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For and on behalf of the President

15th October 2014

Dear Sirs

CONSULTATION ON 'TRANSFORMING LEGAL AID: CRIME DUTY CONTRACTS CONSULTATION

Kent Law Society

Founded in 1818, Kent Law Society is one of if not the oldest law society in England and Wales. The society has over 500 members most of whom are practising solicitors living or working within the county. Our members work both in the public and private sector. Their practices range from sole practitioners to multi partner practices or companies working in all disciplines of law. 27 of them are criminal law specialists, practising in 10 different residential centres, from 17 different law practices.

The county has a population of over 1,500,000 and is approximately 1,440 square miles.

In the Ministry of Justice's proposals, we expect to see this population and area served by seven duty contracts.

Introduction

This email is a formal response made by Kent Law Society in answer to your proposals in 'Transforming Legal Aid: Crime Duty Contracts Consultation.'

Yours sincerely,

Jon Pitt
Consultations Sub-Committee
Kent Law Society
For and on behalf of the President

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.

As an introduction to this response we would like to include and adopt the answer given by Otterburn and Ling:

> *The Duty Provider Contract Additional Information published by the LAA in February 2014 included a reference to a finding from the Otterburn Report that "bidding organisations (or their Delivery Partners) employ at least one full time fee earner with relevant experience of crime work for every £83k of the indicative contract value".*
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> *We would like to make it clear that this was not a finding of the Otterburn Report but a calculation made by the MOJ based on certain figures included in it. We understand the MOJ used the aggregate fee income across all surveyed firms of £137,185,864 as shown in table 5.4 to calculate an average per firm of £873,795. They took the average number of fee earners per firm of 21 as shown in table 4.4. They divided this by two as approximately half of the fee earners worked in criminal departments. £873,795 divided by 10.5 results in the figure quoted by the LAA of £83,000.*
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> *We do not agree with the way the figure has been calculated, and, as it is before the 17.5% reduction in fees, do not consider it to be an appropriate figure to apply to the new contracts. We believe this capacity test imposes an artificial constraint on firms' ability to develop different operational models.*
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> *The problems this test causes was illustrated by one of our clients who currently have seven fee earners and would need one more if they won a duty contract as they would have to cover an additional police station.*
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> *It is not clear whether the £83,000 relates to just the duty element or the firm's total crime fees. The wording in the Additional Information document published in the spring would suggest the former whereas in practice the eight fee earners will be working across own client, duty and private work. There will not be a team just working on the duty contract. If it applies to total fees they would need 13 fee earners making the business unviable. They would have to recruit 5 fee earners they would not need.*
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> *Each fee earner costs around £40,000 - £50,000. The most junior would be a solicitor or accredited representative on a basic salary of £30,000 + call out payments for attending the police station in the middle of the night, a total of approximately 40,000. If you take this and add £13,000 for his/her share of the support staff, £5,000 for NIC, and £38,000 for his/her share of overheads, the total is £96,000. So they need to bill £96,000 simply to cover his/her costs and this firm is aiming for each fee-earner to generate fees of £125,000 to create a viable long term business which is what they and the MOJ need.*
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> *The £83,000 requirement is going to make it make it extremely difficult for good firms to create viable businesses. We would suggest that this requirement is removed completely and that the LAA can instead safely rely on supervisor ratios and peer review to achieve the quality standards they require.*

It appears that the MoJ has been at pains to avoid acknowledging advice it has received where that advice is contrary to what it wants/needs to hear in order to pursue a course of action that the MoJ is determined to follow but which puts at risk the Criminal Justice System in England and Wales. Some examples of this arising out of advice received from Otterburn Legal Consulting LLP (Otterburn) are:

a. At p 7 of Otterburn report it says there are very few firms which can sustain the overall reduction in fees set out in the Next Steps document (very much greater than 17.5% in some parts of the country);

b. At P6 of Otterburn it states most firms are dependent on duty contracts for generating fresh work and few would be sustainable without it in the medium term;

c. At pages 7-8 Otterburn says that any fee reduction should not take place immediately but should be delayed to allow time for market consolidation;

d. Other quotes include that few firms could sustain the overall fee reduction of 17.5% on average, which would be very much greater in some parts of the country;

e. Given their weak financial position, few firms would be able to invest in the structural changes needed for a larger duty contract and to recruit new fee earners;

f. The dual contract approach should not be adopted in rural areas where circumstances are different and in particular the market was already consolidated and where there was insufficient volume to allow firms to generate the necessary efficiencies;

g. 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;

h. Few firms could survive in the medium term without a Duty Provider contract.

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

As an introduction to this response we would like to include and adopt the answer given by Otterburn and Ling:

> *We provided KPMG with a copy of our report and summary financial data from the quantitative survey, and were kindly allowed to read a preliminary draft report outlining the methodology followed, however we had no input into the design of their financial models or the underlying assumptions these were based on. In particular 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. Any business relies on its regular loyal customer or client base to generate the majority of its income and profits. We believe solicitors' practices are no different from any other business in this respect. In addition, firms will want to maintain a healthy 'own client' following in anticipation of a future re-tender of duty work in four years time. Our concern is that the inclusion of this assumption understated the growth that would be required of firms.*
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> *KPMG also assumed that a positive profit was sufficient to ensure viability for providers. We disagree. Our financial analysis allowed for a notional salary for the equity partners of just £51,750, based on the median salary of the highest paid employed fee earners in the participant firms. Having allowed for this notional salary the firms were currently achieving a net margin of 5% in crime and even at this level the financial viability of many of the firms was fragile. This profit is needed to provide working capital and the cash needed to run a contract. Without this firms would be highly vulnerable to any cash flow issues, and in particular would not be able to survive any delays in payments by the LAA, which, for various reasons can occur. We do not believe that a break-even figure would enable firms to remain in the market when developments in IT and changes introduced by the new contracts themselves will require increased investment. 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.*

There are numerous pointers to support the view that KPMG did indeed adopt assumptions that were put forward by the Ministry of Justice in order to achieve a report that appeared to support an ideology rather than produce an independent and expert report to manage significant change in the Criminal Justice System.

a. The report of KPMG ostensibly was to be based in part on Otterburn's conclusions which were to be applied by KPMG in a financial model which would give rise to a recommended number of Duty Provider

contracts. There are clues that the MoJ is not taking warnings on board and is taking huge risks with the Criminal Justice System.

b. The process of compilation of the KPMG report is very unsatisfactory due in part to the imposition of non-disclosure agreements. KPMG would not deal with The Law Society without The Law Society entering into a non-disclosure agreement and it is therefore assumed there was a similar level of secrecy between the MoJ and the KPMG. Within the context of a public consultation for such an important matter with an overarching need to avoid decisions that will adversely impact the Criminal Justice System the secrecy coupled with poor attention to advice received is most inappropriate. This also helps to foster the belief that the KPMG advice was far from independent with an analysis premised upon a number of assumptions which were provided to KPMG by the MoJ and which are very likely to be highly contentious. Put another way, the assumptions were more in the nature of parameters imposed by the Ministry within which the KPMG had to produce a report that purported to support a preconceived conclusion. Examples include:

    i. KPMG was directed to adopt certain assumptions such as 100% and then 50% of own client work would be given up by Duty Firms. The MOJ gave up on the 100% demand as they accepted this was over-optimistic or just plain wrong. KPMG were then directed to include a random 50% figure which was not seen as excessively optimistic. There was little logic to the original demand that duty firms would give up 100% of own client work and even less to explain where a figure of 50% came from. This 50% assumption and a wide range of other assumptions are stated by KPMG to have been derived from “discussions with MoJ”. The idea has not come from Otterburn or even from analysis by KPMG but rather it comes out of the Ministry with no basis for any belief in its relevance.

    ii. Firms are carrying, it is wrongly asserted, significant levels of latent staff capacity, with the result that they

could take on 15% more work without recruiting additional staff. It appears that the Ministry came up with this random idea to help to manipulate the figures and make it look like the costings would work. It certainly does not come from Otterburn. KPMG ought to have rejected this idea as not being based in fact. There is no evidence to support it.

iii. Otterburn said firms would not in general permit other more profitable departments to subsidise their criminal legal aid practice and thereby reduce their profitability. There is no reason to suppose that firms will be content to subsidise the legal aid fund by reducing their profits voluntarily by cross subsidy. Otterburn knows this to be the case but KPMG still continued on the assumption that firms will in effect pay to carry out this work. The concept should have been questioned by KPMG as it is a concept at odds with its report generally which demands that firms make decisions for good business efficacy.

iv. KMPG said firms could take on 20% more staff through organic recruitment. Otterburn disagreed with this assessment and concluded that few firms would be able to invest what was needed to recruit new fee earners. The MoJ did not challenge KPMG over this important matter. KPMG did not have evidence to support their assertion and commonsense alone would have been enough to reject the idea.

v. KMPG said a Duty Provider contract would be viable if it was capable of producing a 0.1% profit. Where did this figure come from? This was contrary to Otterburn's conclusions, which adopted a 5% margin as "a minimum definition of a viable practice" (p.23). This is also contrary to the previously unpublished PA Consulting's report (revealed only through Judicial Review proceedings) where they said '*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.' P 23. Again why did the Ministry not challenge KMPG on their 0.1% profit assumption? Perhaps because it supported the political agenda.

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

As an introduction to this response we would like to include and adopt the answer given by Otterburn and Ling:

> *We do not believe that it is safe to assume work levels will remain constant for the purposes of modeling future contract sizes and numbers whilst at the same time acknowledging that volumes can fluctuate. That does not appear to be logical. We would suggest that the financial models should assume further reductions in volumes in line with trends over the last three years and that the numbers and volumes of contracts should have sufficient flexibility to accommodate the fluctuations in volumes which are caused by the complex environment of the criminal justice system and over which providers have no control.*

The evidence commissioned by the MoJ remains contradictory with Otterburn who says the only survivors of a straight cut in income across the board would be those firms that were 13-44 solicitors or larger, where crime was 33% or less of turnover but PA Consultants say the survivors would be the most highly profitable firms where there are 2-5 fee earners. These figures seem to be at odds, but looking at Otterburn we can see that he has assumed that businesses will be prepared to use their profits from one area of work to subsidise their criminal legal aid work. That is a dangerous and unsustainable assumption. In reality it will be hard to predict whether any large or small firms will survive. It is unlikely there will be a mixed range of firms for clients to choose in most areas and no competition to ensure standards and quality are maintained.

Examples of the advice offered up by Otterburn that seem to have been ignored by KPMG are to be found in the answer to question number 1 above.

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

As an introduction to this response we would like to include and adopt the answer given by Otterburn and Ling:

> The definition of viability is a matter of judgement. At present the firms that participated in our survey were achieving a 9% profit margin overall and 5% in crime. At this level of profitability the supplier base is fragile and vulnerable but most firms have survived. We considered this existing 5% level should be taken as a minimum level required for viability. We believe that for the MOJ to argue that this margin is not necessary is to take a highly imprudent view. They argue that there is very little evidence to support our observation. When faced with a range from 0% to 9% we believe that to have taken an extreme value is a high-risk assumption. It would have been safer for the MOJ to have taken a more balanced, cautious view and required a minimal mid-range level of profitability of 5%. This would have been more likely to have created a viable supplier base.

The level of cuts is unsustainable according to the entire range of expert reports available including those which the MoJ failed to voluntarily disclose.

The MoJ has the dual problem of achieving budget cuts and maintaining the justice system. Unfortunately the MoJ was very ambitious in volunteering very early on to produce a large budget cut. We have had to conclude that the offer could only be made by a department that had no real understanding of the crucial importance of quality to the administration of the criminal justice system. Subsequently, it has relied on KPMG's market assumptions, but those assumptions show that KPMG has failed to understand the dynamic of that market. The consequence of this lack of understanding is that we have a proposal that will deliver a 'token' system of criminal defence, available only to a small proportion of those who need it. Examples of where the MoJ's comments are wide of the mark are set out below.

(a) Those 'accused of a crime will continue to have access to justice and receive quality legal representation'

As the level of cuts is unsustainable according to the MoJ's own experts it is wrong to suggest this. These cuts will prevent firms providing quality access to Justice through their legal aid services and will simply not be there for the public to instruct as is clear from the MoJ's own expert evidence. Those with money will be able to obtain quality representation, others will not.

Firms have started to go to the wall even though they are busy practices with a good reputation. Other firms that have managed to work around the arbitrary cut of 8.75% off their top line are now finding what that means for

their bottom line. Those firms that survive into the next round will have to cope with legal aid rates so poor that a quality service will be impossible for clients on legal aid. That is the general view of the profession and everyone that has any understanding of business realities.

(b) Defendants will be ‘free to choose their lawyer’

This is the MoJ way of saying client choice remains, but it is not true. The MoJ began with an assumption supported by KPMG that firms that acquire a duty contract under the proposals will agree to give up their own client work in order to fulfil their duty contract without having to incur such a level of overheads that they become uneconomic. When advised by the Law Society that firms do not behave like that the model was ‘recalculated’ on the basis that on average firms would voluntarily give up 50% of their own client work. The MoJ also makes the point that if they need to step in to ensure a firm carries out its duty contract fully then they will be demanding that a firm gives up its own client work to concentrate its resources on duty work.

We believe the position in Kent is illustrative of why client choice will be destroyed by the proposals.

It is widely accepted that the two tier system proposed will lead to the demise of the own client firm due to the removal of the main source that all such firms rely upon to regenerate their client base.

In Kent we expect to see 7 duty contracts. Leaving aside that in reality there is no firm with the necessary resources to take up such a contract right now (the MoJ does not differentiate between actual resources and ‘ghost’ resources) any duty firm will need to cover the seven areas with that number of courts and police stations. Gearing up to achieve this is the problem that all bidders need to address at a time when their bottom line has been destroyed by the 8.75%+ cut in remuneration off their top lines. If a duty firm carries on with own client work they will need to have available resources to cover police stations and courts where they are not required to attend as duty on that day. This has resource implications and therefore cost (capital and running) implications.

Now, if those seven firms agree amongst themselves or are made to drop all of their own client business and to refer all such requests for assistance to the duty scheme, the reality is that duty firms will retain the same level of work but

with fewer running costs as they now need only to cover their work where their duties happen to be on any one day. In this way the duty firms retain a similar level of work as if they had retained all their own client work but in a better more structured and therefore less costly way.

When an arrestee asks for his own solicitor then whoever that is will direct the person to the duty scheme thus achieving a more structured and cheaper method of working whilst destroying client choice as the ‘own client’ firms will have disappeared and duty firms do not allow any representation as solicitor of choice.

If a firm decides to keep a proportion of their own client work then it will only make economic sense if they pass on the more resource-intensive clientele, which includes those with learning difficulties, mental health issues and similar. The best case scenario that the MoJ proposals can achieve with regard to client choice is that some clients who are not work-intensive might be able to choose their own solicitor. The MoJ’s model, at best, deprives the most vulnerable in society the right to choose a lawyer whilst protecting some more fortunate others.

The MoJ claims that defendants will be free to choose their lawyer, whether they want a big firm, their local high street solicitor or a particular specialist. That comment by the MoJ has no basis in fact. The MoJ cannot possibly believe it. It is a claim that the MoJ needs to make (as if it is true) as it knows the alternative is unacceptable.

(c) The MoJ claims that all those who provide criminal legal aid services at present could continue to do so, provided they meet minimum quality standards.

There is no one with good working knowledge of the industry who believes that all/many firms will survive if they lose a duty contract. Duty work replenishes ‘Own Client’ work and no replenishment must equate to no work and no business over a fairly short period of time. The problem is that although the assertion might appear to be true in a very superficial and simplistic way, it only stands up if there is a business model that permits this to happen. The current and only viable business model is to be destroyed by these proposals, therefore the claim is wrong.

Reference to ‘minimum quality’ seems to suggest a certain ideology held by the MoJ. Emphasis on ‘minimum’ indicates a desire to destroy genuine quality. Some firms may survive but only by offering the undefined minimum quality representation. The public purse will be used to remunerate important work that is made potentially worthless and dangerous at the point of delivery for those having to rely on it. Firms will be forced to use unqualified staff as much as possible and the qualified staff will be too busy to supervise this work properly.

The MoJ reference to *minimum* quality standards misses the point generally accepted that quality is driven by client choice. These proposals are an attack on client choice and indicate an ideological drive to the lowest quality possible. This includes KPMG’s suggestion that firms can use unqualified paralegals for a wider range of work (see p. 35 of the KPMG report), which they know is necessary to deliver the service with any ambition to make a profit, and which amounts to a ‘dumbing down’ of quality.

(d) The MoJ has claimed that people who do not wish to choose their own provider can opt for the duty provider available.

Unfortunately the model proposed includes the assumption/requirement that firms abandon at least some own client work and therefore the model sends people to the duty scheme even though they will have tried to choose their own solicitor to begin with. This undermines the ordinary person’s trust in the system which is likely to mean less faith in the advice given and probably less likelihood that defendants will accept advice to plead guilty in appropriate cases. The 2 tier system will force solicitors to abandon own clients when the overhead costs become apparent. As own client firms rapidly fail or just stop carrying out the work so the idea of client choice becomes even more illusory. The problem is that many more people will be forced to use the duty provider and lose the concept of choice as the own client firms are driven out of the market. Even those duty firms remaining are likely to be forced to drop their own client work as the MoJ reserves to itself the power to force firms to do this if duty compliance is seen to be at risk. The own client firms will be manipulated out of existence by these proposals and the impact will be a further loss of quality beyond the loss forced by the reduction in remuneration.

(e) The MoJ claims that the restricted number of duty only contracts will provide successful bidders for duty work with greater certainty, and will ensure there are no gaps in provision of defence services

In fact the MoJ is well aware of at least some large areas where it looks to be impossible to achieve anything approaching this. This is another claim that the MoJ has been forced to make but is not a claim that is safe or proper to make. The proposed second cut in rates ought to be enough on its own to wipe out many firms in all parts of England and Wales.

The low rates proposed simply mean that the handful of surviving firms will be working at rates that cannot be sustainable. As the rates are unsustainable it does not assist to get busier by way of increased work. You can be busier in terms of volume but still unprofitable due to the uneconomic rates. The busier a firm becomes with uneconomic rates the quicker the business will die. Both Otterburn and PA Consulting assume, and are correct in their assumptions, that the need to re-invest profit and avoid over-reliance on the banks, together with the overall lack of volume of work, would force such a great consolidation of practices that there would be so few firms left, concentrated in a few high volume areas. As a result, the Ministry's obligations under the Access to Justice Act could not be fulfilled.

The PA Consulting's report was suppressed by the MoJ until the Judicial Review proceedings ensured disclosure. It made it clear that the profession cannot withstand any more cuts. PA Consulting makes it clear that nearly all crime only firms will disappear – whatever their size.

The (international) treaty obligations in relation to access to justice are at very real risk. The proposals restrict the ability of citizens to stand up to a State funded prosecution unless wealthy enough to buy quality representation. The destruction of the criminal defence profession will have appalling consequences and will not produce savings as, in reality, these expected savings will be far outweighed by the financial chaos to other agencies caused by unrepresented clients once the efficient Solicitors and Counsel are driven out of legal aid work.

(f) The MoJ makes a claim that the restricted number of duty only contracts will 'provide successful bidders for duty work with greater certainty, and will ensure there are no gaps in provision.'

This is not true as the MoJ has no control over the work that might be available to firms and does not seek to ensure any efficiencies by the agencies involved in the criminal justice system. Much unremunerated, additional work is forced on practitioners by the failures that go uncontrolled by all other agencies and at the same time the delays that are permitted in the system is tending to destroy vital cash flow. The response by Otterburn confirms the proper approach.

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.

As an introduction to this response we would like to include and adopt the answer given by Otterburn and Ling:

> *The KPMG report identified 30 areas in which further inspection was necessary to determine an appropriate range of contracts. 6 areas had fewer than 3 incumbent providers with the capacity to deliver, 5 areas required an improvement in staff efficiency of more than 20% and 10 areas required market consolidation of more than 20%. In addition, KPMG identified that all London areas required market consolidation of around 50% and choosing 32 areas would present significant challenges to both those bidding and the LAA in evaluating the bids. All these issues create a risk that the MOJ may not be able to deliver its statutory obligations to provide duty representation in police stations and we do not believe the MOJ should proceed without further research and analysis.*

and

> *We have concerns that the very small numbers of contracts to be awarded in many urban procurement areas would result in a significant number of good quality medium and larger suppliers failing to secure duty contracts. As a consequence the supplier base would be weakened and this would lead to difficulties when re-tendering four years on. To have, for example, just four contracts in areas such as Nottinghamshire, is we believe too few to ensure sustainability of the market.*
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> *We also have concerns at the application of contracts to rural areas as the analysis undertaken by KPMG indicated that the market in rural areas was already highly consolidated. Our research indicated a very fragile supplier base in rural areas and we remain concerned that further reductions would weaken this supplier base further and could have un-intended consequences. The problems of over-supply are in London and some urban areas, rather than in rural areas.*

The assumptions and data on which the KPMG report is based are not appropriate, for the reasons referred to in our previous replies. We rely on the response of Otterburn and the matters raised above in respect of previous questions that ~~I~~ we have answered.

Additionally, we would like to refer to the number of contracts specifally in relation to the County of Kent. This has a population of over 1,500,000 and is approximately 1,440 square miles. It does not have a single large population centre, but a large number of small and medium sized centres, spread quite evenly around the county. It can easily take two hours to travel from one side of the county to another by car.

There are significant populations in Ashford, Canterbury, Chatham, Dartford, Dover, Folkestone, Gillingham, Gravesend, Maidstone, Margate, Ramsgate, Rochester, Sevenoaks, Sittingbourne, Tonbridge and Tunbridge Wells, as well as some London Boroughs which for some administrative purposes are treated as part of Kent, such as Bromley. Smaller communities such as Cranbrook, Faversham, New Romney, Sheerness, Tenterden and Whitstable are a considerable distance from any larger population centre and have so developed as independent centres, rather than satellites, as well.

Kent is typical of the largely rural communities which are particularly badly served by the MoJ's proposals. If the County is to end up with a maximum of seven contracts, then that is one contract between two significant population centres at the most. This means that the promise of choice between providers is impossible to achieve within our County, and that is ignoring the needs of those who live in rural parts of the County.

The rural population already suffers in comparison to its more urban counterparts in respect of access to justice, as due to the closure of courts and custody centres in the County, justice is no longer a local process for tens of thousands of the Kent population. The inability to use a lawyer whom one can access at a reasonable distance to one's home is an additional significant disadvantage, particularly to the most vulnerable and least wealthy members of the community.

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

It is our firm belief that, as proposed and fully argued by the Law Society and the Criminal Law Solicitors Association at an earlier stage of the consultation process, there are significant other ways in which efficiencies and therefore cost savings can be achieved in the criminal justice system. We believe that diminishing the quality and availability of legal representation, reducing choice, making timely advice harder to get for accused persons, making justice less local, and forcing qualified and experienced practitioners out of providing the service, are all hitting the wrong target.