Transforming Legal Aid: Crime duty contracts

The Response of the Criminal Bar Association

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

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Executive Summary

1. This consultation has been forced on the Ministry of Justice because the previous process was so flawed as to be declared illegal.

2. The Ministry of Justice's proposals for "Crime Duty Contracts" remain flawed. They rely on unreliable assumptions and ignore the evidence and informed expert opinion.

3. If these proposals are implemented in their current form the CBA believes that there will be serious and irreversible damage to the Criminal Justice System.

The Criminal Bar Association

4. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.

5. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.

6. The CBA is the largest specialist Bar association, with over 4,000 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

Introduction

7. In October 2013 the CBA submitted a Response to the second MoJ consultation entitled "Transforming Legal Aid: Next Steps". In the Executive Summary we submitted:

    4. The CBA opposes the revised model for introducing competition to the Criminal legal aid market and warns of the impact of the proposals on the majority of High Street solicitors' firms; the downward pressure on firms to provide legal services at the lowest price at the cost of experience and quality of representation; and the effect on access to justice.

    5. The CBA highlights the inaccurate and misleading figures used by the MOJ to justify the level of cuts proposed; and challenges the paucity of

evidence used by the MOJ to justify the proposals. The actual figures demonstrate a significant drop in legal aid spend over the last 4 years.

The CBA's response included the following paragraphs which are directly relevant to this consultation.

54. Solicitors also compete in terms of quality. Again, such experience and quality is gained over many years providing legal services in the local community. Solicitors also compete to be awarded legal aid contracts. Unlike the Bar, a referral service, criminal solicitors compete for market share on the High Street through duty solicitor schemes at local police stations and own client work. Few firms make any significant profit, many have already cut costs to the bone; all are having to cut costs which are increasingly difficult to sustain. The proposed changes to procurement of legal aid need to be seen therefore in their proper context and a closer analysis of where reasonable profits are acceptable on the one hand and where cost cutting begins to endanger the quality of legal services on the other should be undertaken. Indeed, the CBA believes that common sense dictates that such review should be held *before* the introduction of any proposed new model.

55. Whilst competition in principle is not objectionable, the criminal justice system, like the NHS, is not a profit making business working in lightly regulated free enterprise markets. The latest model proposed by the government does not, it is submitted, promote fair competition in the market place. The fact that the government has now proposed two different, highly contentious models in less than a year is evidence that a solution cannot easily be found. It is evident that the vast majority of solicitors' firms are against the latest version. The new proposals appear to have been influenced by and will clearly favour only a few large, profit-seeking firms. There is a genuine and reasonable fear that those businesses will sacrifice quality and experience. The CBA repeats it warnings from its June response that a rushed introduction of wholesale change in the procurement of legal aid will lead to unintended and costly consequences; and, above all the delivery of quality legal services to the community will be adversely and irreparably affected.

Procurement of Legal Aid Services

56. The CBA remains opposed to the government's new proposals. They are not supported by evidence nor have they been properly reviewed or tested in any pilot scheme. For a firm to be able to compete in the market,

costs will have to be kept to a minimum. Cost cutting on such a scale will inevitably mean that experienced, criminal solicitors will be made redundant and replaced by part-qualified or non-qualified staff 'supervised' by a solicitor. Economies of scale and downward financial pressure will be such that less time, care and attention will be spent on each case. Again, once experience and quality are lost, they cannot be replaced. Again, the individual will suffer and there will be an increasing gulf in equality of arms between the individual and the State. Ultimately, Society suffers from a weakened criminal justice system where fundamental rights are put in danger and access to justice is limited.

57. The CBA understands that most solicitors now believe that they will go out of business if the proposed further cuts are introduced. These businesses cannot sustain 17.5% cut in litigation fees in magistrates' court work and crown court litigation fees. Indeed many believe that the actual cuts will be far greater. Most of the few firms undertaking VHCC work will be unable to provide the required standard of service if 30% cuts are introduced.

58. These proposals aimed at solicitors will inevitably impact heavily on the independent Bar. As a referral service, the Bar depends on receiving instructions from solicitors employed in private practice or by the State. If further cuts are to be made, a profit-seeking business will not outsource the advocacy work to the Bar, if it can keep the work and have double recovery of (litigation and advocacy) fees, even where it does not employ enough sufficiently qualified, experienced advocates. Whilst there may be some criminal barristers who will have little option but to take employment in such firms, they will be relatively few as the most experienced and highly qualified barristers will move into other areas of work (as is already happening). The example of indigent defense services in the US, as outlined in the CBA's June response, is a stark warning of where downward financial pressure leads.

59. The CBA defers to the views of experienced High Street solicitors when it comes to the detail of the new proposed model. However, it is abundantly clear that many highly respected criminal solicitors believe that the combination of the proposed contract structure, the cuts to police station duty fees, Magistrates Court and Crown Court litigation fees and to Crown Court advocacy fees will destroy High Street firms and that in terms of quality there will be an unbridled race to the bottom for the quality of services provided.

60. The additional pressure on solicitors to put pressure on (often

vulnerable) clients to plead guilty inevitably raises fundamental issues of professional conduct and ethics. Again, once standards that have been established over many years drop or are lost and once experienced, trusted local solicitors are no longer available on the High Street, they cannot be replaced. Again, it is the individual, who faces arrest or prosecution by the State, who will suffer.

8. For these reasons and what follows below, the CBA continues to oppose the proposals advanced by the MoJ.

9. This consultation concerns the decision of the Ministry of Justice to proceeds with its plans to implement what has become known as the "two tier contract" proposals.

10. On 19th September 2014 the Honourable Mr Justice Burnett concluded that the approach the MoJ had adopted in relation to these plans was so flawed as to be illegal. The remarkably short time frame of this consultation does nothing to reassure the professions that the Ministry has understood the gravity of the criticisms advanced nor has any interest in a fair or meaningful consultation. In particular we are concerned by the demand for evidence at a late stage when it required Judicial Review proceedings before the MoJ would disclose the Reports on which it purports to rely.

11. The changes which will result from implantation of these proposals in their current form are very likely to be far reaching and destructive. There is no reliable evidence that any significant sums of public money will be saved as a consequence. The most likely outcome will be irreversible damage to the CJS.

The Proposed Model

12. The scope of the "consultation" is limited to exclude consultation on the "*dual contracting model and the decision to limit the number of duty provider contracts*". It is however impossible to respond to the questions posed without some reference to these issues.

13. In broad terms the proposed scheme will permit 525 "Duty Contracts" and in the

region of 1800 “Own Client” Contracts for those who wish to “choose their own provider”.

14. For reasons that will become apparent there are few if any solicitors who believe that any firm will survive with only an “Own Client” Contract. Nor is there any reason to suppose that any solicitors’ firm specialising in other kinds of work will have much interest in subsidising the efforts of criminal lawyers. In fact our experience of the consolidation that has taken place in many parts of the country already shows that successful commercial and mixed law practices have been actively jettisoning their criminal departments.

15. If the MoJ persists with these proposals then it would seem likely that the only firms left will be those big enough to obtain Duty Contracts. For reasons that will become plain, we do not believe that the solicitors profession is going to be able to re-organise itself into 525 firms in the time period contemplated by the MoJ. We believe that there is a real risk that the system as we know it will collapse.

16. This would be catastrophic for the reputation of the United Kingdom internationally as a place to do business and conduct litigation and could not be more against the public interest.

17. Before we answer the particular questions posed it is necessary to examine some of the background and detail of the two reports upon which the MoJ now purports to consult: “Otterburn” and “KPMG”.

The Otterburn Report

18. The MoJ and the Law Society commissioned Otterburn consultants to produce a report. The unhappy history of this commissioning process and the subsequent vote of no confidence in the Law Society leadership has been addressed in the Judicial Review proceedings in the Judgment of Mr. Justice Burnett . It suffices for our purposes to note that the remarkably restricted terms upon which the Law Society was permitted to consult solicitors with any real experience of the CJS, in part underpinned the judgment that the decision making process by the

MoJ was so flawed as to make it illegal.

19. Otterburn was instructed to consider three particular issues:
    - "The volume and value of contract needed to ensure viability and thus the number of contracts that can be awarded;
    - The size of the procurement areas and the impact that has on the costs firms incur;
    - The ability of firms to expand and to do so quickly enough to the scale that would be required to deliver the contracts."

20. Otterburn was instructed to research:
    - "The current financial position of criminal defence firms;
    - Firm's views on the size of contract they would need to deliver a viable duty and own client contract;
    - The impact of the proposals on firms that would just have an own client contract."

21. Otterburn based its conclusions, on the comments made by participants in the survey, the quantitative data, and their own knowledge of the sector. They concluded:
    - "All firms surveyed have experienced a significant fall in volumes of work in recent years, and they attributed that fall to falls in crime levels but also local decisions not to prosecute. The latter appears a significant factor and was a cause for concern amongst many of the firms we spoke to – not simply due to the impact it had on their business, but perhaps more importantly the impact this may have on local communities and victims of crime;
    - Margins in crime are very tight, especially in London, and the effects of previous fee reductions in crown court work have yet to be fully felt. The survey strongly suggests that the supplier base is not financially robust and is very vulnerable to any destabilising events, for example rejections of bills due to incomplete claims or errors by LAA staff leading to delays in payment by the LAA;
    - Based on the findings of the survey, in our opinion, any fee reductions should take place after, not before, the market has had a chance to consolidate as firms will otherwise be weakened financially at the very time that they will

need to invest in new staff and systems, and fund any redundancies. Fee reductions prior to market consolidation would make it more difficult for the market to restructure;

- There are very few firms which can sustain the overall reduction in fees set out in the Next Steps document, which would be very much greater than 17.5% in some parts of the country, particularly in London and the South East; but also in some rural areas which had higher fees due to higher costs of travel and waiting. Due to the weak financial base, we conclude that few firms will be able to invest in the structural changes needed for a larger duty contract and recruit new fee earners;

- The proposed procurement areas are based on Criminal Justice Areas; but a significant number of respondents raised practical problems arising from this. We believe that this is because the Criminal Justice Areas were designed for a different purpose and may not be suitable as a basis for procurement areas without amendment. They are often extremely large geographically and would be difficult to service. A significant number of respondents expressed the view that it would be better to build a structure based on courts;

- The participants indicated that fees of approximately £1.1m in London, £1.2m in urban areas and £600,000 in rural areas were needed in respect of police station, magistrates court and crown court litigation to enable them to run a viable practice. Our research strongly suggests that it would not make sense to apply a single national contract size across the country and that flexing contract sizes to take account of local conditions and volumes would be more effective. In calculating the size of contracts, a delicate balance will have to be struck by the MOJ. Too large and some very good, smaller firms will be excluded from duty contracts. Too small and existing major providers would have to scale back their operation;

- There is a small number of very large crime suppliers however there is also a large number of mid-sized suppliers, with current crime fees of approximately £750,000 to £1m. The large firms are clearly very important, however this group of mid-sized suppliers is likely to be key to any new system and would be able to sustain a modest increase in size;

- We consider that the MOJ should take a different approach to securing duty solicitor provision in rural areas. The supplier base is already consolidated in many rural areas and there may be insufficient volume to allow firms to achieve significant efficiencies. There is a risk that any attempt to reduce the number of contracts in rural areas could cause more problems than it would solve and could result in an over-stretched supplier base struggling to cover

the whole of some very large procurement areas. The imposition of a single national system may fail to recognise differences in volumes of work available and the information generated by the survey suggests that the over-supply of firms relative to the work available is in London and urban areas, rather than rural areas;

- Some firms have the management skills needed to oversee reasonably rapid growth however that number is limited and their ability to grow is likely to be restricted by financial constraints."

22. The picture emerging is one of fragility and instability. This is an unhappy foundation upon which to impose further severe fee cuts, let alone to require solicitors' firms to undertake the most far-reaching rationalisation that has ever taken place.

23. The CBA has neither the direct experience nor the evidence to independently verify the findings of Otterburn. However we have no reason to doubt the principle thrust of its conclusions. We are sure that the MoJ was content to use this consultancy because it had confidence in Otterburn's abilities and knowledge of the sector. We note that the representative bodies most closely engaged in the Judicial Review proceedings consider the broad thrust of Otterburn's conclusions to be sound. We have no reason to doubt that they are right.

24. We observe that at page 51 Otterburn wrote:

> "*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."*

25. If Otterburn and the respondents to its research are correct, then the thousand or more firms which do not obtain a Duty Contract will struggle to survive financially beyond a year. The legal landscape will be irreversibly altered beyond all recognition and the consequence will be far reaching and undesirable. This likelihood was identified by Mr Justice Burnett in his judgment at paragraph 37 when he found:

> *"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."

26. The loss of more than two thirds of the firms that conduct this work would have a shattering impact on client choice. It would appear fanciful for the MoJ to maintain that somehow the firms who retain own client contracts will be around for long enough to provide the flexibility and client choice that the system requires to function effectively.

27. Furthermore the conclusions set out at 21 above identify why the question of the reliability of the assumptions used by KPMG is so critical. The LCCSA and CLSA believe that KPMG "has got it wrong on almost every level" and disagree with almost all of the assumptions upon which the KPMG model is based. We have no reason to doubt that they are right. But before we turn to KPMG we must note a number of further points made by Otterburn which appear to have been dismissed by the MoJ:
    - Many crime firms are fragile and do not have significant cash reserves. On average firms were achieving a 5% net profit in crime. Margins in crime are very tight. The key issue facing most firms is a significant reduction in work levels.. these views were confirmed by the report of PA Consulting in their report 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. Most firms had already

made such costs savings as they could and had little opportunity to reduce overheads further. It will be difficult for firms to reduce costs quickly;

- 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;
- Few 'general' firms will be willing or able to cross-subsidise crime.
- The current uncertainty has made it impossible to plan. Few firms were interested in contracts outside of their procurement area. Nor was there interest in mergers;
- The differences in the numbers of suppliers in London and elsewhere in the country shows that a single national system for duty solicitor position is not appropriate;
- Very few firms can sustain the overall reduction in fees proposed by the Government.

KPMG

28. The main assumptions used by KPMG did not derive from the Otterburn report or any independent process. The assumptions were provided by the MoJ. It is hard to conceive of an approach which would be less likely to produce an independent and objective view.

29. We note that KPMG used the following assumptions (as appear listed in the consultation paper at para 14:

    - Many providers with a duty provider contract would have capacity issues in both servicing the duty provider contract and maintaining their existing own

client work. KPMG adopted an assumption that providers would, on average be prepared to give up up-to 50% of their own client work in order to meet larger duty provider contract volumes.

- When considering the efficiency challenge facing providers, KPMG assumed that positive profitability would be sufficient to ensure viability for providers.
- That there would be a minimum of 2 bidders for each contract, that 2 of these bidders would be from out-of-area providers and 75% of remaining bidders would become sufficiently large to fulfil the duty contract and 50% of their in-area own client work.
- That work volumes will remain constant at 2012/2013 levels
- That firms had latent capacity of 15%,
- That providers have capacity for organic growth and could increase growth organically by 20% through recruitment,
- That providers would be willing to give up 50% of their own client work in order to obtain a duty contract; and
- That providers would be viable at any level of profit (e.g. 0.1%). This assumption was expressly contrary to the views expressed in the Otterburn report.

30. We further note that Otterburn said that a minimum 5% profit margin was a reasonable measure of viability which would appear to conflict with the numbers used by KPMG .

31. We understand that there is a third report either commissioned or obtained by the MoJ that was referred to during the JR proceedings prepared by "PA Consulting", which 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 early 2014:

> *"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."*

32. The CBA does not have the first hand evidence beyond that already gathered by Otterburn to substantiate the concerns of the solicitors' profession. Nonetheless we observe that the fragility of the market and the narrow margins already in place ought to cause any Government to think very long and hard before imposing re-organisation on the scale contemplated as part of this dual contract process. We set out our detailed response to KPMG's assumptions below.

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.

33. We agree with the LCCSA and CLSA's view that Otterburn's research is based on evidence. Otterburn considers the response to its surveys to be good. We note that the solicitors consider the findings that came out of the evidence based research to be sound. We have no reason to doubt their view.

- **Reduced levels of work**

34. There have been a significant reduction in work levels and LAA expenditure has been falling significantly for several years.

- The budget for 2012/13 was £1.025 billion on criminal legal aid. The actual spend was £975 million.
- The predicted spend for 2013/14 was £941 million. The actual spend on crime was £908 million. The LAA report that produced these figures states that the volume of work had dropped in the year by 6% in Magistrates' Courts and an unspecified amount in Crown Courts.

- Figures produced by the Crown Prosecution Service confirm these patterns providing independent indication that the number of cases coming into the criminal justice system is falling each year[1].

35. The CBA considers that the MoJ should acknowledge these figures and include them in its planning. The cost of the system has been dropping precipitately for several years and all informed evidence (known to the MoJ) is that the existing fee cuts have not yet fully fed into these figures. It is irresponsible to be considering such fundamental change without reference to these figures.

36. The views of the CLSA and LCCSA are that:

- **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**

  The CBA is not party to these figures, but we have no reason to doubt the results of Otterburn and the submissions made by the LCCSA and CLSA..

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

  The CBA is not party to these figures, but we have no reason to doubt the results of the Otterburn work and the submissions made by the the LCCSA and CLSA.

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

- ***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;***

  The CBA is not party to these figures, but we have no reason to doubt the results of the Otterburn work and the submissions made by the the LCCSA and CLSA. We further understand that the PA Consulting report only disclosed during the judicial review proceedings confirms these findings.

- ***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;***

  The CBA is not party to these figures, but we have no reason to doubt the results of Otterburn and the submissions made by the the LCCSA and CLSA.

  Our experience of those solicitors who instruct us is that they are heavily dependent on the duty schemes for generating work and any firm that does not have a Duty Contract will rapidly wither and perish, with the consequential damage to client choice and access to justice.

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

  The CBA is not party to these figures, but we have no reason to doubt the results of Otterburn and the submissions made by the the LCCSA and CLSA.

  The CBA is very troubled that the MoJ appears to have substituted different and lower figures simply to suit its own position.

37. We have noted above that PA Consulting concluded:

"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."

38. We note (as the LCCSA and CLSA have done) that Otterburn articulates the complexity and variety on the supply side and that "one size does not fit all when it comes to criminal legal aid firms". Viability will depend 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."

39. In these circumstances it seems extraordinary that the MoJ seems content to rely on (or impose) the KPMG assumption that a profit margin of 0.1% means that a firm is viable. The CBA fails to understand how anyone can believe that firms and people will work so hard in such a difficult field when the margins are so tight. The CBA finds it hard to imagine that any single employee of KPMG would consider a profit margin of 0.1% to be an indicator of a viable business. We note what the LCCSA has said about its enquiries of KPMG as to the source of this

figure and await an answer with interest. In the interim it cannot be rational for the MoJ to be proceeding with proposals based on this assumption.

- ***Consortia***

40. Some firms will of course already be large enough to obtain contracts on their own. Some may be able scale up sufficiently in order to obtain contracts. The CBA seriously doubts that it will be possible for the vast number of smaller firms to form effective "consortia" to obtain through "delivery partners" as contemplated by the MoJ. We note at page 45 of the Otterburn report:

    "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."

41. This view reflects our experience of the challenges of organisational change. The extra administrative burden and the regulatory issues involved in taking on or being a "delivery partner" are huge. No one will willingly take on such a position. Whenever organisations merge in the real world they do so believing they will achieve economies of scale (perhaps by the merging of back office staff for example). This simply cannot happen if "delivery partners" are used.

Otterburn in general

42. 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.

43. In a short report[2] dated 10th October 2014 the authors of the Otterburn work make plain how they consider the Ministry of Justice and KPMG have either misunderstood or misused their work. The CBA relies upon the conclusions set out in this short paper. But for the avoidance of doubt we consider it essential to set out several short points made in, and quotations lifted from, that paper:

(i) The Ministry of Justice has used some Otterburn figures and run its own calculations which it then mistakenly attributes as Otterburn's work.

(ii) Otterburn considers that the misuse of its figures means the MoJ has created an unnecessary and artificial requirement in its "Duty Provider Contract Additional Information" that is 'going to make it make it extremely difficult for good firms to create viable businesses.'

(iii) Otterburn did not have any control over the assumptions used by KPMG. In particular they note 'we were very clear that the assumption that firms would give up their own client work to undertake duty work was incorrect and would not happen.'

(iv) Even the firms that were achieving 5% profitability were in a fragile position. This figure was the minimum required to have the working capital and cash that permits a firm to run a contract. Any lower figure would make future investment (for example in the in new IT required under the proposed system) impossible.

(v) 'They would not be able to generate the working capital and reserves essential to run any business and would be highly likely to fail. We do not believe they would be viable businesses and may have difficulty obtaining bank finance as their business case would be so weak. It is also debatable whether many people would take the personal financial risk of setting up and running a firm when they could earn virtually the same as an employee elsewhere.'

[2] http://www.otterburn.co.uk/141008%20MOJ%20consultation%20questions%20-%20AO_VL%20response.pdf

(vi) Any assumption used that work will remain constant in the future is imprudent. It would be safer and/ or more appropriate to assume that work levels would continue to decline as had been the case in recent years and/ or build more flexibility in to the contracts to reflect changes in volume over which the provider has no control.

(vii) The MoJ has been imprudent in assuming that a margin of less than 5% will leave any firm viable.

(viii) KPMG itself had noted that there were many areas of the country that would require further research before it was possible to make any judgment as to the appropriate number of contracts.

(ix) The small number of contracts would lead to serious weaknesses in the market and simply store up trouble for the future.

(x) Rural areas have already consolidated and further reductions are unstainable. Over supply is an issue limited only to London and some other urban areas.

44. 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.

45. For this Association and our members, it is difficult to see how anything other than disaster will ensue 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.

46. We have considered each of the assumptions relied on by KPMG in turn below. In relation to each of them we adopt and endorse the observations made by the LCCSA and CLSA in their responses to this consultation. In particular, we share their concern that it is unrealistic to ask that we provide evidence to support our views given the extremely short consultation period. This is particularly concerning when most of the assumptions we are being asked to comment upon appear themselves to be without an evidential foundation. Where there are such serious consequences for access to justice and legal practice throughout England and Wales if the assumptions are wrong[3] then the burden of proving their reliability must remain with the Ministry. At the very least, sufficient time should be given for representative bodies to seek expert advice on these proposals.

First Assumption

'*KPMG considered that many providers with a duty provider contract would have capacity issues in both servicing the duty provider contract and maintaining their existing own client work. KPMG adopted an assumption that providers would, on average be prepared to give up up-to 50% of their own client work in order to meet larger duty provider contract volumes. This assumption was derived from the position that some providers would be prepared to give up 100% of their own client work in order to meet larger, more reliable volumes of work through duty provider contracts if required, and that some providers would choose not to give up any of their own client work and would grow to accommodate both. Each business would make an individual decision based on their business model, client base and capacity to expand.'*

47. We find both the original suggestion that *any* firm with a duty contract would voluntarily give up 100% of its own client work and the revised assumption that firms would give up 50% of such work, to be highly implausible. Although Burnett J observed in R(LCCSA and CLSA) v Lord Chancellor that this was *'one of the most contentious aspects of the modelling'*,[4] no further justification or

[3] As was common ground in R(LCCSA and CLSA) v Lord Chancellor [2014] EWHC 3020 (Admin). See para 37 of the judgment.
[4] At para 28

evidential foundation has been provided to support the assertion. The assumption appears to have come from 'Discussions' with the Ministry of Justice[5] even though previously Ministry officials had shared the view that firms would simply not give up this work.[6]

48. The assumption makes no financial or business sense. In a competitive environment such as criminal legal aid, where the finances of many criminal practices are 'fragile'[7] and already having to absorb a 8.75% cut with the looming prospect of a further cut of similar magnitude it is wholly unrealistic to suggest that they would voluntarily give up work. This is particularly so in relation to own client work which, deriving as it does from repeat clients and recommendations, is more likely to lead to further work in the future.

49. More importantly, the assumption fails to recognize the importance of the relationships built up with repeat clients by dedicated solicitors acting for some of the most vulnerable people in society. All those who practice in criminal law understand the value of experience and trust that long standing clients have for such solicitors. Many of these clients are the most instinctively distrustful and alienated people in society. Often they will only accept prudent advice (to plead guilty) from someone who they do trust. This precious quality provides a massive unmeasured and unappreciated saving to society. The MoJ undermines this at its peril. It may be possible to estimate the financial savings this provides for the criminal justice, healthcare and welfare services. It is not possible to estimate the human cost of having such a service and the potentially devastating effect of it being withdrawn.

50. Further, KPMG's report (at page 30) makes clear that this assumption is based on an analysis of the top 25% of profitable firms. No consideration seems to have been given to whether such a model is appropriate for the remaining 75% of the firms in the market or the proportion of them that survive these proposals. This

[5] KPMG, p32
[6] R (LCCSA and CLSA) v Lord Chancellor, para 23
[7] Otterburns, p5

is concerning in light of the instability and unsuitability of many of the assumptions acknowledge by KPMG themselves in their report at pages 44-46.

51. The potential impact of this fundamentally flawed assumption on KPMG's analysis is considered below at paragraphs 70 onwards.

Second assumption

When considering the efficiency challenge facing providers, KPMG assumed that positive profitability would be sufficient to ensure viability for providers.

52. We are particularly troubled that the assumption has been made not only without an evidential foundation, but contrary to the conclusions of the Otterburn[8] and PA Consulting[9] reports.

53. The criminal justice system is largely unpredictable and subject to innumerable variables. Theses have been written on the extent to which crime rates can be affected by factors such as the economy, the media, social inequality, sentencing policy and the weather.[10] Further variables such as detection rates, quality of investigation and charging policy will determine how many offences then enter the system, let alone the eventual income for solicitors. KPMG acknowledge this uncertainty to an extent:

'Actual contract value will be dependent on crime volumes, the proportion of defendants who choose to use the duty provider and the number of contracts in an area.'[11]

54. How a firm proposing to run itself on a 0.1% profit margin in this environment could be considered 'viable' is unfathomable. The effect of running the criminal justice system on such a knife edge will be market collapse and chaos as, without

[8] At p23
[9] At p1
[10] For example, http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/mrcbg/publications/awp/ranson_2012-8.FINAL.pdf
[11] At p4

warning, firms go out of business at the first sign of a downturn or hiatus. At the Otterburn report summarises:

'Margins in crime are very tight, especially in London, and the effects of previous fee reductions in crown court work have yet to be fully felt. The survey strongly suggests that the supplier base is not financially robust and very vulnerable to any destabilising events, for example rejections of bills due to incomplete claims or errors by LAA staff leading to delays in payment by the LAA.'[12]

55. The draft report from PA Consulting makes the true position clear. Given the reductions in the litigator's fee:

'firms who have a greater reliance on criminal legal aid revenues will struggle more to maintain profit levels than those who have a more diverse set of revenue streams.' [13]

56. The effect will be therefore that specialist criminal firms will cease to exist. Criminal legal aid could only remain as a poor cousin, propped up by more profitable areas of law. Why any commercial business would wish to support such a drain on resources is not clear.

57. Our membership will attest to the importance of having a solicitor base which is not cut to the bone but vibrant and flourishing. Not only is this essential to an effective justice system, it is the only way to ensure the system runs efficiently.

Third Assumption

KPMG made a series of assumptions calculating the necessary number of bidders for a given number of contracts to ensure competitive tension. They assumed a minimum ratio of 2 bidders for each contract, that 2 of these bidders would be from out-of-area providers and 75% of remaining bidders would become sufficiently large to fulfil the duty contract and 50% of their in-area own client work.

[12] At p7
[13] At p1

58. This assumption in part relies upon the flawed assumption that firms would only retain 50% of their own client base going forward. Doubtful as that is for the reasons set out above, we have concerns about the other assumptions relied upon which appear to be simply speculation or worse. As the LCCSA observe in their response, there is also an element of making the assumption fit the desired outcome – for example, by changing the above hypothesis from 2 to 4 new 'out-of-area' providers in relation to London. It may also be observed that even stretching the material in this way, the degree of market consolidation which would be required in such a short period of time for certain areas of London appears phenomenally unrealistic.[14]

Fourth Assumption

Work volumes remain constant: Whilst it was recognised that volumes of criminal legal aid work may fluctuate going forwards, for the analysis it was assumed that volumes remain constant at 2012/13 levels.

59. As eloquently demonstrated by both the LCCSA and CLSA, this assumption is not only unreasonable but dangerous. Legal Aid Agency figures show a pattern of constant decline in both the number of cases and the overall cost of legal aid. At the very least, one would expect some analysis of the 'worst case scenario' and the likely effect on the market if levels decrease further. It is simply not known if the proposed system could cope with either a further decline or a sharp increase in volume.

Fifth Assumption

Latent 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.

[14] KPMG Report p49

60. Dealing firstly with the assumption that there is currently latent capacity within providers, we have sought to identify the basis for the assertion bearing in mind KPMG acknowledge that:

'It is not possible from the data collected to make an assessment of whether firms have taken management action to align their cost base for reduced volumes of work or whether there may be excess capacity in the system.'[15]

61. The only numerical basis which appears to be relied upon is set out at page 35 of KPMG's report, namely that *'Some firms are already more efficient than average'*. Without any analysis as to why particular firms score highly on this measure and whether there is any effect on the quality of work produced, these figures are meaningless. Furthermore, even if some firms could become more efficient this does not mean that every firm could become more efficient, which is what the model supposes. The most efficient firms are unlikely to have further room for improvement.

62. This therefore leaves what are coyly referred to at p35 as 'indications' of latent capacity in the system. Counter-intuitively, more is revealed in the summary to the report where it is explained that these are 'anecdotal indications'. To rebut the assertion therefore, we can assure the Ministry anecdotally there is no latent capacity, there is no more room to give.

63. The second aspect said to potentially give rise to greater capacity is said to be reallocation of staff. It is not clear who precisely is being referred to save that suggested that these are likely to be 'fairly junior' member of staff.[16]

64. This again appears to be without foundation and without proper acknowledgement of the skills and experience required by criminal solicitors. As others have noted, the cost and time involved in training criminal practitioners is significant and shuffling people around is simply not feasible. This is not an occupation where a particular area can be picked up for a few months and then

[15] KPMG p26
[16] KPMG p32.

dropped. Inexperience and lack of skill leads to loss of confidence in their lawyer on the part of clients with all the consequential expensive problems that occur.

65. Moreover, the suggestion that junior solicitors can be transferred from other areas, reinforces the concern that only firms with other income streams can survive. It is also contrary to the finding of Otterburn that few generalist firms are willing to subsidise criminal departments. It would appear that the proposals envisage the death of the specialist practice and criminal legal aid continuing as a charitable sideline within commercial firms.

Sixth Assumption

Providers have capacity for organic growth: 20% organic growth capacity was assumed to be achievable through increased recruitment activity.

66. This assumption would appear to be roundly debunked by the Otterburn report which makes it clear that:

'Due to the weak financial base, we conclude that few firms will be able to invest in the structural changes needed for a larger duty contract and recruit new fee earners.'[17]

67. It appears that the solution envisaged by KPMG is not for firms to recruit high quality qualified solicitors, but to exploit legal graduates:

'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).'

68. We observe that there are undoubtedly good reasons why this resource is 'untapped'. With criminal practices currently operating on a financial tightrope, if it were possible for paralegals to carry out more work than they do currently

[17] At p7

without contravening the firm's professional and ethical duties to the client, many of them would be doing so. This proposal is an indication of the report's prioritization of costs over justice. It is also wholly unclear how 'organic growth' can be achieved in an environment in which both recorded crime and legal aid spending are falling year on year **before** the current proposals are taken into account.

69. It may also be appropriate at this point to raise concerns over the extent to which these proposals are founded upon the presumption that firms will be able to merge or form consortia. To a large extent this aspect has been dealt with in the responses of the LCCSA and CLSA. We share those concerns and note in particular that the KPMG report itself accepts that:

'Based on the data available, it is possible to illustrate the extent of market consolidation needed, but not to fully assess the extent to which this level of market consolidation can be achieved'[18]

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

70. As the LCCSA and CLSA have highlighted it has not been possible to obtain expert advice on the analysis carried out. In any event, where the assumptions relied upon for the analysis are untested and without foundation, we submit that trying to create a working system based on the results is like trying to build a castle in a swamp.

71. Obviously, we are concerned not simply with the lack of evidence behind the assumptions highlighted above but the effect of applying incorrect assumptions. We are extremely concerned with the effect on unsuccessful bidders. Although this was not part of KPMG's remit[19] they observed that:

[18] KPMG p8
[19] KPMG p59

'Own client work may be sufficient to support some firms but given the importance of duty provider work in enabling new client relationships, there is a risk that such work will not continue at current volumes and that some firms may choose to exit the market. Therefore in second and subsequent procurements it is possible that the market may no longer be competitive under the same procurement terms… This is uncertain.'[20]

72. We have no doubt that without duty provider work, firms will wither and die. The model therefore fails even on the Ministry's own terms, which required that *'For this and at least one further competition there is competitive tension in the market'*[21].

73. We are further concerned about the closure of over 1,000 firms, some of whom have served their communities for generations. A wealth of knowledge, experience and talent will be lost as hard-working, skilled and qualified solicitors are not 'consolidated' but replaced by warehouses packed to the rafters with over-worked paralegals.

74. Even if the assumptions were correct, the proposals would mean the end of client choice by the back door as firms turned away the less profitable 50% of cases, leaving at best a choice of a handful of firms in the country able to survive on own client work alone by cutting every available corner.

75. Beyond the above, without sufficient time for expert consideration, it is simply not possible to comment further.

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

[20] KPMG p11
[21] KPMG p5

76. Our views are plain from the introduction to this Response and the other answers given above and below. This is a bad proposal that is ill founded on misconceived assumptions without proper reference to the true numbers. We urge the MoJ to think again. There will be significant change and consolidation over the coming year in any event as current fee cuts bite further. This is not the time to impose arbitrary system-wide restructuring of the supply chain.

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.

77. By now anyone reading this Response and considering it objectively will understand that the CBA considers that such evidence as is available to us (referred to above) shows that the assumptions are utterly flawed.

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

78. It is plain that the smaller the number of contracts awarded by the MoJ, the smaller the number of providers who will continue to practice in publically funded criminal defence work. Legal aid is not a free market, it is clear the MoJ intends to reduce the number of providers. The current proposals are designed to cause experienced solicitors to leave the criminal legal aid market because of perceived inefficiencies in how they work and how they are paid. There is, of course, no restriction on large national firms holding contracts across several areas of the country, provided they are profitable. We repeat the concern set out earlier in this response and in KPMG's own analysis (at page 58 of their report) that by the time that the 'third generation' procurement takes place the number of firms able to bid for contracts will have reduced catastrophically. Therefore, we agree with the Law Society, and with the LCCSA and CLSA that the maximum number of contracts should be provided. Indeed sufficient contracts should be provided to provide appropriate quality of representation even if this number

exceeds the numbers proposed by KPMG, given our concerns about the erroneous assumptions on which their report relies, considered above.

79. It is highly likely that the reduction in the number of providers which will result from the current proposals will lead to an ever-increasing focus on volume and quantity for solicitors practising in criminal aid. It is apparent that a relentless focus on volume and bulk processing of legal aid work will come at the expense of client care and a consequent reduction in the quality of representation.

80. We note and agree with, but do not repeat, the table that appears in the joint LCCSA and CLSA response to this question showing that since March 2014 hourly rates paid to solicitors are less in money terms than they were in 1996. That table shows that solicitors are now being paid nearly 50% **less** in real terms than they were paid in 1996. In no other area of public service would those providing a vital service to the state have accepted such savage cuts. The government has not acknowledged the fall in legal aid spending which has taken place without any intervention or cuts at all. It is unclear what the rationale is for the further reduction in quality in the Criminal Justice system which will result from the current proposals.

81. We conclude by repeating our strong concerns that the dual contract system as currently proposed poses a serious risk to the health of the ailing criminal justice system. The goodwill of the lawyers who maintain the running of the system is exhausted. When the skilled professionals who currently maintain the system have disappeared the damage done by these proposals will be irreparable.

Criminal Bar Association

12th October 2014