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The London Criminal Courts Solicitors' Association

The London Criminal Courts Solicitors' Association (LCCSA) represents the interests of specialist criminal lawyers in the London area. Founded in 1948, it now has over 1000 members including lawyers in private practice, Crown prosecutors, freelance advocates and many honorary members who are circuit and district judges.

The objectives of the LCCSA are to encourage and maintain the highest standards of advocacy and practice in the criminal courts in and around London, to participate in discussions on developments in the criminal process, to represent and further the interest of the members on any matters which may affect solicitors who practice in the criminal courts and to improve, develop and maintain the education and knowledge of those actively concerned with the criminal courts including those who are in the course of their training.

Any questions in relation to this response should be referred to either:

Nicola Hill (President)

Kingsley Napley
14 St John's Lane
London EC1M 4AJ
DX 22 London Chancery Lane
020 7814 1200
nhill@kingsleynapley.co.uk

Steven Bird (Committee Member)

Birds Solicitors
61 Wandsworth High Street
London SW18 2PT
DX 59062 Wandsworth North
020 8874 7433
s.bird@birds.eu.com

Preamble

Although there is no mention of it in the Ministry of Justice material, this consultation was forced upon a reluctant Minister by the outcome of the recent judicial review proceedings taken by the LCCSA and the CLSA in which the Honourable Mr Justice Burnett found that the previous consultation process was "so unfair as to result in illegality" (para 50). The immediate response of the MOJ was to dismiss the judgment as merely having highlighted a few "technical issues" in the process. For the process to have been so unfair as to result in illegality goes far beyond a few technical issues. It is almost beyond comprehension that the Ministry tasked with running the justice system could make such a comment about a finding in the High Court.

However, this seems to be the way of things within the MOJ as we have now been given a mere three weeks to respond to a short questionnaire masquerading as a consultation clearly set up in haste and with the utmost reluctance. Although the judgment suggested that a short re-consultation might be appropriate, the parties were not able to address that point before it was made by Burnett J. In fact, it is our firm view that having treated the profession with such contempt previously and lost the judicial review as a result, the Ministry should be acting now with the utmost fairness to allow the profession adequate time to respond to complex reports which apparently form the basis of the complex model chosen by the Ministry for the tender of Duty Provider Contracts.

Many in the profession, not directly involved with the judicial review, would not have considered in detail the issues that the reports throw up and we are not being provided with sufficient time to instruct an expert to consider the reports and the proposals in order to make further comments on them and to provide the evidence which appears to be demanded by the Ministry within the "consultation" document.

It is somewhat ironic that the Ministry demands evidence to support the views of those responding when it has not been troubled by evidence itself at any point in the process. Going back to the first consultation document, the Ministerial Foreword justifying the whole process was littered with assertions, not one of which was actually supported by evidence and each of which was flatly contradicted by evidence that was available. Where evidence has been available that contradicts the Minister's aims, it has been comprehensively ignored.

The introduction to this "consultation"

The introduction to this "consultation" informs us that there has been "*detailed engagement with the Law Society*" in formulating these proposals. In fact, as was apparent from the judicial review proceedings, there was engagement with some select members of the Law Society in the latter stages none of whom had direct experience of criminal legal aid work and who were sworn to secrecy such that the wider profession could not be consulted by them on the proposals as they developed. Other Law Society representatives who were making valid points contrary to the views of the MOJ appear to have been side-lined and ignored.

The Ministry says that the "*proposals will deliver the necessary savings to the public purse, while ensuring that all those accused of a crime will continue to have access to justice and receive quality legal representation; that defendants will be free to choose their lawyer, whether they want a big firm, their local high street solicitor or a particular specialist; and that all those who provide criminal legal aid services could continue to do so, provided they meet minimum quality standards."*

It is our view that these proposals will not provide those suspected of crime with a choice of solicitor or access to a quality service. Indeed the very assumptions underlying the proposals contradict the freedom of choice claim in the above statement. It is to be assumed that firms with a Duty Provider Contract will give up 50% of their Own Client work to service that Duty Contract. Let's assume for a moment that this assumption is correct. This means that anyone asking for their

own solicitor has only a 50/50 chance of getting that solicitor if that solicitors' firm also has a Duty Contract.

Indeed the situation will be far worse than this as the overwhelming majority of firms without a Duty Contract will not be able to survive the 4 year Contract period on an Own Client only contract. The evidence for this is in the Otterburn report at page 51 where own client only contracts are considered:

> "*Most firms considered that the loss of a duty contract would be terminal, and based on the figures they provided, it appeared that most would make a loss on such contracts within the first year."*

If Otterburn and the respondents to that research are right, and we believe that they are, the vast majority of firms not obtaining a Duty Contract will struggle to survive financially beyond a year. Therefore anyone arrested for an offence will no longer be able to choose those firms. Indeed the loss of hundreds of firms in this way will put increased pressures onto those firms with a Duty Contract who would have obtained one based on one level of capacity only to find that as firms disappear, the number of cases coming through the Duty Solicitor schemes will increase and challenge their ability to cope with the increased demands.

It is fanciful and based on no evidence at all to suggest that there will be a free choice of lawyer whether the individual wants a big firm, a local high street practitioner or a particular specialist. The available evidence suggests these smaller operations will simply cease to exist within a very short period of time.

The introduction claims that the MOJ has "*awarded over 1,800 own client contracts for providers who meet quality standards so people can choose their own provider if they wish to.*" Currently every firm has applied for an Own Client Contract as that has been the necessity of the process. However, as stated above and relying on Otterburn's research, such Contracts are unlikely to be fulfilled by firms not also

obtaining a Duty Contract beyond a short period of time thereby removing the freedom of choice of provider from the client.

Furthermore, Burnett J in paragraph 37 of his judgment also makes the point about the doubts around the survival of own client only firms:

> *"A number of important contextual and factual matters provide the foundation for consideration of fairness in this case. First, the impact of the decisions upon any existing firm of solicitors which fails to secure a Duty Provider Work contract is likely to be very profound. It is questionable whether a criminal legal aid firm, or a department within a firm with a broader work base, could survive, or survive for long, on Own Client Work. The impact upon those who secure the contracts and upon access to justice if the assumptions underlying the KPMG calculations are wrong would also be serious."*

Burnett J makes an extremely valuable point in highlighting the seriousness of effect on access to justice if KPMG have got it wrong. We believe that KPMG has got it wrong on almost every level given that we agree with few, if any, of the assumptions upon which their model is based. If the assumptions are wrong, the model has to be wrong and the proposed system will not work as envisaged (at least by the MOJ and indeed only by the MOJ).

There is a very real risk that in ploughing ahead and ignoring the informed comments of the criminal defence profession to this and previous consultations, the Minister will be putting the criminal justice system at risk of collapse. Indeed we say that this is more than a risk, it is a certainty. The stakes are high if you have got it wrong, and you have got it wrong.

The Ministry says in the introduction that it "*received advice from Otterburn Legal Consulting LLP (Otterburn) and KPMG LLP (KPMG) and we concluded in February*

that there should be 525 of these contracts (the maximum in the range put to us as part of this advice)."

Indeed advice was received from Otterburn but it was very largely ignored. By way of example the following points were made by Otterburn but proved to be inconvenient to the Ministry and were therefore ignored:-

- Very few firms could sustain the overall reduction in fees set out in the Next Steps document, a view also expressed by PA Consulting in the document which only surfaced in the judicial review proceedings;
- Most firms were dependent on duty contracts for generating new work and few would be sustainable without it in the medium term;
- Any fee reduction should not take place immediately but should be delayed to allow time for market consolidation;
- Few firms would be able to invest in the structural changes needed for a larger duty contract and to recruit new fee earners;
- The dual contract approach should not be adopted in rural areas, where circumstances were different, and in particular the market was already consolidated and where there was insufficient volume to allow firms to generate the necessary efficiencies.
- The number of firms which could grow reasonably rapidly to meet the requirements of a large Duty Provider contract was limited, and their ability to grow was restricted by financial constraints;
- Few firms could survive in the medium term without a Duty Provider contract.

The main assumptions used by KPMG did not derive from the Otterburn report. They came from the MOJ. Specifically, the assumptions that firms had latent capacity of 15%, could increase organically by 20%, would give up 50% of their own client work and would be viable at any level of profit (e.g. 0.1%) did not come from Otterburn.

Indeed Otterburn said that a minimum 5% profit margin was a good measure of viability. PA Consulting also recognised that low profit margins would drive firms out of legally aided criminal defence work when considering whether a cut of 8.75%

could be made in February 2014 (which cut was actually made in March 2014 contrary to the recommendations in the reports of both Otterburn and PA Consulting):

> *"In this scenario, an 8.75% reduction in fee levels, is expected to reduce to firms' median margins to 1.6%. It is likely some firms may decide this profit level whilst positive is not sufficient to sustain them in the market due to the impact on the levels of available working capital. Similarly, even if firms do not have liquidity constraints, they may still take the view there is insufficient incentive/returns to remain in the market."*

The reluctance with which the Ministry undertakes this "consultation" exercise is evident on the face of the document and by the absurdly short timescale allowed. The scope of the "consultation" exercise is limited to exclude consultation on the "*dual contracting model and the decision to limit the number of duty provider contracts*".

There is symmetry here with the first consultation document which was said to be a consultation as to how PCT should be brought in not whether it was to be brought in. In the event, 16000 adverse responses went some way to pulling the Minister back from the brink of disaster and those ludicrous plans were shelved. Unfortunately what is proposed in their place will have the same devastating consequences for access to justice. It is our hope, that by making comments on the concept of dual contracts, the Minister will see that by blindly following this course, disaster waits around the corner.

The consultation questions

1 Do you have any comments on the findings of the Otterburn report, including the observations set out at pages 5 to 8 of his Report? Please provide evidence to support your views.

Otterburn's research is based on evidence. Contrary to comments elsewhere about the response that Otterburn had to its survey, Otterburn consider the response to be good.

The findings that came out of the evidence based research are, in our view, sound.

- **Reduced levels of work**

We agree that there has been a significant reduction in work levels. Overall within the criminal legal aid budget, there have been reductions in the level of cases coming through the system year on year for several years. This was stated by the Legal Aid Agency in its most recent publication setting out the spend for the financial year 2013/14 which was £30 million less than forecast.

This was also the finding of Oxford Economics in their report commissioned partly by the LCCSA and submitted to the Minister only to be swept aside within days as unreliable. Oxford Economics predicted that with spend based on the falling volume rather than a flat line, the savings from the fall alone would be £84 million by 2018/19. The Minister responded by saying that the MOJ predicted on a flat line and that this was accurate to within 1%. Unfortunately this was untrue.

The budget for 2012/13 was £1.025 billion on criminal legal aid. The actual spend was £975 million. These figures were published at the time of the Minister's dismissal of the Oxford Economics report. The difference between forecast (£1.025 billion) and actual spend (£975 million) was £50 million. The percentage difference was 5%. The Minister was wrong to say the forecast was accurate to 1%.

Subsequent to that statement and the dismissal of the report, the LAA published the figures for 2103/14 in its Annual Report. The predicted spend was £941 million. The actual spend on crime was £908 million, some £33 million lower than expected and a margin of error of 3.5%. The report also states that the volume of work had dropped in the year by 6% in Magistrates' Courts and an unspecified amount in Crown Courts.

The Crown Prosecution Service Improvement Plan published in March 2013 also shows a continued decrease in cases in both the Magistrates' and Crown Court (at page 10). This is a further independent indication that the number of cases coming into the criminal justice system is falling each year[1].

The reduction in volume is recognised by Otterburn, Oxford Economics, the LAA, the CPS and those working in the profession. However, the MOJ refuses to acknowledge that this is a factor which should be considered when considering the likely savings to be made going forward.

- **On average firms were achieving a 5% profit margin but larger firms had lower margins and the full effect of previous fee cuts had not been reflected in the figures**

We have no reason to dispute the figures. We point out that the available evidence from Otterburn demonstrates that larger firms have smaller margins and this demonstrates that, despite any economies of scale, the larger firms may well be less able to cope with the fee cuts than the smaller firms. This has been the feeling within the profession for some time. Continued fee cuts have a tendency to fragment the market and consolidation in the face of such cuts becomes impossible.

- ***The finances of many crime firms are fragile. Most do not have significant cash reserves or high excess bank facilities (the difference between a firm's actual bank balance and its overdraft facility). In the qualitative interviews and in comments submitted with the surveys, a number of respondents expressed the view that their bank would be unwilling to extend further credit to them. In November 2013, the Solicitors Regulation Authority published research into firms facing financial difficulties1. It found that 5% of firms had a high risk of financial difficulty and 45% percent of firms faced a medium risk.***

[1] http://www.cps.gov.uk/publications/docs/cps_improvement_plan_march_2014.pdf

Generating at least 50 percent of revenue from legal aid, particularly crime or family, was identified as a risk factor;

We agree with this finding. It is why further cuts are so damaging to the supplier base and to access to justice generally. The fact that the SRA recognises an over-reliance on legal aid fee income as a significant risk factor should be a red flag to the Government in seeking to implement proposals in this sector where legal aid fees are the main source of income for so many firms.

- ***If the first reduction in fees of 8.75% takes place before there has been any opportunity for the market to consolidate the participants indicated that their profitability would be significantly weakened before they had managed to secure additional volume;***

We agree with this statement. The Government, however, having jointly commissioned Otterburn, ignored this finding and went ahead with the cut as originally planned. The Government also ignored the warnings on these cuts in the PA Consulting report which was not disclosed to the profession until it came out in the judicial review proceedings.

The full effect of that cut will not be seen for a few months but we expect to see firms struggling as this cut is actually higher than the average profit margin of firms and will therefore put very many into a negative profit situation once it works through the system.

- ***Most firms are dependent on duty contracts for generating fresh work and few would be sustainable in the medium term without it. A number of respondents suggested that practitioners may split away from firms that only secure an own client contract, resulting in an increase in the number of suppliers and a proliferation of small contracts;***

This finding demonstrates the difficulty that will be faced by any firm not obtaining a Duty Contract. It demonstrates that the supplier base will contract dramatically if the

Duty Contract regime comes into place as firms without a Duty Contract will die rather quickly.

Client choice and general access to justice will suffer as a result and pressure will be put on the Duty Contract holding firms as more clients are forced to forego a free choice of lawyer in favour of the Hobson's choice of the duty solicitor.

- ***We have taken achieving a 5% margin as a minimum definition of a viable practice (p23)***

This is crucial as it is a reasonable approach to take to in relation to criminal defence work. Such a margin is necessary to keep those that run the firms with some incentive to continue doing so. Cuts of the magnitude of 8.75% wipe out this profit margin immediately.

This is a clear indication of the type of assumption that ought to have been taken through into the KPMG work. It was specifically ignored in favour of a ludicrous notion than any profit makes a firm viable. The MOJ has not adequately explained why such a divergence of approach was taken to the best evidence available on this issue.

In addition PA Consulting found that a cut of 8.75% would reduce profit margins to 1.6% on average and that at this level firms may begin to leave the sector. The exact quote was given above but bears repetition here:

> *"an 8.75% reduction in fee levels, is expected to reduce to firms' median margins to 1.6%. It is likely some firms may decide this profit level whilst positive is not sufficient to sustain them in the market due to the impact on the levels of available working capital. Similarly, even if firms do not have liquidity constraints, they may still take the view there is insufficient incentive/ returns to remain in the market."*

At page 23 Otterburn also makes a valid point that one size does not fit all when it comes to criminal legal aid firms and that viability is dependent on many things, a large number of which are outside the control of the firm:

> *"The supplier base is very diverse and a firm's ability to make a profit depends on a range of factors that combine to mean there is no single size or format that is viable. Key issues include volumes of work that are available, which varies according to geographical location, the firm's overall reputation and profile, its efficiency and use of technology, and the firm's financial structure. It also depends crucially on many factors beyond the firms' control, such as the efficiency of the police, CPS, prison transport services, prisons and courts where it operates. In the qualitative interviews, a number of respondents commented that the more efficiently these operate, the more efficiently a firm can operate. If there are problems elsewhere in the overall criminal justice system, these impact directly on firms' profitability."*

This demonstrates the complete idiocy of the MOJ working on the KPMG assumption that a profit margin of 0.1% means that a firm is viable. Such a ridiculously small margin leaves absolutely no room for error. As Mr Eadie QC, counsel for the Secretary of State in the judicial review proceedings, pointed out, this is "*an area in which the Ministry of Justice was engaged in an exercise of prediction and judgement in respect of a new world of criminal legal aid which made precision difficult*."

Indeed precision is impossible and that is why the whole proposed system is so dangerous. Basing any system on a profit margin of 0.1% is insane and any slight adjustment, be it a fall in volume or a few quiet nights on duty, would have a dramatic effect on the real viability of a firm.

We cannot believe that KPMG would ever before have advised any business in any sector that a profit margin of 0.1% means that the business is viable. It is not particularly relevant to the discussion but it is very interesting to note that their own profit margin, after a 13% fall in profits, in 2012 was 19.4% (a profit of £349m from

turnover of £1.8 billion)[2]. This is a proper profit margin and one legal aid criminal firms can only dream of. To build a structure around a margin of 0.1% is disingenuous and frankly an insult.

The LCCSA has written to KPMG directly questioning their use of this assumption and a copy of that letter has been sent to the MOJ. In the letter we raise the following issues:-

- Was this assumption was provided by the MOJ or based on their own in-house knowledge and expertise?
- KPMG will have advised thousands of clients as to the viability of their businesses and will have extensive analysis and understanding of profit margins and the difficulties that can face businesses facing changes including, "scaling up", cuts to income and structural change such as mergers or informal consortia arrangements. Indeed, their report confirms more than once that they have been "*concerned with the profitability aspect of the viability of contracts*". We suspect that no clients of KPMG have ever been advised by KPMG that an operating profit of 0.1% makes for a viable business; certainly no client in any comparable business. Any KPMG client has ever been advised
- Without understanding the basis on which KPMG rejected the suggestion from Otterburn for a 5% minimum profit margin level, it is difficult to understand the rationale for the assumption
- We invited KPMG to confirm whether and to what extent they accepted, investigated, considered or challenged the assumption as to profitability and to indicate whether they hold any view on the assumption whatsoever.

- ***Consortia***

The Ministry seems at pains to suggest that Duty Contracts would not go only to large firms. This is of course untrue to a very great extent. Only large firms are likely

[2] http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/9000943/KPMG-partners-hit-as-profits-fall-13pc.html

to be able to demonstrate the capacity to take on most Duty Contracts. In their modelling, KPMG have assumed that the two largest suppliers in each procurement area will make bids (and be awarded contracts).

The process allows “consortia” through “delivery partners”. This is, however, unlikely in our view to provide any assistance to firms seeking to scale up sufficiently to be able to obtain a Duty Contract.

Otterburn uses the term “consortia” but is in effect describing the same thing when at page 45 of the report, it states:

> *“Some firms may achieve critical mass through the creation of consortia however these are unlikely to create the more efficient financial structures required. They will be unable to re-structure the balance between equity and other fee earners, will not benefit from one set of systems and will have added an administrative task in liaising with the other firms in the consortium, and guaranteeing consistent performance, that someone will need to manage.”*

This is absolutely correct. The extra administrative burden and the regulatory issues involved in taking on or being a “delivery partner” are so great that it is unlikely to be an attractive proposition for many firms. In addition economies of scale, the whole point of the exercise, are completely lost if “delivery partners” are used.

Otterburn in general

Otterburn’s research provides the Ministry with hard evidence as to the actual state of play within the criminal defence sector. It should not be ignored. We appreciate that much of what Otterburn says is contrary to what the MOJ wants to do in pushing ahead with these changes.

However, the consequences of the MOJ making serious mistakes are extremely grave for access to justice for some of the most vulnerable members of society, for the criminal justice system and for the lawyers who work within it. Most changes of

such magnitude would normally be tested by pilot schemes but in this instance the Ministry has opted for an all or nothing approach and, if it goes wrong, it will go wrong on a grand scale.

Obviously there are serious consequences for the Minister personally if such a calamity befalls the criminal justice system and we imagine that he has at least considered the possibility of this going wrong.

For this Association and our members, it is difficult to see how anything other than disaster should the scheme be introduced against the overwhelming opposition of the profession. The warnings are in the Otterburn report. They should be heeded.

2 Do you have any comments on the assumptions adopted by KPMG? Please provide evidence to support your views.

In his judgment, Burnett J said the following:

> "*The fact that the assumptions, other than on the flow of criminal work into the system, amounted to an uncertain judgemental prediction of future behaviour of those likely to be most directly affected by the decisions would, to my mind, tend to suggest not only that those very people should be asked, but also that any resulting decision would be better informed if they were."*

This comment is important as Burnett J recognises that criminal defence solicitors working under legal aid not only should be asked their views on the assumptions but should be listened to when they give those views. The decision will be better informed for our input only if our input is taken on board, properly considered and properly informs any ultimate rational decision. To ignore the views of those working in the system and directly affected by it in favour of assumptions made up by civil servants in the MOJ to suit a pre-determined decision would be irrational and ill advised.

Now that our input is being requested, albeit reluctantly, we trust that the Minister will listen to it, as envisioned by Burnett J.

The assumptions:

- ***Future work levels are predicted on a flat line***

We have already set out above the fact that this is not the case at present and has not been the case year on year for several years. The Oxford Economics report sets out how the volume is decreasing. Such decreases have been shown from the actual figures produced by the LAA and the LAA acknowledged in the recent Annual report that volumes were falling. Otterburn reports firms reporting a drop in volume.

Notwithstanding all the evidence to the contrary, the MOJ still insists on a flat line assumption. This has lead to a margin of error in 2012/13 of 5% and in 2013/14 of 3.5% on predicted spend. Mr Grayling declared the Ministry to be within 1% of their predictions in rejecting the Oxford Economics report but his figures do not match the figures as published by the LAA.

A fall in volume over time will, of course, reduce the amount of money spent on criminal legal aid. It will also decrease the value of the Duty and Own Client Contracts. With firms working already on very small profit margins which all but disappear following the first 8.75% cut, any negative fluctuation in volume is potentially disastrous for any firm.

With profit margins reduced to levels where PA Consulting say firms will walk away from legally aided crime, a continual drop in volume, against further rate cuts or not, will be fatal.

The LCCSA would wish to instruct an expert to provide guidance on what these changes would mean to the KPMG model but the time allowed for this consultation does not allow it and renders the consultation itself unfair. These are complicated calculations. One only has to look at the Otterburn, PA Consulting and KPMG

reports to see how complicated the figures and calculations are and why the instruction of an expert would be of invaluable assistance to the Association. This is particularly so when the consultation specifically asks for evidence to support our assertions.

- ***Solicitors obtaining a Duty Contract will give up 50% of their Own Client work***

This assumption is so off the mark that it is actually difficult to articulate a response of sufficient strength. The assumption, quite simply, is wrong. In the criminal legal aid market firms compete for clients on the quality of their service. Most firms undertake duty solicitor work providing a valuable 24 hour service to people arrested and in need of representation. Doing a good job for that client will mean referral of other clients by recommendation from him or by repeat business as own client should he be arrested again. Other clients are referred directly as own clients.

The notion that a firm would turn away an old (or even a new) own client referral makes no business or economic sense. It would be a disaster on every level. If a firm turned away an own client referral from Client A, it is most likely that Client A would never refer any of their friends to that firm in the future or return himself.

In economic and business terms this assumption makes no sense as it is suggesting that firms will during a limited contract period turn away guaranteed own client work in order to service a duty contract which they might lose at the next contract round (if any firms were still around to bid against them). Therefore the goodwill in the business is being eroded rather than built. This is the opposite of how any business operates in such a market. Goodwill is the lifeblood of the firm

It is simply wrong that any own client work would be turned away in favour of duty work. Neither the MOJ nor KPMG understand how criminal solicitors operate or the clients that they represent. We represent some of the most vulnerable people in society. The firm gets to know these individuals if they get in trouble on a regular basis. We know their problems, peculiarities and their history. We can, therefore,

deal with each of our own clients more efficiently and swiftly than if they had to deal with a new firm each time they got into trouble; repeating the same background material (usually unreliably) on each occasion and necessitating the new firms obtaining previous files from numerous other solicitors if the client has had to take up a new duty solicitor every time he has been arrested. Clients can become quite upset with a change of representation even within the same firm on occasions.

If clients are not able to go back to their regular solicitors, because that firm is not taking on every own client case, or that firm has disappeared as they only had an own client contract, more time is required with them and more delays at every stage of the process will ensue.

The criminal justice market is very competitive and no firm will sacrifice its hard won own clients for the random nature of Duty work. Client choice is a constant driver of quality of service. If firms are not to take on their own client work, quality will suffer.

It is absolutely clear that this assumption is wrong. The Law Society had said as much in the meetings they had with the MOJ and, on this point, we agree with them. The assumption should be that no ‘own clients’ will be dropped to service the duty contract.

We do not know without expert input what effect changing this assumption to one which is more accurate would have on the model.

In terms of evidence we can only say that the Association has not heard any solicitor at any firm say anything other than they would not give up any own clients to service duty work. Everyone has expressed an absolute bemusement that anyone could have suggested anything to the contrary. This assumption has caused the most outrage with the criminal defence community as has the fact that it has been made without any discussion with the solicitors who work in the system and who can tell the MOJ how absurd it is. The absurdity of the assumption also undermines our confidence in the rest of the work undertaken by KPMG.

- ***If the firm showed a positive profitability under the proposed number of contracts it was considered viable***

We have addressed this in some detail above. This is nonsensical on every level. It makes no business or economic sense. Solicitors' practises undertaking criminal legal aid work are generally small and medium size enterprises (the sort of business that one expects the Conservative party to support), even the larger ones. The owners of the businesses rely on the income generated by the business for their income.

It is important that there is a profit margin of sufficient size to allow the risk of running such a practice to be rewarded. Most are not rewarded terribly handsomely for the effort and stress that goes into running a business of this nature especially given the huge and constant uncertainty over legal aid in the last decade or so.

It is simply not worth running the business if the reward is a profit of 0.1%. To put it in context, on a turnover of £2 million, that of a medium to large firm, a profit margin of 0.1% is only £2000. Even if this is taken after a notional salary (Otterburn used a relatively modest figure of £51,750 as an average across the various size of firm), it clearly provides no incentive to continue in business. PA Consulting recognised this as a problem if profit margins dropped too far.

We would be interested to know if KPMG has ever suggested to any business in any sector that *any* level of profit makes the business viable. Such a suggestion undermines the confidence that we can have in the work done by KPMG.

Otterburn says that the *minimum* profit margin for a viable practice should be considered to be 5%. We would suggest that this is a more sensible assumption to make and we cannot tell without expert assistance how this assumption change would affect the model.

Otterburn has a considerable experience of this market but their views have been dismissed because they do not suit the MOJ plan. In the Next Steps Response the reason is given as follows:-

> *"Otterburn, while not asked to make recommendations, expressed a number of observations including the view (based on his experience) that a minimum 5% profit margin was necessary to make providers sustainable. There was very little evidence to support this view. KPMG, based on their judgement and experience, did not agree that any particular minimum profit margin was strictly necessary. In the absence of robust evidence to support Otterburn's view on the 5% profit margin we accept KPMG's assumption was a reasonable one to make."*

KPMG therefore are considered to have experience and judgement in this area and Otterburn is side-lined despite the relevancy of Otterburn's experience in this particular market, an experience not shared by KPMG. We have not been told why there was a divergence on this point. What is not clear is if KPMG agreed that profit margins as low as 0.1% were viable, or if they deemed it sensible to allow for such a possibility when creating their model.

- ***There is 15% latent capacity in any firm***

The full assumption is that *"[l]atent capacity exists within providers: A 15% improvement in capacity was assumed to arise from latent capacity already existing within providers and/or the reallocation of some staff from other areas of the firm to work on criminal legal aid work".*

Very many criminal legal aid firms do not have "other areas" to pull people from. Equally any firm that does is almost bound to be making more profit from the "other areas" than they are from crime given the recent cuts and low profit margins. No firm would move staff from a more profitable area to a less profitable one. Any such move incurs significant time in re-training staff to undertake criminal work.

We do not understand where the evidence comes from to justify the assumption. There seems to be a suggestion that as volumes are falling, staff will have the capacity to increase their workloads. However, in reality this is unlikely to be the case.

Firms have adapted to changing levels of work over time and with profit margins so low all staff have to be fully employed at all times to maximise the number of cases that the firm deals with. An increase of 15% is a significant increase for individual fee earners to achieve from their current case load. Assuming an individual has a caseload of 50 cases, a 15% increase would take that up to 58 cases. This is a significant increase in work.

We would suggest that latent capacity does not exist in criminal firms. If it does it would be at a much lower level. We are not aware of any research on this area and to commission it now is not possible given the very short time period to respond to this "consultation".

- ***Organic growth of 20% has been assumed to be achievable through increased recruitment activity***

We presume that the MOJ considers that there will be plenty of redundant solicitors around to be taken on by the Duty Contract winning firms at lower salaries now that the status of duty solicitor has been de-valued. In fact the MOJ may be right in this as there will certainly be plenty of redundancies among qualified solicitors.

However, given the rates of pay under the new scheme, firms will not be recruiting qualified solicitors but unqualified paralegals. KPMG recognise this when they say (in a rather condescending manner):

> *"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 e.g. as a paralegal)"*

The suggestion therefore is that those not good enough to get a training contract in an area of the law that pays better, can work as a paralegal for a criminal legal aid firm.

Otterburn also pointed out the financial challenges that exist for criminal legal aid firms in terms of obtaining finance and to increase the size of the firm by 20% would involve considerable expense. It is most unlikely that firms would have the financial capabilities to do this or be considered a good risk for bank loans.

We do not fully understand this assumption or how it has been calculated. Expert assistance would of course be helpful in responding more fully to it.

- ***There will be 2 or 4 new entrants to the market***

The assumption is 2 in all areas except London where in order to work the figure needs to be four. This seems to be a case of the tail wagging the dog. It is not, in truth, easy to follow the logic of this assumption. It seems to be based on nothing but what is required to make the model work properly and we would be greatly assisted by expert input on this particular assumption.

On a basic level it is difficult to see how any new entrants would enter the market at a sufficient size to be able to bid for a Duty Contract in any area, let alone every area. We assume a new entrant includes any firms joining together. However, such consortia are, for reasons stated above, unlikely to be very popular.

3 Do you have any comments on the analysis produced by KPMG? Please provide evidence to support your views.

This is complicated and requires expert assistance to provide any meaningful response. We do not have time to obtain such assistance with a three week “consultation”.

However, we make the following observations to make:

- **Disclaimer by KPMG**

We have considered the “Important Notice” that appears at the forward to the KPMG report. This note sets out a number of disclaimers in respect of the report and the reliance that may be placed upon it. On the face of it, these disclaimers seem to suggest that in a number of areas KPMG has relied upon assumptions and information provided by the MOJ (or others) but that such information has not been tested.

KPMG confirms that the responsibility for such information remains the responsibility of Ministry of Justice and Otterburn Consulting and go on to state:

> *“..we have satisfied ourselves, so far as possible, that the information presented in our report is consistent with other information which was made available to us in the course of our work in accordance with the terms of our contract and scope as agreed with you. We have not, however, sought to establish the reliability of the sources by reference to other evidence. This engagement is not an assurance engagement conducted in accordance with any generally accepted assurance standards and consequently no assurance opinion is expressed”.*

It is not entirely clear what this disclaimer means or whether it is a common disclaimer in any such report. It seems to indicate that KPMG has not tested the validity of any assumptions and has taken them from the MOJ as being accurate.

We do not know what an “assurance engagement” or an “assurance opinion” are or what he “generally accepted assurance standards” are. KPMG seems to be suggesting that they provide no assurance that the work they have undertaken is reliable as it is based on assumptions provided to them by others.

If this is the case, the MOJ is seeking to introduce an untried and untested new method of provision of criminal legal aid services based on assumptions that it has made (in large part) which themselves seem not to be based on any evidence or empirical research and which the consultant producing the report upon which the system is to be modelled has not tested the assumptions and is not providing any guarantee that the model is accurate and will work. At best this appears reckless. At worst it is negligent.

We remind you of the words of Mr Justice Burnett:

> *"The impact upon those who secure the contracts and upon access to justice if the assumptions underlying the KPMG calculations are wrong would also be serious."*

- **Multiple bids (London)**

We wish to raise an issue which is perhaps most apparent in London in connection with the scaling up calculations. In the course of the Judicial Review proceedings, Dr Gibby from the MOJ stated at paragraph 122 of her statement, that the MOJ were assuming that the largest firms will be bidders in each procurement area.

We understand that this is an assumption that KPMG also worked to when determining the degree of scaling up that would be required by firms bidding for a duty contract.

This is of particular concern to London firms where workloads typically cross multiple duty contract areas. Our fear here is expressed through the following example:

- On the basis of Dr Gibby's statement, if firm A is one of the largest firms in Area 1, then when considering the scaling up required for procurement area 1, firm A will be considered a likely bidder and winner of a contract.
- However, it is quite possible that firm A may also be one of the largest bidders in Area 2.

- When considering the scaling up required by Area 2 firms, it is therefore vital also to consider that Firm A may already be scaling up in order to meet the contractual demands of a contract in Area 1.
- The awarding of a contract in more than one area will have an inevitable and immediate impact on the rate and scale of growth required.
- If firm A is also one of the biggest firms in other areas the problem is repeated.
- This could mean that the scaling up required of firms in the London area may have been grossly underestimated.

We have not seen evidence that this issue has been considered and included in the calculations run for the model. If there has been no consideration as to the effect of multiple bids on the ability of firms to scale up to meet the contracts, it undermines the work done by KPMG to such an extent that it cannot be relied upon.

It also makes it impossible to comment meaningfully on a number of issues relevant to the new consultation particularly without expert input and an executable version of the model so that other scenarios can be modelled. This has been requested by the CLSA and refused by the Minister.

We have asked for confirmation from KPMG as to whether each procurement area was processed for the model as if it were separated from all others, or if they ran various versions of modelling taking into account the potential for firms to bid and gain contracts in multiple areas with ever increasing scaling up required with the award of each further contract. If KPMG did conduct such work we have not seen it and have asked to be directed to the relevant findings.

4 Do you have any views on the MoJ comments set out in this document? Please provide evidence to support your views.

We do not know which comments and which document you are referring to: the current “consultation” document or the response to the last consultation when you set out your proposals.

We have commented above on your introductory comments to the “consultation” document. We assume that this is what this question asks.

5. If the assumptions and data on which the KPMG recommendations are based remain appropriate, do you consider that there is any reason not to accept the maximum number of contracts possible (525), as the MoJ have done? Please provide evidence to support your views.

The assumptions are not appropriate and never have been. To ignore all responses to the contrary and plough on regardless (which is what this question suggests the MOJ is planning to do) would be irrational and show this “consultation” for the sham that it is.

6 Do you have any other views we should consider when deciding on the number of contracts? Please provide evidence to support your views.

These reforms are radical and dangerous. They are untested and based on seriously erroneous assumptions which make the model itself unreliable. Any decisions taken which are based on this model will be liable to fail as a result.

It is a matter for the Minister whether he wishes to put his own political neck on the line and keep his fingers crossed that it all works out. However, he is playing with the future of the criminal justice system and if these proposals go forward we confidently predict that the system will fail spectacularly and quickly. Unfortunately, he is also playing with the rights of individuals to a quality legal representation by a solicitor of their choice and the livelihoods of thousands of solicitors and support staff up and down the country. He is likely to destroy hundreds of small and medium size enterprises as a result and no amount of rhetoric as to the fiscal problems facing this country will justify such a catastrophic decision. Legal aid lawyers have never had

the benefits of the boom times and the underlying rates of pay have not changed since 1996, not even to be adjusted for inflation. They are now 8.75% below where they were 18 years ago.

The table below indicates the effect of the stagnation of legal aid rates on the real value of the rates. It sets out the rates paid on confiscation and appeal work and for special preparation in the Crown Court. The Ministry will be aware of the Deloittes report concerning the stagnation in legal aid rates. In real terms, we are working now on rates that are marginally above half of the rate paid 18 years ago once adjusted for inflation.

Work	**Grade of fee earner**	**1996**	**1996 rate indexed to 2014**	**Pre-20 March 2014**	**20 March 2014 onwards**
Preparation & attendance	A	£55.75	£91.32	£55.75	£50.87
	B	£47.25	£77.40	£47.25	£43.12
	C	£34.00	£55.70	£34.00	£31.03
Attendance at court	A	£42.25	£69.21	£42.25	£38.55
	B	£34.00	£55.70	£34.00	£31.03
	C	£20.50	£33.58	£20.50	£18.71
Travel and waiting	A/B	£24.75	£40.54	£24.75	£22.58
	C	£12.50	£20.48	£12.50	£11.41

We know and so does the Minister that the legal aid spend is falling ahead of target each year. When the first consultation was launched in April 2013, he said he wanted to save £220 million from the 2011/12 budget by 2018/19. The spend in 2011/12 was £1.08 billion. Reducing that by £220 million would have left a budget for 2018/19 of £860 million. Subsequently the amount to be saved has gone down to £215 million so the ultimate budget for 2018/19 would be £865 million. At no time

has he or anyone in the MOJ acknowledged that this is the end figure at which they are aiming as they wish to keep moving the goalposts backwards while savings are being made in the interim.

In just two years since the 2011/12 figures, the actual spend on criminal legal aid has fallen from £1.08 billion to £908 million. This is a fall of £172 million in only two years. To get to the target figure the Government needs to save a further £43 million in 4 years or £10 million a year. The financial case for these reforms and their drastic nature with all the risk that entails has not been made out. The Minister has never been up front on the figures and still refuses to confirm the target figure for 2018/19. It cannot be anything other than the figure set out above as to say otherwise would expose the initial required saving as a lie.

It is somewhat ironic that we head towards the 800th anniversary of Magna Carta with a Lord Chancellor who appears determined to destroy the criminal justice system and tear up the Human Rights Act. The criminal justice system is in crisis now. The defence solicitors are the glue that is holding it together. Once we have gone, we cannot be replaced.

London Criminal Courts Solicitors Association
9th October 2014