**Birmingham Law Society Response to Consultation on Transforming Legal Aid: Crime Duty Contracts**

**A. Introduction**

1. The Birmingham Law Society represents solicitors, barristers and paralegals working in the West Midlands area. The Society is responding to the consultation on Transforming Legal Aid: Crime duty contracts.

2. The Birmingham Law Society is of the view that this further consultation is in itself fundamentally flawed due to its stated limited scope. It is noted that the “*dual contracting model and the decision to limit the number of duty provider contracts are not within the scope of this consultation*” (page 3 of the consultation document). Nevertheless, the Birmingham Law Society reiterates the concerns that it expressed in its response to the Consultation on Transforming Legal Aid: Delivering a more credible and efficient system. In particular, in relation to the questions raised in the current consultation, attention is drawn to the views of the Birmingham Law Society in relation to the 17.5% reduction in fees and the size of procurement areas. Further, the Ministry of Justice (‘MoJ’) have not sought any views on the PA Consulting report (which appears largely to support the Otterburn report).

3. Since this latest round of consultation commenced, Otterburn has published a response dated 10 October 2014. It is noted that the report is critical of the approach adopted by the MoJ and we are supportive of the analysis contained therein as to costs per fee earner, profit margins, and the viability of the 525 contracts proposed, particularly in view of the concerns that the MoJ may not be able to deliver its statutory obligations.

4. The criminal justice system is a balancing exercise involving the power of the state prosecuting those who may or may not be guilty and the rights of defendants in answering those allegations. In criminal proceedings, particularly when defendants face custody if convicted, the principle of equality of arms is an accepted requirement in the criminal justice systems of the developed world – both domestic and international. These proposals will have the effect of producing inequality of arms, with the state, as prosecutor, having all the advantage. This is particularly pertinent in an adversarial system, such as ours.

**B. Consultation: Questions and Responses**

***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?***

4. The Birmingham Law Society is in broad agreement with the findings of the Otterburn report as they accord with the general experience of its members. Other than the perhaps overly cynical view that the MoJ has chosen to rely on the report which best suits its aims, there does not appear to be any legitimate reason for the KPMG report to have been favoured over that of Otterburn, particularly when the PA Consulting report is also taken into consideration. The PA Consulting report, commissioned by the MoJ is a wholesome critique of the KPMG report and exposes its flaws.

5. In addition, there are areas where both the KPMG and Otterburn reports raise concerns and, despite the apparent reliance of the MoJ upon the KPMG report, those areas have been pointedly ignored.

6. One of the major differences between the reports is the view as to the level of profit margin is necessary to make providers sustainable. The MoJ has taken the view of KPMG. However, ~~that~~ the KPMG view is tempered by the consideration of the market over the longer term. KPMG warns that

“*Marginally profitable contracts (as modelled in our analysis) are unlikely to generate high enough returns to encourage investment in the market.*” (page 58).

7. KPMG further notes that trainee solicitors could be discouraged from specialising in criminal law which is has “*the potential to jeopardise the future strength of the profession*”.

8. There is then a further warning as to sustainability, namely in relation to the lack of reward failing to encourage new equity partners and acknowledgment that “*the market does not exhibit the characteristics of an attractive investment opportunity*”.

9. None of the above concerns are surprising when the profit margins suggested by KPMG are considered. The MoJ asks for responses to be supported by evidence when it is in fact already in possession of a significant amount of evidence from Otterburn. The MoJ cannot point to another market where the level of profit margin suggested by KPMG has resulted in a viable enterprise.

10. Otterburn suggests that a much greater level of profit margin is necessary (page 23). Given the matters of concern raised by KPMG, and the fact that Otterburn addresses some of those very concerns when it postulates the figure of 5%, that is a much more realistic figure. The MoJ state that there is “*very little evidence to support this view*” (paragraph 20) without taking into account that this is at least based on a more realistic analysis of what comprises a sustainable business model. It is submitted that a system modelled on suppliers breaking even or making only minimal profits will not be sustainable in the long term. Such a model fails to take into consideration the needs of the legal profession to modernise to meet the requirements of the new contracts proposed. This is particularly the case in terms of investment in IT to enable digital working.

***Do you have any comments on the assumptions adopted by KPMG?***

11. Remarkably, the MoJ have attributed (paragraphs 22 and 23) the assumption that providers who were successful in the procurement process would stop doing up to 50% of their own client work. In fact, it is clear from the KPMG report that this assumption is one which is in fact attributable to the MoJ (page 32). There is no evidence that has been provided to suggest that firms would in fact make such a choice.

12. It is the view of the Birmingham Law Society that firms will continue to retain their own client base and that, in order to fulfil their obligations under a duty contract, they will expand as necessary. We are not aware of any evidence that indicates that firms would give up own client work in order to satisfy the needs of the Duty Provider Work Contract. To the contrary, as the amount of Duty Provider Work received by a successful supplier will be fixed for the period of the contract the only means for firms to expand will be by development of and retention of own client work. In areas where firms choose to service only Duty Provider Work the process will build in a disincentive to retain high quality standards. Firms who are “capacity constrained” such that they undertake only duty work will have no incentive to retain clients and will consequently have no incentive to ensure a quality of service which ensures the return of that client in future cases. It is important therefore that any bidding process entails robust scrutiny by the MoJ as to the viability of proposals so as to avoid the pitfall of awarding contracts to enterprises which are incapable of maintaining the highest standards.

13. The MoJ also attributes to KPMG the assumption that work volumes will remain constant. This is again (page 32) an assumption made by the MoJ. KPMG actually regard the market as reducing (page 7) due to lower crime volumes, changing sentencing patterns and fee reductions. In its views as expressed in this consultation, at no point does the MoJ acknowledge the impact of the fee reductions that have already been imposed since the preparation of the reports. Further analysis is undertaken (page 14) and it is recognised the impact of the changes resulting from the fee reductions introduced over the period April 2010 to April 2012 has “*not yet been fully demonstrated in financial results*”.

 ***Do you have any comments on the analysis produced by KPMG?***

14. It is notable that the KPMG report did not consider the impact of the proposed number of contracts on providers that are unsuccessful in the procurement process as it was outside the scope of the its work. The evidence suggests that few are likely to survive as it is recognised by both Otterburn and KPMG that duty provider work is important in maintaining an own client base. We do not agree with the assumption that firms who are not granted Duty Provider Work Contracts will survive in the long term. It appears to have been assumed that firms with only an Own Client contract would survive on the basis that they would receive own client work from the firms who obtain Duty Provider Work contracts. There is no basis for this assumption. It also fails to understand the general nature of criminal behaviour and its general reduction as individuals get older.

15. Clearly the position will have been further affected by the subsequent 8.75% reduction in fees. Otterburn highlighted the preference of firms to allow the market to consolidate before the first reduction in fees. Given the view of KPMG that investment funding may be required in order to successfully make the transition to the duty provider contracts (page 57), the acknowledgment that firms have limited cash available for investment and that it is the view of the market that it will struggle to obtain funding from lenders (see also the reference above to the unattractive characteristics of this market for investment), the reduction in fees that has taken place is going to have a further significant impact upon the resources available to firms. In light of this analysis the MoJ is invited to reconsider the intended further reduction in fees of 8.75% scheduled for Spring 2015 which will clearly have an additional detrimental impact on the sustainability of the supplier base.

16. It is a considerable omission in the KPMG report that it has not sought to quantify the likely size of the investment funding required. It is also a considerable omission that there has been no assessment as to the impact upon firms that are unsuccessful in the procurement process.

 ***If the assumptions and data on which the KPMG recommendations are based remain appropriate, do you consider there is any reason not to accept the maximum number of contracts possible (525) as the MoJ have done?***

1. It is clear from the preceding sections of this response that it is not accepted that the assumptions and data referred to remain appropriate. At the very least, it is essential to take account of the 8.75% fee reduction that has already taken place.

Future rounds of bidding will be restricted to those firms holding one [or more] of the 525 original contracts which will mean that there will not be competitive future bidding processes without the encouragement of firms back into the market, or the reduction of the number of contracts, or a significant expansion of the Public Defender Service (PDS).

               If there is to be a price increase at future bidding windows this will need to be a significant price increase to encourage new entrants to commit money to the training and administration required to support the work.

               If there is to be a reduction in the number of contracts then, on the analysis provided by KPMG, the MoJ has already been advised that the proposals will result in there being an unsustainable number of firms in the nine areas identified. Furthermore there are twenty one “borderline” areas of sustainability identified within the KPMG report and it is acknowledged by KPMG that the London scheme is problematic even now.

              If there is to be an increase in the scope of the PDS then the costs attributable to the defence portion of the budget will increase significantly. We in the West Midlands were a pilot area for the PDS, one of the offices subsequently found to be unsustainable and which was closed. We have no reason to think that the overheads and costs which plagued the office in this locale would reduce in the future, nor that the expansion of the PDS is a sustainable long term solution.

 ***Do you have any other views we should consider when deciding on the number of contracts?***

18. We are concerned that no provision is made should there be a significant increase in volume. Suppliers are reactive to that increase and have no means to control the numbers of arrests or the decision making process as to charge. Suppliers have already noted the impact of the change in priority in charging the more serious violent and sexual offences. We anticipate those changes in priority arise from decisions as to the allocation of funds by the police and Crown Prosecution Service. Suppliers have no means to predict or affect the numbers of people charged or the complexity of the charges they face. Once the supplier base has been reduced by the current proposals the damage done will be significant and long lasting. It is likely to prove very difficult to attract individuals and firms back into this area of the law based on future increases of volume, which cannot be predicted to be sustainable. The proposals run the risk that if there is a future increase in volume the depleted Supplier base will not be able to accommodate that work.

**C. Conclusions**

19. It is evident that any consolidation must take place before further fee reductions are considered.

20. The MoJ is urged to undertake further analysis of the market in order to take into consideration the effects of the last round of fee reductions. The MoJ asks for evidence to support the views provided by those responding to this consultation. Given the very short time period in which it has sought responses, respondents may be forgiven for thinking that this is not intended to be any meaningful consultation. It has certainly not left any time for respondents to seek their own expert economic analysis. Nevertheless, the Birmingham Law Society is of the view that is has sufficiently demonstrated that the MoJ’s own views are not based on reasonable assumptions and that there is ample support in both the Otterburn and KPMG reports that the financial situation of firms has changed since the 8.75% reduction earlier this year.

21. If despite the objections raised the MoJ persists with its stated aims of proceeding with the procurement process, the Birmingham Law Society urges it, with consideration to the problems which will be faced by firms that are unsuccessful in obtaining a duty provider contract, to firstly increase the number of contracts available and, second, , to assess the need for such cuts by further analysis of the market given the cost saving which will be incurred by the procurement process. The present number proposed will result in the removal of many very competent and experienced solicitors. Once gone, they will not return.

22. Finally, any procurement process must be robust in assessing the viability of those applying for duty provider contracts. It must further ensure that potential applicants are fully informed, in good time before the process commences, of the relevant criteria. It is worrying that the MoJ is already concerned about the administrative costs of overseeing this process. That must not be allowed to lead to a failure to adequately assess bids as awards of contracts to firms that prove ultimately unable to meet their obligations to the necessary standard will have far reaching implications, and not just in financial terms. In the meantime, it appears likely that a number of providers will be forced to withdraw from the market which will mean a lack of new providers in subsequent generations of procurement.

23. The MoJ is urged to look beyond the short-term viability of its proposals and to consider the sustainability of providers in this market.

BIRMINGHAM LAW SOCIETY

October 2014