on offer were too low to ever make duty work sustainable in its own right (see paragraph 2.31)

62. We concluded by stating that should these proposals be introduced, there would be a fairly rapid collapse of the whole profession involved in criminal practice, with massive harm done to the criminal justice system. We did not want to be constantly battling with Government over legal aid, but it was deeply concerning that such profound changes, upsetting the constitutional balance in removing the citizen's ability to stand up to the power of a State funded prosecution, could be made at the stroke of a Ministerial pen without any vote in Parliament or any proper inquiry. We once again offered to help the Ministry of Justice to find answers to the problem of establishing a more efficient and cost effective criminal justice system, through the medium of a fast track and evidence-based inquiry.

63. The LCCSA raised similar concerns (WOW/3/A9/ p730 – 757), noting that the required savings of £220 million were already being made due to factors such as reducing crime rates, arrest rates, charging rates, the effect of means testing, and the reduction in fees for the more serious cases (paragraph 24(a)). The LCCSA shared our objection in principle to the idea of separating Duty Provider work from Own Client work (paragraph 38), pointing out that very few firms would be able to survive without a Duty contract and the resulting 40% loss of turnover. The proposed methodology for determining the number of contracts for Duty Provider Work would lead to the death of own client firms. The cuts and restructuring proposed would cause irreparable damage to the criminal justice system. The LCCSA also pointed out the particular effects of the proposal in London, where Duty Provider work accounts for a greater percentage of an individual firm's work (more than the national average of 40%), there is greater travelling time and the proposed fee cuts were in the magnitude of 30% rather than the average figure of 17.5%.

64. The Law Society responded to the consultation on 31 October 2013 (WOW/3/A10/ p758-769). The Society reiterated its opposition to proposals for uneconomic or inappropriate fee structures, and highlighted concerns about flat fees in the Courts and imposing a single national fixed fee for police station work. It repeated its position that a proposed reduction of 17.5% was unlikely to be sustained by many criminal law firms, as many firms are in a very fragile financial position (due to legal aid remuneration not increasing since 1993, with year on year reductions despite the growing costs of running a business). The Law Society welcomed the Government's commitment – demonstrated by the joint commissioning of Otterburn to conduct an independent research exercise – of the need to base the final number of duty

solicitor contracts on the best available evidence. The Society repeated its message that the final number of contracts should reflect the maximum possible number compatible with financial viability (paragraph XIII).

65. The Law Society agreed in principle with the proposed methodology for determining the number of contracts for Duty Provider Work, so long as there was maximum possible flexibility with respect to the types of bid permitted. At paragraph 3.3, the Law Society stated that:-

> *"The Law Society therefore welcomes the ongoing cooperation with the MoJ with respect to the jointly commissioned research that will form a* key part *of the decision-making exercise as to the number of contracts for Duty Provider Work. It is vitally important, in the Society's view, that the maximum possible number of contracts – subject to a financial viability test – is set via the best available evidence."*

66. The Law Society reiterated its opposition to proposals to further reduce rates of remuneration for legal aid work. At paragraph 5.2, it stated:-

> *"Evidence has consistently highlighted the financial fragility of a large number of criminal legal aid firms. The Ministry therefore needs to be very sure that its supplier base is robust enough to withstand this cut before taking the risk of proceeding with it."*

67. In the Law Society's press release, Mr Fluck commented "We are confident that, with some modifications, the Ministry of Justice's proposals can ensure that anyone accused of a crime and unable to meet the costs of legal representation has access to a high quality defence solicitor of their choosing" (WOW/3/B/ p1071-1072). In relation to the issue of procurement areas, the Law Society confirmed that the Otterburn research jointly commissioned with the Ministry of Justice "will provide the essential evidence needed to decide the final number of duty solicitor contracts." The CLSA agreed about the importance of the empirical evidence, but disagreed with the Law Society's other views in this press release. On 4 November 2013, I wrote to Mr Fluck (WOW/3/B/ p1073-1078) to express my shock and concern at what he had been quoted as saying and to make it clear that the Ministry of Justice's proposals, even with 'some modifications' would not have the result suggested.

68. The Lord Chancellor responded to my 21 October letter on 4 November 2013 (WOW/3/B/ p1079) confirming that the need to save £220 million per year was unavoidable and confirming that savings through case volumes and reductions in rates to date were not sufficient to secure that reduction. He confirmed it would be useful to meet, referring to a meeting being arranged by the Law Society with specialist practitioner groups.

69. Akthar Ahmed, the President of the LCCSA at the time, wrote to the Law Society on 4 November 2013 (WOW/3/B/ p1080-1081) setting out a number of concerns about the Law Society's position in relation to the Government's proposed legal aid reforms. In particular, he stated "Reviewing the events since May onwards the Law Society has been continually at odds with both its members and representative organisations. The message that the Law Society has sent out is defeatist, that campaigning is pointless and that the MOJ cuts and consolidation juggernaut is unstoppable because there is no political will to defend legal aid and the public just do not care enough." With reference to the campaign which led to the u-turn on the critical issue of client choice, Mr Ahmed stated "instead of capitalising on the success of the campaign you disastrously proceeded to negotiate a deal without mandate or even agreement from the key legal experts within your own ranks. No amount of spinning can dissipate the real anger and disappointment many feel."

70. I am aware that Mr Fluck of the Law Society responded on 5 November 2013 (WOW/3/B/ p1082-1084) stating "Whilst the Society chose a different influencing strategy to that favoured by yours and other representative groups, our core objectives are very similar." With respect to its strategy, he stated "The decision to engage with the MoJ was not taken lightly. However, based on the Society's substantial experience of trying to influence Government across a number of policy areas, we took the view, after much deliberation, that the best way to influence is to present clear and cogent factual evidence and to work through the issues directly with ministers and officials."

71. The roundtable meeting with the Lord Chancellor, the Legal Aid Minister and various Ministry of Justice officials which had been referred to in the Lord Chancellor's letter of 4 November 2013 took place on 13 November 2013. I attended on behalf of CLSA together with representatives from big and small firms from all over England and Wales as well as representative groups including the LCCSA. Mr Fluck and Mr Hudson of the Law Society attended. During the meeting, various issues were

discussed. The Lord Chancellor said that if the March cut of 8.75% were not made, the whole cut might be made in September, bringing forward the second cut of 8.75% and the two contract approach which had been proposed to commence in 2015. He also confirmed that the Government would follow the recommendations of the Otterburn report. Responding to suggestions that legal aid spend was declining, the Lord Chancellor said that his advice was to the contrary but he invited practitioners to try and prove otherwise. The Lord Chancellor said that he would look again at police station fees in London (where, on average, fees were being cut by over 30% rather than 17.5%) and escape payments. I produce the note taken by Paul Harris of the LCCSA of this meeting (WOW/3/B/ p1087-1090).

72. By 20 November 2013, arrangements were in place with the Law Society to jointly commission a report from a research consultancy named Oxford Economics to test whether the legal aid cuts proposed by the Government would be necessary in order to secure the necessary savings over the next five years, or whether those savings would be achieved anyway by changes which had already occurred, and would occur in the future, within the criminal justice system. This report was funded 50% by the Law Society and 50% by CLSA, LAPG, BFG and the LCCSA.

73. A Practitioner Group meeting took place on 25 November 2013, which I attended. Richard Miller (the Head of Legal Aid at the Law Society) noted that there was a near final draft of the Otterburn report and Dr Patricia Greer (Head of Corporate Affairs) confirmed that she would circulate the report (although in the event this did not happen). Mr Miller also noted that KPMG would be doing some modelling on the Otterburn data. To the best of my recollection, this was the first time that I (and the CLSA and LCCSA) was made aware of the fact that KPMG had been engaged to undertake modelling. My understanding, although I cannot now recall when I first learnt this, was that in relation to both Otterburn and KPMG, the Law Society had entered into some form of confidentiality undertakings with the Ministry of Justice which meant that they considered themselves unable to share information about them. I understand that in the response to the pre-action letter, it has been said that the Law Society "...was closely involved in instructing and commenting on Otterburn's and KPMG's research and drafts of their reports. Otterburn and KPMG gave presentations to MoJ and the Law Society about their conclusions. Both the MoJ and the Law Society discussed with KPMG the assumptions which underlay KPMG's conclusions..." Until receipt of that response, I had not been aware that the Law Society had played such a role, in particular in relation to KPMG, although as

set out at paragraph 126 below, after publication of the KPMG report the Law Society did explain how one of the assumptions came to be made.

The Vote of No Confidence in the Law Society

74. During this period, a request was made by other practitioners in accordance with Law Society Bye-Laws for a special meeting to consider a resolution that "the meeting has no confidence in the ability of Nicholas Fluck, President of the Law Society of England and Wales, and Desmond Hudson, Chief Executive of the Law Society of England and Wales, to properly and effectively represent those members of the Society who undertake publicly funded legal aid work in negotiations with the Lord Chancellor as to the future and extent of criminal legal aid in England and Wales on the grounds that they purposed to enter into an agreement with the Lord Chancellor without a mandate from those members of the Society who practise publicly funded criminal law and in circumstances where the purported agreement was to the detriment of and against the will of those members and to the maintenance of sustainable legal aid service to those subject to criminal proceedings."

75. This Special General Meeting took place on 17 December 2013 and after views were expressed both for and against the resolution, it was carried by 228 votes to 213 (WOW/3/B p1091-1095). The CLSA and LCCSA remained neutral in relation to this vote.

76. At this stage at the very latest, the Lord Chancellor can have been under no illusions that the Law Society did not speak for all criminal practitioners.

77. The report commissioned by Oxford Economics was completed (WOW/3/A11/ p770-797) and sent to the Lord Chancellor on 13 January 2014 by Ms Hill of the LCCSA (WOW/3/B/ p1096). Ms Hill asked for a meeting with the Lord Chancellor given her understanding that he had met with the CBA earlier that week. This report confirmed that two thirds of the savings which were being sought would in any event be made through falling crime rates without the need to cut legal aid rates any further. I was also aware that the Lord Chancellor had met with the CBA that week and I therefore wrote to the Lord Chancellor on 13 January 2014 (WOW/3/B/ p1097) also asking for a meeting with representatives of the CLSA. The Lord Chancellor responded to Ms Hill on 17 January 2014 (WOW/3/B/ p1098) stating that there were shortcomings in

the methodology used by Oxford Economics and therefore he was unable to accept the conclusions from the work. He did not respond to her request for a meeting. I emailed the Lord Chancellor on 31 January 2014 (WOW/3/B/ p1103) to remind him of the CLSA's request for a meeting, which he had not answered.

78. However, the Lord Chancellor in his reply on the day after receiving the Oxford Economics report stated that the MoJ based their budgets on a level rate of cases in the CJS, which had been proved to be accurate within 1%. This was in fact incorrect. It is true that they based the expected costs on a level number of cases despite the obvious trend to fewer cases, but their estimate was 5% out and not 1% out as claimed by the Lord Chancellor. The MoJ over-estimated the 2012/13 spend by £50 million – i.e. they were out by 5%. The Oxford Economics report shows that if you factor in a falling volume of cases in the CJS, £86 million extra will have been saved from falling volume alone from 2012/13 to 2018. We took the view that the Lord Chancellor was simply dismissing the Oxford Economics report because its figures were unhelpful to him.

79. On 20 January 2014, Mr Hudson of the Law Society wrote an article in the Gazette entitled "Next Steps on legal aid" (WOW/3/B/ p1099-1100) in which he confirmed that further to the publication of the second consultation in September, "in the absence of a common position, it was decided that the MOJ's final position would be based on two independent published studies from Otterburn and KPMG." The purpose of the reports was to "inform the decision as to the approach and its practicality, and issues concerning rural provision and the maximum possible number of duty contracts compatible with long-term financial feasibility." He further stated "The Law Society placed considerable importance on a fact based basis for the duty contract in the absence of common agreement."

80. At this time, the CLSA and LCCSA spearheaded the formation of the National Justice Committee formed by those involved in criminal legal aid at the highest level who are opposed to further cuts to legal aid. This included circuit leaders, CBA, CLSA, LAPG, LCCSA, Justice Alliance and BFG. The Committee was formed in response to the vote of no confidence passed against the Law Society. The Law Society had diminished its credibility as a negotiating body by its failure to represent the profession's overwhelming concerns about the Ministry of Justice's proposals. Ms Hill wrote on 27 January 2014 to the Lord Chancellor (WOW/3/B/ p1101-1102) informing him of the formation of the National Justice Committee and asking for him

to suspend the implementation of cuts and to engage with the Committee to find alternative savings and greater efficiencies within the criminal justice system. He responded to Ms Hill on 4 February 2014 (WOW/3/B/ p1105) referring to a Law Society roundtable the following week to which he understood that the members of the National Justice Committee would be invited. Ms Hill responded on 11 February 2014 (WOW/3/B/ p1107) pointing out that the Law Society's meeting was arranged for solicitors and asking that he meet with both solicitors and barristers together. We wished to remain loyal to our friends at the Bar as we had agreed with them not to negotiate separately. I am not aware whether the Lord Chancellor responded to this request.

81. Meanwhile, on 7 February 2014, Ms Hill wrote to *The Times* (WOW/3/B/ p1106). She pointed out that the National Justice Committee believed "that the savings sought by the Ministry of Justice can be achieved without cuts, however there is a problem with access to information. The Ministry of Justice is suppressing important reports, by KPMG and Otterburn Legal Consulting, which analyse proposed changes in the supply of defence work, and the Legal Aid Agency will not disclose its raw data or financial models." She called on the Ministry of Justice to release the reports before it published the consultation response. She also called on the Legal Aid Agency to allow expert analysis of its database. She stated "Without disclosure how can there be an informed debate as to whether the cuts and reforms are sustainable or irreversibly harmful?" The CLSA supported Ms Hill in making these public requests of the Ministry of Justice.

82. The roundtable meeting with the Lord Chancellor took place on 11 February 2014 at the Law Society. The representatives of the Law Society in attendance, including Mr Hudson and Mr Fluck, did not participate in the meeting. The Lord Chancellor confirmed that the Government response to the second consultation would be published imminently. The Lord Chancellor was asked whether the Otterburn and KPMG reports were going to be published at the same time as the consultation response. He confirmed that they were. The Lord Chancellor acknowledged that this would not give us an opportunity of commenting on the reports before the response was published. He reiterated that in the absence of common agreement, he would be using this independent evidence commissioned with the Law Society to inform the number of duty contracts. The Lord Chancellor confirmed that the Government would be proposing a dual contract system and that the work being undertaken was "designed to recommend the number of duty contracts that are needed to make the

system work." At the conclusion of the meeting the Lord Chancellor was given a set of questions prepared by the Justice Alliance, which I produce along with my note of the meeting (WOW/3/B/ p1108-1116).

83. On 13 February 2014, I attended a Practitioner Group meeting by telephone. The Law Society reported that it was in a difficult position. If they disengaged from the Ministry of Justice, it was feared that the Lord Chancellor would take a hard line and as few as 300–350 duty contracts would be available. If it continued to engage, whilst taking soundings from the profession, they believed that there may be as many as 750 duty contracts. It was said that the Law Society wanted to engage with the organisations represented on the Practitioner Group by setting up confidential meetings with them, but that it had not yet done so.

84. The Law Society confirmed that it had not seen a final report from KPMG but believed that this was imminent. The Law Society stated that it did not see any reason why the Lord Chancellor could not publish the reports before the publication of the Government response. Although it could only speculate on the contents of the KPMG report, the Law Society believed that the report would suggest ways of delivering a model to determine how many duty contracts were needed within the 63 CJS Areas and what successful duty contract holders would need to do to scale up in readiness for the contract. It was said that the viability threshold would be arrived at by looking at the Otterburn survey and that it was a possibility that the number of duty contracts may be higher or lower than previously proposed. My view at the conclusion of this meeting was that the Law Society wanted to engage with the Ministry of Justice, with the support and involvement of the CLSA and the LCCSA, in relation to the number of duty contracts so the profession would be reassured that the three bodies had done all that was possible to secure the best possible outcome in the circumstances. The implicit threat from the Lord Chancellor was that if the profession failed to engage, the number of contracts may well be lower than the 400 already suggested.

85. A confidential telephone conference attended by Mr Fluck, Mr Hudson, Mr Murray and myself took place on, I believe, 18 February 2014 to alert us to the fact that the Government's response to the second consultation was imminent. The Law Society also told us that the KPMG report was "virtually ready" and about a "day away". Mr Fluck/Hudson reiterated the fact that they could see no reason why the Lord Chancellor should not publish this report, along with Otterburn report, before his

response. I again emphasized that it was essential that those reports were released for information and discussion purposes before the publication of the response. I learnt during this call that the Law Society had been consulted on the basis of the model which was going to be proposed by KPMG in its report. Mr Hudson stated that this involved working out highs and lows in each contracting area in order to make recommendations as to what would be the minimum viability number of Duty Providers in each area. None of these matters had ever been raised with myself, the Practitioner Group, the CLSA or any other representative body more generally before this date. Mr Hudson also stated for the first time that the Law Society did not agree with the dual contract structure and they had not signed up to this, as had been presented by the Lord Chancellor. Both Mr Murray and I were astonished when Mr Hudson said this. I said to Mr Hudson that I was rather surprised to be told this because we had understood from the announcement made at the time of the publication of the second consultation that the Law Society had signed up to the concept of the two tier contract. Mr Hudson repeated that the Law Society did not agree with the two tier contract and said that although the Lord Chancellor had presented it as if the Law Society had signed up to it, they had not.

"Transforming Legal Aid – Next Steps: Government Response".

86. The Government published its response to the second consultation on 27 February 2014, in "Transforming Legal Aid – Next Steps: Government Response" (WOW/3/A12/ p798-890). The outcome of the second consultation, in relation to the number of duty contracts that are to be tendered, was an increase to 525 in total. The expressed intention was that these contracts should be awarded in early 2015 and commence in June 2015. In relation to Own Client Work, the contracts were due to be awarded in mid 2014, with the tendering process beginning in April 2014. In relation to the fee reduction, the initial 8.75% reduction was to take effect from 20 March 2014.

87. On the same date, the Government also published the Otterburn and KPMG reports. The Otterburn report (WOW/3/A13/ p891-992) stated that the firm had been jointly appointed by the Law Society and the Ministry of Justice to undertake research into a number of matters including: "the current financial position of criminal defence firms; firms' views on the size of the contract they would need to deliver a viable duty and own client contract; and, the ability of firms to expand and to do so quickly enough to the scale that would be required to deliver the contracts."

88. The KPMG report was entitled "Procurement of Criminal Legal Aid Services: Financial Modelling" and was accompanied by a covering letter from KPMG to the Ministry of Justice dated 25 February 2014 (WOW/3/A14/ p993-1056). KPMG had been appointed by the Ministry of Justice "to provide quantified financial analysis in order to inform the Ministry of Justice as it considered the question: 'For each procurement area, how many contracts should be let in order to create a sustainable market at the reduced rates?'" An amended version of the KPMG report was subsequently published on 14 March 2014. I saw both reports for the first time on 27 February 2014, as part of the response to the second consultation. I explain in the next section below the key role played by these reports in the Government's decision-making.

89. Also on 27 February 2014, the Lord Chancellor laid the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2014 (SI 2014/415) before Parliament. These Regulations, which introduced the first 8.75% reduction in fees, were made by the Lord Chancellor on 26 February, the day before the response to consultation was published, and came into force on 20 March 2014.

90. The CLSA, the LCCSA and other practitioner groups that had been working alongside us, were dismayed that the Government response had been delayed so long and was published just 21 days before the first fee reduction of 8.75% would come in force. We were shocked to discover, upon learning of the conclusions of the Otterburn report, that the Ministry of Justice had not adopted those conclusions, as promised by the Lord Chancellor. We were also shocked to find, upon reviewing the KPMG report, that its conclusions were based on a large number of misconceived assumptions on which the profession had not been consulted. I describe these misconceived assumptions below at paragraphs 105 - 143, and explain how we would have sought to correct these errors if we had only been given the opportunity to do so..

91. On 27 March 2014, the Lord Chancellor announced changes to some of the decisions that had been announced a month earlier in "Transforming Legal Aid – Next Steps: Government Response". One of those changes was that the Ministry of Justice had "agreed that, prior to putting before Parliament the second fee reduction, it will consider and take into account the following factors: Sir Brian Leveson's review to identify ways to streamline and reduce the length of criminal proceedings; criminal

justice reforms, such as digitisation, which will increase efficiency and affect how advocates work; and any impacts from earlier remuneration changes". The announcement went on to say, however, that "Providers should plan and bid for duty and own client contracts on the basis of the second 8.75% reduction...".

92. I am aware that Ms Hill wrote to the Lord Chancellor on two further occasions, 11 April 2014 (WOW/3/B/ p1117) and 15 April 2014 (WOW/3/B/ p1118), on behalf of both the LCCSA and CLSA, asking for a meeting. She received a response on the Lord Chancellor's behalf from Dr Elizabeth Gibby dated 16 April 2014 (WOW/3/B/ p1119) simply stating that the "LCCSA and CLSA member had already several opportunities to air views with the Lord Chancellor in relation to the legal aid programme, most notably through the round table events organised by the Law Society which took place in November 2013 and February 2014, as well as through the separate provider group meetings. I should add that other MOJ ministers have also held or attended a wide array of meetings with members of the legal profession, some of whom would have inevitably been affiliated with the LCCSA and CLSA." For this reason, and with reference to the pre-action letter sent in the current judicial review proceedings, Dr Gibby confirmed that it would not be appropriate for the Lord Chancellor to meet with us. I wrote on 25 April 2014 reiterating the request for a meeting (WOW/3/B/ p1120-1121) and again on 2 May (WOW/3/B/ p1123-1124). Ms Hill wrote again on 29 April 2014 (WOW/3/B p1122) pointing out why the reasons given in the letter dated 16 April 2014 were inadequate and again asking for a meeting. Dr Gibby replied to me on 9 May (WOW/3/B/ p1125) to say that the Lord Chancellor was unable to accept our invitation to meet.

The significance of the Otterburn and KPMG reports

93. As I have already noted, according to the second consultation paper, the Otterburn report was commissioned to inform the Lord Chancellor's analysis of sustainability and the final decision on the number of contracts for Duty Provider work (paragraph 3.33). The KPMG report was commissioned to provide quantified, financial analysis on these issues, and to reach a conclusion on how many Duty Provider contracts should be let in each procurement area in order to create a sustainable market at the reduced rates. The reports went directly to one of the Ministry of Justice's key questions set out in the second consultation document: "For each procurement area, how many contracts should be let in order to create a sustainable market at reduced rates?"

94. Indeed, the issues which they considered were fundamental to the package of reforms as a whole. The number of Duty Provider contracts would determine how much change there would have to be in the market as compared to the current position – how large firms would be expected to become, how many firms would have to close, whether Duty Provider work was going to provide sufficient income going forward etc. The issue of sustainability was closely related and also threw into sharp focus the dangers inherent in the fee cut which had been proposed. The consequences of getting the answer to the key question wrong would be devastating to the criminal legal aid profession.

95. The Government's response to the second consultation confirmed the importance of the Otterburn and KPMG reports (WOW/3/A12/ p798). For example:-

(a) At paragraph 9 – the response stated that the number of duty contracts being offered had been informed by the independent research jointly commissioned with the Law Society.

(b) At paragraphs 20 and 21 – the response set out the five factors which were to be considered in determining the number of Duty Provider contracts. At paragraph 22, the Government stated that in order to inform consideration of these factors, assessment of the market, and to assist in determining the number of Duty Provider Contracts to offer, the Government commissioned jointly with the Law Society, reports from Otterburn and KPMG.

(c) Paragraph 27 sets out what the Government describes as "a key departure" from the factors originally set out in the second consultation document, as they no longer assumed that Duty Provider work contracts had to be large enough in value to be sustainable in their own right. The Government now proceeded on the basis that providers would wish to retain some of their Own Client Work, and had asked KPMG to model on the basis that providers would give up 50% of their Own Client Work. It was stated that this figure "best represents how providers are most likely to react in the new market".

(d) At paragraph 33 the response confirmed that the independent research provided "an important evidence base" for determining an appropriate range of Duty Provider Work contracts to offer in each procurement area.

(e) At paragraph 37, the response confirmed the role played by the independent research, and adopted the maximum number of Duty Provider Work contracts suggested by KPMG, i.e. 525 contracts. This is a reduction of more than 1000 contracts from the current position.

96. I have never been told *why* the Lord Chancellor and Ministry of Justice refused to disclose the Otterburn and KPMG reports ahead of the publication of its response to the second consultation. Disclosure would have enabled the specialist practitioner groups who had asked to see the documents to comment upon their findings and recommendations, to give views on this "important evidence base" and upon the "key departure" from the methodology set out in the second consultation paper.

97. Having reviewed the Otterburn and KPMG reports, there are a number of points that the CLSA and the LCCSA would have wanted to have made in representations to the Lord Chancellor and Ministry of Justice before they took the decisions set out in the Government response to the second consultation, and ahead of the almost immediate implementation of the first round of cuts. I set out below at paragraphs 105 - 143 the ways in which KPMG relied upon inaccurate or incomplete information and assumptions to underpin its financial modeling.

Issues in relation to the Otterburn report

98. The Otterburn report was commissioned to consider three particular issues, including the volume and value of contract needed to ensure viability and thus the number of contracts that can be awarded; the size of procurement areas and the impact that has on the costs firms incur; and the ability of firms to expand and to do so quickly enough to the scale that would be required to deliver the contracts. Otterburn was asked to research the current financial position of criminal defence firms, the firm's views on the size of contract they would need to deliver a viable duty and own client contract and the impact of the proposals on firms that would just have an own client contract.

99. The Lord Chancellor promised that he would follow the recommendations of the Otterburn report. Yet the Otterburn report reached a number of clear conclusions which the Government did not even address in their response, still less act upon. The report states that the Ministry of Justice had recognised "the need for an evidence based approach" and the report summarises the "principal findings and conclusions to emerge from that evidence." However, the conclusions of the report have been largely ignored by the Ministry of Justice in going ahead with their proposals.

100. To give some examples drawn from the Executive Summary of the Otterburn report, it is concluded, based upon the comments made by participants in the survey, the quantitative data analysed and the firm's considerable experience in the sector:

- that any fee reduction should take place after not before market consolidation;
- that few firms could sustain the overall fee reduction of 17.5% on average, which would be very much greater in some parts of the country.
- that few firms would be able to invest in the structural changes needed for a larger duty contract and to recruit new fee earners.
- that the CJS areas were not suitable as a basis for procurement areas without amendment.
- that a different approach should be adopted in rural areas, where the market was already consolidated.
- that the number of firms which could grow reasonably rapidly was limited, and their ability to grow was restricted by financial constraints.

None of these conclusions was acted on by the Ministry of Justice.

101. In the body of the report, Otterburn finds that on average firms were achieving a 5% net profit margin in crime with larger firms of 40+ solicitors achieving lower margins than smaller firms (WOW/3/A13/ p911-912). This runs contrary to the Government's assumption that economies of scale will provide better financial viability and allow lower costs. In fact the evidence is that larger firms have smaller profit margins and can therefore afford the fee cuts even less than smaller firms. Seeking to force consolidation is to act completely contrary to available evidence. Otterburn also notes that the impact of previous fee reductions had not yet fully worked through in respect of Crown Court cases, and that it would not be until those cases closed that firms would fully feel the impact of the reductions (WOW/3/A13/ p 912). Firms in London are the least profitable. Two thirds of London firms had a profit margin of less than 5% (WOW/3/A13/ p 916) and this makes London particularly vulnerable to these fee changes.

102. The report goes on to state that the finances of many crime firms are fragile. Most do not have significant cash reserves or high excess bank facilities. The Otterburn report specifically warns against making the first reduction of 8.75% before there has been any opportunity for the market to consolidate. Profitability would be significantly weakened before they had managed to secure additional volume. Many participants informed Otterburn that they had already made such costs savings as they could and had little opportunity to reduce overheads further. Yet this cut was introduced against the weight of this evidence three weeks after the response was published.

103. Firms were asked to indicate the minimum contract value needed to undertake a combination of duty work covering the procurement area, and own client work, for the business to be viable in a world with a 17.5% cut in fees (WOW/3/A13/ p927). The size of the contracts that firms said in the survey that they would require for duty and own client work to be viable are significantly greater than the value of the contracts which will actually be on offer following the KPMG report: being £600,000 for rural areas, £1.2 million for urban areas and £1.1 million for London (WOW/3/A13/ p929-932). The rates of overall growth that would be required to reach such levels would be challenging in urban and rural areas. Few firms would be sustainable in the medium term without duty work. The overwhelming strength of opinion was that own client only contracts were not viable beyond a relatively short period of time. Most firms would make a loss on such contracts within the first year (pg WOW/3/A13/ p941).

104. Had the Otterburn report been disclosed prior to the publication of the response, we would have been able to highlight to the Ministry of Justice the areas of concern which had been raised and to make alternative proposals on issues where Otterburn had disagreed with the Ministry of Justice's proposed approach, in each case supported by evidence from our members. Such comments would have been particularly valuable when viewed against the background of the Lord Chancellor's commitment to accept Otterburn's conclusions. We would also have been able to highlight the areas in which KPMG's assumptions and analysis are inconsistent with the conclusions set out in Otterburn (such as KPMG's assumptions with regard to growth capacity of firms and firm viability).

Matters upon which representations would have been made had the KPMG report been disclosed

No evidence of further consideration by the Ministry of Justice of issues raised by KPMG in their report

105. There are various issues within the KPMG report which it had identified needed further consideration (WOW/3/A14 p1002, 1005). In particular, KPMG recommended a review by the Ministry of Justice of each procurement area and in particular the results with reference to the assumptions made. For those areas, like London, where further consideration is required, it was recommended that the MOJ should consider:

(a) The capability of incumbents to grow\likelihood of procurement attracting out of area providers to enter the market

(b) How staff efficiency improvements required reflect the local context

(c) The proportion of market consolidation achievable

(d) The special position of London

(e) The issues with firms (especially in London) bidding across areas

(f) The non-financial factors

These were matters on which the profession would certainly have had a view, and important information to convey to the Ministry of Justice.

106. At the time of finalising the report, KPMG comment that the Ministry of Justice had begun to consider these factors [WOW/3/A14/ p1005]. However, the report was finalised on 25 February 2014, just two days before the Ministry of Justice published its response to the second consultation setting out its decision on the availability of

duty contracts. I therefore question the extent to which even the Ministry of Justice considered the issues which had been identified for further consideration by KPMG. There was almost no time between receipt of the final report and publishing the response and as far as I know there was no contact with the practitioner groups to discuss any of these issues. These are key issues given that most firms without a duty contract, especially in London, would not survive the four years before the next contract round. In the pre-action letter sent to the Lord Chancellor, our solicitors have sought disclosure of documents relevant to this issue, but the Lord Chancellor has, so far, not provided the documents requested.

Lack of reliability of primary sources of evidence

107. KPMG's report was commissioned to answer the question of how many contracts should be let in each procurement area to create a sustainable market at reduced rates. In writing the report, KPMG relied upon information from the following primary sources (WOW/3/A14/ p 994):

(a) Ministry of Justice internal management information

(b) Representations made by the management of the Ministry of Justice

(c) The Otterburn report

108. It is noted that KPMG has not "sought to establish the reliability of the sources by reference to other evidence" and therefore were entirely reliant upon the information from the Ministry of Justice and collected by Otterburn. Had the practitioner groups been given the opportunity to comment on the reports, there are various factual assertions which we would have wished to either clarify or challenge.

109. An important limitation in the reliability of the KPMG financial data analysis is that the Otterburn report has been their "principal data source and it is it is the most up to date and comprehensive available but it has limitations" which the KPMG report sets out at WOW/3/A14/ p1019. The main limitation of the Otterburn data is the sample size of 167 respondents, with only 157 providing financial data. This is less than 10% of the total number of 1599 firms undertaking criminal defence work. The other limitations upon the reliability of KPMG's data include the use of aggregated data, the use of annualised estimates, the lack of ability to assess whether there is excess capacity in firms (something that is assumed on anecdotal evidence), the large number of very small firms and the lack of information on multiple region firms. Had this report been disclosed earlier, it is likely that the LCCSA, CLSA or Law Society

would have instructed experts to consider how important these limitations are to the ultimate value of the figures produced by KPMG and, where possible, would have provided information which would have alleviated the limitations upon KPMG's data. As it is, the Ministry of Justice has proceeded to take decisions which will have devastating consequences for many criminal legal aid solicitors on the basis of manifestly incomplete and flawed data.

Factual inaccuracies within the Executive Summary

110. The KPMG report has been prepared by specialist consultants and consists of detailed statistical analysis. Had the report been disclosed, the CLSA and LCCSA would have been able to seek its own expert assistance with respect to the interpretation and reliability of the report, having regard to the underlying data, so that further issues could have been raised with the Ministry of Justice.

111. The various difficulties with the underlying facts and assumptions which I have identified below are based on my understanding of criminal legal aid practice in England and Wales. In certain instances, it may be that my understanding of KPMG's treatment of the underlying facts is mistaken, reflecting the fact that I am a lawyer rather than a statistician. However, this does not detract from the concerns that the CLSA and LCCSA hold with respect to certain fundamental misunderstandings of the nature of criminal legal aid practice, which must undermine the reliability of KPMG conclusions concerning the appropriate number of duty contracts.

112. In the Executive Summary, KPMG set out a "number of key market characteristics which will impact on the number of duty contracts which could be let." Many of the underlying facts stated by KPMG are simply wrong.

"There are anecdotal indications that there is latent capacity in the system as workload has declined without being matched by similar levels of staff reductions in firms." (WOW/3/A14/ p1000)

113. I have no idea what are the "anecdotal indications" of latent capacity which KPMG apparently gleaned from discussions with the Ministry of Justice (see WOW/3/A14/ p1025). As set out in Otterburn, firms cannot afford to have fee earners doing nothing, or working below full capacity, when profit margins are so tight. CLSA would

have been able to provide ample evidence that our members are not carrying any "latent capacity". This "fact" has been translated into one of the operating assumptions underpinning KPMG's financial modelling.

"The continued presence of competitive tension in the market over time is uncertain." (WOW/3/A14/ p 1001, 1004))

114. It is patently clear that firms not achieving a duty contract are unlikely to be able to survive for four years on Own Client work alone, particularly in London. Therefore, on the second round of tendering for contracts, there will be no firms left who could bid for contracts against the then incumbents, if indeed even the incumbent firms have managed to survive the first contract period. This is recognised by KPMG as a potential problem. In the view of the CLSA and the LCCSA, this is more than a potential problem, it is a certainty. Had the professional associations had the opportunity to comment upon the KPMG report, we could have made this point clear and provided evidence in support of our views. We certainly did make this point in general terms in our consultation response, but if we had seen the KPMG report we would have been able to relate our comments to the particular model which KPMG proposed, of 525 contracts, and also to comment on the effect of this matter on the assumptions made by KPMG and the conclusions reached on the basis of those assumptions.

KPMG's assessment of firms

115. KPMG report includes an assessment of firms, which is based upon the Otterburn data, from WOW/3/A14/ p 1011.

116. The average net profit margin of rural firms was 1.7%. The larger rural firms have an average loss of 6% whereas the medium firms have an average profit margin of 6.2%.

"The lack of profitability among larger firms appears to be counter-intuitive as greater economies of scale may be expected. Indeed, overheads as a percentage of revenue are lower among larger firms. The cost of staff among higher firms [sic] represents 84% of revenues, higher than small and mid-sized firms. A potential cause for this is excess staff capacity, which means that additional volume and value of work could be delivered without increasing staff numbers." (WOW/3/A14/ p 1013)

117. I believe this to be a baseless assumption. Staff costs are the highest overhead for solicitors' firms, which have to employ qualified staff in order to provide proper advice of appropriate quality. In fact, both Own Client Work and Duty Work contracts require firms to have supervisors who meet certain criteria, including particular amount of police station and court experience. Solicitors have to undertake advocacy and at the least accredited representatives have to attend the police station. However, the requirements to maintain duty solicitor status means that a significant number of police station attendances within a firm will have to be undertaken by solicitors. I would be extremely surprised if the actual cause of lack of profitability amongst larger firms was excess staff capacity – this simply does not match my knowledge of how large firms – indeed any firms – operate.

118. KPMG recount that in urban areas, larger firms appear more profitable than small firms. Here the average profit margin is only 6.3% with small firms averaging a loss of 4.8%, mid-sized firms an average profit of 8.3% and larger firms a profit of 8.9% (WOW/3/A14/ p 1015).

119. In London (WOW/3/A14/ p 1017), small firms make an average loss of 5.4%, medium firms an average loss of 9.9% and larger firms an average profit of 10.3% giving an overall average profit margin of 6.8%. The smaller table on this page also introduces a novel concept of the "unqualified solicitor". I can only assume that this means "paralegal", but it highlights the lack of understanding of the report writers concerning the operation of criminal legal aid practice.

120. None of these profit margins is high. It cannot be assumed that firms operating on these kinds of margins can withstand the further cuts of 17.5% which firms are expected to bear (and which in some areas will be higher, coming as they do on top of recent cuts, the effect of which has not yet fully been felt (as KPMG noted), and in view of there having been no increase in fees since 1997, and without giving the market any opportunity to consolidate. Indeed the Lord Chancellor himself said at the time of the initial consultation that he knew that firms could not take an across the board cut of 17.5% and that consolidation of the market was required. However, he has made an across the board cut of 8.75% without allowing any time for consolidation. He is pushing firms beyond the edge of viability and not allowing any opportunity for those firms to consolidate (even if consolidation into a larger more cumbersome entity would protect against economic failure).

121. Had we been provided with this data prior to the decision being made by the Lord Chancellor, these are points which the LCCSA and CLSA would like to have made.

Assumptions underlying KPMG's methodology

122. Although the broad factors which would be used in determining the number of duty contracts in each procurement area had been identified in the first and second consultations, the methodology used by KPMG to arrive at its recommendations regarding the number of duty contracts had not been disclosed. In particular, we were not aware of the assumptions which underpinned its modelling which are set out at WOW/3/A14/ p 1025. This table lists the source for these assumptions, which are either (i) "MoJ consultation paper"; (ii) "discussions with MoJ"; or (iii) "analysis provided by MoJ". It seems, from paragraph 28 of the Government response to the second consultation that one of these assumptions may have been discussed with the Law Society (i.e. the percentage of Own Client Work that providers would give up). As I explain below, this "assumption" was never discussed with the Practitioner Group, with CLSA or LCCSA or, so far as I am aware, any other criminal practitioners. This and other of the "assumptions" appear to have no factual basis and seem to me to be entirely misconceived. If we had known that these assumptions were going to be deployed in the key financial modeling which would underpin the Lord Chancellor's decision, CLSA and the LCCSA would have been able to provide a full and effective response to the second consultation and a number of misconceptions could have been corrected.

"Whilst the MoJ recognise that volumes may fluctuate going forwards, for this analysis it has been assumed that volumes remain constant at 2012 / 13 levels" (page 32, KPMG report)

123. There is no reasonable basis for the assumption that volumes are expected to remain stable in future. Crime rates have been falling and continue to fall. The research conducted by Oxford Economics showed that the number of cases coming into the CJS has been falling for the last 5 years (in line with crime detection rates) and KPMG themselves recognised on p. 14 of their report that the volume of legal aid acts of assistance had fallen by 7.7% between 2010-11 and 2012-13. Had we known that KPMG would be proceeding on the basis of stable volumes going forward, the CLSA would have been able to provide evidence to support an expectation of continuing falls in volumes and upon the impact of this assumption on

KPMG's analysis. As it is, one of KPMG's "key market characteristics" seems to be based on a Ministry of Justice assumption which runs contrary to the available statistics.

"The capacity analysis assumes that duty and own client work is interchangeable on the basis that the fee structure and work requirements are the same... the method applied assumes 50% of existing own client capacity would be available to deliver new Duty Provider contracts" (page 32, KPMG report)

124. In other words, it was assumed that firms with Duty Provider Contracts would give up 50% of their own client work in order to undertake duty work (and thereby could utilise existing capacity rather than having to take on new staff). Paragraph 28 of the Government response reads: "Following discussions with the Law Society, we acknowledged that in practice providers may wish to retain some of their Own Client Work, although these decisions will vary widely between different providers. Therefore, in order to maximise the number of Duty Provide Work contracts on offer and thereby reduce the consolidation challenge, we asked KPMG to model based on providers giving up no more than 50% of their Own Client Work. We think this departure from the intention set out in Next Steps is justified, as it assumes providers will retain some of their Own Client Work and we think best represents how providers are most likely to react to the new market." [WOW/3/A12/ p 809]

125. This is, quite simply, nonsense. Based upon my understanding of legal aid practice derived from my own experience and from the representation by the CLSA of hundreds of criminal legal aid practitioners, I do not believe that ANY firms with Duty Provider contracts would give up ANY proportion of their Own Client Work. No firm which has worked hard over years to build up their reputation and client following would ditch even one of their own clients, let alone half of their loyal clients, to allow them to represent others under a duty contract, who may, but may not, return as clients in the future. As is made clear in the Government Response (WOW/3/A12/ p 859), under the Duty Contract there will be no guarantee of any volume of work. Rather, "providers will be given an equal share of the police station and Magistrates' Court Duty Provider slots in the given procurement area over the life of the contract". The solicitor may pick up no work, some work or a great deal of work. Further, only some of these police station attendances may result in further case work and the type of work will vary. There is a big difference between a shoplifting matter and a drug conspiracy in terms of fees subsequently generated. In particular in light of that

uncertainty about what work can be obtained as a result of being a duty solicitor, the principal commercial reason for undertaking Duty Solicitor work is so as to expand a firm's own client base – today's duty solicitor client is tomorrow's own client or a source of referrals of work.

126. It is stated in the Government's response that this assumption was devised following discussions with the Law Society. I attended a Law Society Training Day meeting on 7 March 2014. At that meeting Mr Atkinson explained that in an earlier meeting between the Ministry of Justice, KPMG and the Law Society, KPMG had said that they felt that firms with a duty contract would give up all of their Own Client work and the Law Society had responded that firms would give up none of it. This disagreement does not provide any basis for the conclusion that firms would give up 50% of their Own Client work.

127. Had we been aware of this assumption, the practitioner groups would have been able to provide evidence that no firm would either wish to give up, or would even consider giving up, any of its Own Client work. This assumption was important to the calculation of the number of duty contracts to offer – if no (or less than 50%) Own Client work is sacrificed, there must either be more contracts, or faster and larger growth in firm size in order to service the duty work. Proceeding upon the basis of this mistaken assumption must render all figures produced unreliable.

"A 15% improvement in capacity has been assumed to arise from latent capacity already existing within firms and / or the reallocation of some staff (likely to be fairly junior) from other areas of the firm to work on criminal legal aid work." (page 32, KPMG report)

128. I have dealt above with KPMG's factual conclusion, based on "anecdotal indications" that there exists latent capacity within firms. The assumption that this could amount to as much as 15% across all firms is highly questionable and we would certainly have questioned it, with evidence, if we had known that it was going to be part of the financial analysis.

129. Further, there are very real practical obstacles to the suggestion that staff can be reallocated within a firm. Some firms only undertake criminal work. Even within multi-departmental firms, it would not make financial sense to move staff from profitable work to non-profitable areas such as crime. In any event, solicitors are not easily interchangeable across disciplines and it may take many years, and considerable

investment in training and supervision, for a solicitor to move successfully into criminal work. The assumption seems to be that unqualified graduates could be a "pool of untapped capability". However, with respect to non-qualified staff, it is not possible to send a paralegal without criminal experience to the police station without retraining her at expense to the firm as a police station accredited representative. These are all matters which we would have wished to raise to challenge this assumption which seems to me to be plainly wrong. We would also have pointed out that when he appeared before the Justice Select Committee in July 2013 (WOW/2/A6/ p385) the Lord Chancellor said that he wanted "...a quality service delivered by experienced and qualified solicitors and barristers...".

"Organic growth of 20% has been assumed to be achievable through increased recruitment capacity" (page 32, KPMG report)

130. The basis for this assumption is said to have been "discussions with MoJ" but I have no idea what information the Ministry of Justice relied upon as evidence for the contention that all firms could increase in size organically by 20%. Firms will be limited in their capacity for recruitment by the costs involved and the space available within their existing offices (in particular as the financial risks of taking on new space will be substantial in the current market). Had the report been disclosed, the CLSA and LCCSA would have consulted their members in order to provide actual evidence relevant to this assumption.

131. This assumption also has to be read alongside the assumption that firms can reduce their staff costs as a percentage of fee income by 20%. This will presumably require firms to reduce staff numbers or at least to sack higher qualified staff and replace them with cheaper less highly qualified staff, so the starting point for recruitment will be a loss of staff rather than organic growth.

"An initial assumption is applied of 20% average change in staff cost efficiency – this means that, for example, staff costs of 70% of revenue would reduced by 20% to 56% of revenue" (page 34, KPMG report)

132. This figure of 20% does not appear to be based on evidence. It is extremely unlikely that staff costs efficiencies of 20% can be made in any firm reliant on criminal legal aid revenues. These firms had, as Otterburn notes, already made as many cuts as are sustainable. Again, had we sight of the report, the LCCSA and CLSA would have

consulted with its members to provide more accurate information concerning the extent to which efficiencies in staff costs could realistically be achieved.

"For competition to exist, it is assumed that there must be at least two bidders per contract. Two have been assumed to be new entrants to the market and only 75% of incumbent bidders are assumed to be of scale."

133. This is another assumption which does not make sense and does not appear to be based on evidence. In a market where any new firms would have to be a significant size in order as to take on a duty contract, the costs of starting such a firm would be prohibitive when weighed against the risk of not winning a contract and the limited benefit of working at the rates available. Further, providing legal services is expensive given it has to be undertaken by qualified solicitors or accredited representatives who have undertaken some considerable training. Even the largest of businesses, like G4S, are unlikely to see much profit in this area of work. Had the CLSA and LCCSA seen the KPMG report, these points would have been made.

The firm viability assessment

134. KPMG set out a worked example of its approach to assessing firm viability at WOW/3/A14/ p 1026. It oddly uses a reduction of 10.7% whereas the Lord Chancellor's stated aim was a reduction of 17.5% on average (which will be higher in certain areas). Using the figures of this example, but applying a 17.5% reduction, the figures shows a total final profit of £0.0175m, which is just about half of the original net profit before the new contract and a profit to revenue figure of 2.9%. It therefore appears that these figures do not add up at the level of cuts the Ministry of Justice is introducing.

135. The example also assumes that the extra work expected by taking on a duty contract can be achieved with no increase in staff costs and only a marginal increase in variable overheads. I have outlined above why I consider it is inaccurate to rely upon the fact that there is latent capacity within firms.

136. The assessment of firm viability is also based on a number of assumptions set out on page 34, some of which lack coherency as follows.

"50% of own client revenue generated in the area being analysed is also assumed to be retained by a firm. The capacity to deliver the remaining 50% of own client in area revenue has been included with the capacity method (see page 32) Associated revenue has therefore not been included in the viability method" (page 33, KPMG report)

137. The retention of own client revenues is not understood. It is assumed that the assumption is that 50% of own client work in the area of procurement will be given up to enable duty work to be undertaken. For the reasons set out above, this simply would not happen.

"For the firm being assessed, we applied the cost ratios before the fee reduction. We then applied the fee reduction to revenues and calculated the profit. If the firm showed a positive profitability under the proposed number of contracts it was considered viable" (page 33, KPMG report)

138. The assumption here appears to be that any profit makes a firm viable, but this clearly does not reflect commercial reality for firms. A profit margin of 0.1% on a turnover of £1 million is £1000. This would be considered viable under this assumption but no firm owner would run a business with a turnover of £1 million for an annual income of £1000, and nor would any bank lend money to a firm operating under those circumstances.

139. The report sets out on page 35 the assumed cost-saving potential within firms. With respect to the latent capacity within firms, which I have commented upon above, the report states "There is potentially a pool of untapped capability that could reduce salary costs (for example 38% of College of Law graduates in 2010 were unable to get training contracts, albeit the majority of these managed to gain law related work eg. as a paralegal"). I am unsure whether the intended inference is that work of a legal firm should be done by paralegals and the use of qualified solicitors will become unviable if your firm is to survive. Whilst paralegals can perform an important function within a firm, they cannot represent people in court and without the firm bearing the cost (including training costs) of accreditation, cannot attend the police station.

Specific issues relating to the London legal market

140. In its response, the Ministry of Justice confirmed that "London provided a difficult challenge" (WOW/3/A12/ p 809, paragraph 29). KPMG stated that all London procurement areas required further consideration (WOW/3/A14/ p 1001-2). In its response, the Ministry of Justice confirmed that it asked KPMG to consider two options for London; nine procurement areas as originally suggested in its second consultation and given few firms currently have capacity to deliver the size of contract needed within the nine areas, an alternative approach was considered, splitting London into 32 areas based on the current police station schemes.

141. However, the tables on WOW/3/A14/p 1002 suggest that, even with this change, the figures do not alter very much. Market consolidation of around 50% is required either way. KPMG then developed an alternative scenario for London where four new entrants joined each London market instead of the two modelled elsewhere. As stated above, this does not appear to have any factual basis, a point which could have made to the Ministry of Justice if comments on the KPMG analysis had been permitted.

142. KPMG state that "further consideration is required to assess whether this level of market consolidation is achievable in the context of the London market and the propensity of firms to bid in multiple areas". The Ministry of Justice subsequently considered the KPMG and Otterburn reports, conducted an analysis with respect to the four factors within its second consultation paper and determined – on a basis which remains obscure - that London should be divided into 32 procurement areas. It does not appear that any real "further consideration" has been given to this problem by the Ministry of Justice.

143. It is possible that this aspect of the report has been misunderstood, in which case, had the LCCSA had the opportunity to comment upon it, the significance of the figures used could have been clarified. In any event, the LCCSA in particular would have wished to engage with the Ministry of Justice and provided assistance on these further considerations.

Why the information available in the second consultation did not allow an effective and lawful consultation

144. As I have explained above, in the second consultation paper, the Lord Chancellor identified the five broad principles that he would apply in determining the number of duty contracts which should be tendered, having regard to ensuring sustainability, and invited submissions on those factors. However, without the detailed material contained in the Otterburn and KPMG reports, it was not possible for the CLSA or any other body representing criminal legal aid lawyers to understand the proposal put forward by the Lord Chancellor or to be in a position to give a full and effective response to it.

145. We raised as many points as we could in relation to the general principles. However, we had no idea that the Lord Chancellor had provided a series of assumptions to KPMG that had been used by KPMG in informing the rest of its report. If we had been aware of those assumptions, we would have raised the points set out above to demonstrate that the assumptions were wrong. More importantly, the fundamentally flawed nature of the assumptions, as set out above, is such that we could not reasonably have been expected even to suspect that they would be used for the purpose of modelling to see if the dual contract proposal could be made to work.

146. In the response to the second consultation, the Government carried out what it described as a "sense check" on the KPMG analysis. The Government used the KPMG model and estimated that the average growth requirement for all contract bidders across England and Wales would be an average increase of one staff member to meet their "in area" duty contract work. This was crucial to the Government's conclusion that the dual contract approach, with 525 Duty Provider contracts, was realistic and sustainable. If we had been able to make the representations set out above, we would have been able to offer our own conclusions on how many extra staff would be needed on average (which would have been considerably more than one, in particular because, as set out above, Duty Providers would not give up Own Client work and so would need to be staffed on the basis that they would retain all of their Own Client work) and on whether the true number was sustainable in the light of Otterburn's conclusions.

147. The Government also assumed that the market would remain competitive in future tendering rounds. The assumption seems to be based on a belief that most of the

initial Duty Contract awards will be to consortia or delivery partners or members of joint ventures, with those firms involved then being able to bid, together or separately, in future tender rounds. I think it is highly unlikely that most initial awards will be to consortia etc. It is not at all clear what regulatory requirements there will be in respect of such arrangements. In addition, in the time available it is likely to be extremely difficult to undertake the due diligence work needed before entering into what for most firms would be a major commitment.

148. If we had been able to make these points to the Lord Chancellor, he would have had a materially different range of evidence to consider, and there is at least a realistic possibility that he could have reached different conclusions upon the principle and/or the detail of the dual contract structure and the 17.5% average fee reduction. He had, after all, revised proposals when faced with considerable opposition to PCT and abolishing client choice. He had also made changes after the second consultation when it was pointed out to him that introducing a national fee for police station attendance would result in more than a 30 % cut (rather than the planned 17.5% cut) in London.

I believe that the facts in this statement are true.

Signed: .....

Date: .....