

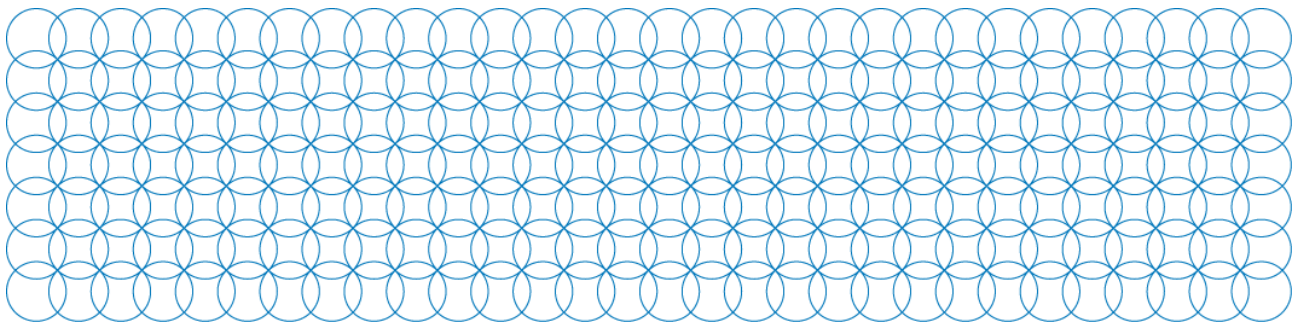


Ministry  
of Justice

# Transforming Legal Aid: Crime Duty Contracts

This consultation begins on 24 September 2014

This consultation ends on 15 October 2014





Ministry  
of Justice

## **Transforming Legal Aid: Crime Duty Contracts**

A consultation produced by the Ministry of Justice. It is also available at <https://consult.justice.gov.uk/>

## About this consultation

**To:** This consultation is aimed at providers of publicly funded legal services and others with an interest in the justice system.

**Duration:** From 24 September 2014 to 15 October 2014

**Enquiries (including requests for the paper in an alternative format) to:**

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A Welsh language consultation paper will be available at <https://consult.justice.gov.uk/>

**How to respond:**

Please send your response by 15 October 2014 to:

Annette Cowell  
Ministry of Justice  
102 Petty France  
London SW1H 9AJ

Tel: 020 3334 3555

Email: [LegalAidReformMoJ@justice.gsi.gov.uk](mailto:LegalAidReformMoJ@justice.gsi.gov.uk)

**Response paper:**

A paper summarising the responses to this consultation will be published following their consideration. The response paper will be available on-line at:

<https://consult.justice.gov.uk/>

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## Introduction

1. Following our earlier consultations on transforming legal aid,<sup>1</sup> and detailed engagement with the Law Society, we announced our proposals for a sustainable legal aid market in criminal litigation in February 2014. The proposals will deliver the necessary savings to the public purse, while ensuring that all those accused of a crime will continue to have access to justice and receive quality legal representation; that defendants will be free to choose their lawyer, whether they want a big firm, their local high street solicitor or a particular specialist; and that all those who provide criminal legal aid services could continue to do so, provided they meet minimum quality standards.
2. We have awarded over 1,800 own client contracts for providers who meet quality standards so people can choose their own provider if they wish to. Those who do not wish to choose their own provider can opt for the duty provider available. A consolidated number of slots on a duty provider rota will be allocated through a contracting mechanism based on quality and capacity ensuring that only providers, or groups of providers, which demonstrate clearly they have the capability to operate the scale of service envisaged will receive a contract. In a more challenging financial environment, this will provide successful bidders for duty work with greater certainty, and will ensure there are no gaps in provision. We received advice from Otterburn Legal Consulting LLP (Otterburn) and KPMG LLP (KPMG) and we concluded in February that there should be 525 of these contracts (the maximum in the range put to us as part of this advice). The Law Society specifically asked us to adopt the highest possible number of contracts in the range for the benefit of their members and to provide the market with the maximum flexibility. The proposals for a limited number of duty contracts will deliver a long term and sustainable way forward both for the Government and for the profession.
3. We are now consulting on the reports undertaken by Otterburn and KPMG (published in February 2014 at <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps>) and the assumptions used in the course of the preparation of the KPMG financial modelling with a view to deciding the number of duty provider contracts to offer. The dual contracting model and the decision to limit the number of duty provider contracts are not within the scope of this consultation. This paper seeks views and evidence relating to the analysis undertaken by Otterburn and KPMG that we commissioned jointly with the Law Society ahead of responding to Transforming Legal Aid: Next Steps,<sup>2</sup> including, in particular, the findings of and conclusions drawn by Otterburn and the assumptions used by KPMG in the preparation of its analysis.

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<sup>1</sup> [https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/consult\\_view](https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/consult_view)

<https://consult.justice.gov.uk/digital-communications/transforming-legal-aid>

<sup>2</sup> <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/results/transforming-legal-aid-next-steps-respons.pdf>

4. Ministers will consider the number of duty providers contracts that will be offered in the forthcoming tender for criminal legal aid defence services in light of the evidence gathered in this consultation. The financial modelling undertaken by KPMG, informed by the research from Otterburn and claim data from the Legal Aid Agency (LAA), produced a range of the numbers of contracts that could be considered within the parameters of the modelling. Previously, Ministers, following discussion with the Law Society, decided that the number of contracts should be as large within the range suggested by KPMG as possible despite the practical challenges of running a competitive tender for such a large number of contracts and the increased administrative burden of managing these contracts for the LAA. Ministers will now decide on the number of contracts that should be offered. Our objective remains to implement a model which ensures a sustainable service so that anyone in need of a duty solicitor can access one. In deciding on the number of duty contracts, there is a balance to be struck between having a high number, allowing more providers the opportunity to access duty work, and having a low number which would give individual contract holders a greater volume of work. We are interested in gaining further information from criminal legal aid practitioners that could be relevant to the research analysis so that ministers can decide on the number of contracts to be offered across England and Wales. Subject to the outcome of this consultation, it is our intention to proceed with launching the Duty Work tender exercise as soon as possible.
5. The Impact Assessment and equalities assessment, which were published in our response to consultation in February, are available at <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps>. These assessments are based on 525 duty contracts. We will review them in light of evidence collected from this consultation exercise, and if necessary publish a revised assessment in line with the decision taken.

## Issues for Consultation

6. In Transforming Legal Aid: Next Steps<sup>3</sup> we proposed that we offer an unlimited number of contracts to deliver own client work. Any applicant capable of satisfying the requirements of the tender process (including the required quality standards) would be eligible to be awarded an own client work contract. However, those wishing to deliver criminal legal aid services to those clients choosing the duty provider would need to apply for one of a limited number of duty provider contracts in one or more procurement areas. This overall approach of limiting the number of duty provider contracts is not at issue in this consultation; we have consulted extensively on it and announced the way forward in February. We are specifically seeking views and evidence specifically in relation to the Otterburn<sup>4</sup> and KPMG<sup>5</sup> reports. There is no need to repeat comments already made in response to the previous consultations, as these have already been considered.
7. We set out in the Next Steps document (paragraph 3.31) a number of factors which we considered in determining the number of duty provider work contracts for the final model. In summary, we determined that any future criminal legal aid scheme must have:
  - a sufficient supply of providers to deal with potential conflicts of interest;
  - a sufficient case volume to allow fixed fee schemes to work on a ‘swings and roundabouts’ principle for providers;
  - market agility – the ability of existing providers in each procurement area to scale up in order to take on increased volumes of work; and
  - sustainable procurement – the need to ensure the market is competitive in future tendering rounds.
8. In addition any future legal aid scheme had to be sustainable with viable providers.
9. In order to help inform our analysis of sustainability and the decision on the number of contracts for duty provider work, we commissioned, jointly with the Law Society, two consultants (Otterburn Legal Consulting LLP and KPMG LLP).
10. Otterburn was asked to collect evidence from current criminal legal aid providers through both quantitative and qualitative research methods and provide anonymised datasets to KPMG in order to inform the financial modelling and analysis required. Both the LAA and the Law Society encouraged providers to participate in the Otterburn data gathering work.

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<sup>3</sup> <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps>

<sup>4</sup> <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/results/otterburn-legal-consulting-a-report-for-the-law-society-and-moj.pdf>

<sup>5</sup> <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/results/kpmg-report.pdf>



11. The remit of the survey undertaken by Otterburn was to explore:

- the current financial position of criminal defence firms;
- firms' views on the size of contract they would need to deliver a viable duty and own client contract; and
- the impact of the proposals on firms that just have an own client contract.

12. Although not part of the remit for this work, set out above, Otterburn made a number of additional observations. These are set out at pages 5 to 8 of the Otterburn report. The views of consultees are sought on these observations.

13. As we set out in response to the Next Steps consultation, KPMG was asked to use the survey data from Otterburn Legal Consulting and, combined with claim data from the LAA, construct a financial model to advise the Ministry of Justice on the appropriate number of duty provider work contracts in each procurement area. KPMG also considered the observations made by Otterburn. The three questions KPMG posed when constructing their model were:

- Sufficient capacity: Are there sufficient providers capable of delivering the required volume of work under the new contracts?
- Competition: For this and at least one further competition is there competitive tension in the market?
- Viability: Do winning bidders have a business model that results in a financial performance that enables them to continue to trade in a sustainable way?

14. KPMG, following discussions with the Ministry and the Law Society, and based on its expert knowledge of the behaviour of markets, made a number of modelling assumptions as to how providers would be likely to behave in the future. While KPMG accepted these assumptions may not reflect the individual behaviour of each provider, they needed to apply a series of assumptions which captured overall market behaviour in response to changing circumstances. The key modelling assumptions are set out below.

- 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.
- When considering the efficiency challenge facing providers, KPMG assumed that positive profitability would be sufficient to ensure viability for providers.
- 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.<sup>6</sup>

- 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.
  - 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.
  - Providers have capacity for organic growth: 20% organic growth capacity was assumed to be achievable through increased recruitment activity.
15. KPMG's analysis then assessed the degree of challenge associated with different numbers of duty contracts against thresholds (which KPMG referred to as "initial thresholds") for staff efficiency, the number of existing providers of scale and market consolidation. The purpose of this analysis was to judge whether particular procurement areas required more detailed consideration before determining a range for the appropriate number of contracts in each area.
16. The initial threshold for assessing staff efficiency was that a 20% increase could be made, which was based on the Otterburn data. The initial threshold on the number of existing providers of scale assessed whether a procurement area had at least three such providers. The report defines "Incumbents of scale" as existing providers in the procurement area who would already have sufficient capacity to fulfil a duty contract of a given size, without the need for inorganic growth (e.g. mergers, consortia). The market consolidation threshold looked at whether bidders had a capacity shortfall and what proportion of capacity from other providers in the market would be needed to consolidate to deliver the duty contracts and 50% of their in area own client work. This initial threshold for market consolidation was set at 25%.
17. Using this modelling and assumptions, KPMG's analysis produced a range of 355 to 525 duty contracts.

### **Ministry of Justice Current Views**

18. The current views of MoJ on these issues are set out below. MoJ will reconsider its view in light of the views and evidence provided by consultees.

#### *Views on Otterburn*

19. MoJ considers that the data collected by the Otterburn survey helped to fill an important gap in the available data on the costs faced by criminal legal aid providers. While the survey was a sample, rather than a census, we believe it provided the best available reflection of the state of the market.
20. Otterburn, while not asked to make recommendations, expressed a number of observations including the view (based on his experience) that a minimum 5% profit margin was necessary to make providers sustainable. There was very little evidence to support this view. KPMG, based on their judgement and experience, did not agree

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<sup>6</sup> See page 30 of the KPMG report.

that any particular minimum profit margin was strictly necessary. In the absence of robust evidence to support Otterburn's view on the 5% profit margin we accept KPMG's assumption was a reasonable one to make.

*Views on KPMG – assumptions*

21. Predicting the future behavioural response of providers to change is difficult. Whilst data of the kind obtained by Otterburn is useful in informing such assessments, it is not possible to predict future behaviour precisely. Inevitably judgement calls need to be made about how firms will behave in the future, hence the need for KPMG to adopt assumptions in their modelling.
22. In relation to the assumption that providers would, on average, be willing to give up, up-to 50% of their own client work, KPMG's advice was based on their expert knowledge of the behaviour of markets adapting to change. KPMG took the view that it would be reasonable to assume that capacity constrained organisations operating commercially would be willing, even if they did not like doing so, to deploy their resources in the most commercially advantageous way for their business, including, in this scenario, giving up all of their own client work. On the other hand, some would argue that no providers would give up any own client work. MoJ entirely accepts that providers would not wish to give up any own client work as a matter of positive choice. Nonetheless MoJ considers that if providers are capacity constrained they might give up own client work to deliver their contractual obligations under duty provider contracts, however reluctant they might be. The decisions providers will need to make in relation to own client work would depend on individual circumstances of their business and the specific contract size; the larger the contracts (and so the higher the volume of work) the more likely it is that providers would need to concentrate on meeting the contractual requirements for duty work.
23. KPMG recognised, having listened to the views of both the Law Society and MoJ, that some providers would choose to retain as much own client work as they possibly could; while others would take the commercial decision to prioritise the work under the duty provider contract that delivers most certainty for their business. Therefore, KPMG decided that it was reasonable to assume 50% own client work substitution for modelling purposes. We think that is a reasonable assumption to make.
24. We agree with the assumptions KPMG made in calculating the necessary number of bidders for a given number of contracts to ensure competitive tension. We agree with KPMG's expert assessment of market behaviour and how providers might react in terms of their bidding behaviour to the different number of contracts being offered.
25. We also agree with the assumption that work volumes will remain constant. Whilst legal aid volumes have seen falls over the last 5 years, particularly in the police station and the Magistrates Court, the latest data published by the Legal Aid Agency suggests the downward trend in volumes was slowing in 2013/14. In fact, police station claims were higher in 2013/14 compared to 2012/13, the first year-on-year increase since 2008/09 and legal aid applications in the Crown Court increased from 112,607 in 2012/13 to 122,094 in 2013/14. Given the difficulty in accurately predicting crime, and the variety of other factors that affect legal aid volumes – for example the seriousness of offences committed, the impact of previous policy changes, and the capacity of the criminal justice system – we think an assumption of constant volumes is a reasonable assumption to make.

26. The assumptions about latent capacity and growth capacity were made by KPMG based on their professional judgement and experience and in light of the views of practitioners from the Otterburn research. We consider that those assumptions are reasonable. We consider that 15% latent capacity is a reasonable assumption to apply (in fact for some providers, 15% would be a relatively low level of latent capacity) to apply. This assumption is supported by the fact that work volumes have fallen, yet the number of providers working in the criminal legal aid market has remained fairly constant. In addition, under the current duty solicitor rota allocation system an individual solicitor could be on call for an eight hour period and only receive one or two calls in that time. Respondents to the consultation also stated that they would use a mixture of qualified duty solicitors and accredited representatives and where necessary use agents to ensure coverage. Given KPMG's understanding of the market behaviour, we also agree with their assumption of 20% organic growth through increased recruitment activity.
27. While we recognise the limitations of any attempt to predict future behaviour our current assessment is that the assumptions made by KPMG were reasonable, though we recognise the inevitable limitations of any attempt to predict future behaviour. We will review that assessment in light of the views and evidence provided by consultees.

*Views on KPMG – analysis*

28. We consider the modelling that KPMG undertook, using the assumptions outlined above and based on the Otterburn data and LAA claim data, was sound and that the resulting range from the analysis of between 355 and 525 duty contracts was appropriate given those assumptions and data.
29. Overall our assessment is that the KPMG analysis, informed by Otterburn data and claim data from the LAA, is a sound evidential basis for the decision on the number of duty provider contracts to offer.

**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.**
- 2. Do you have any comments on the assumptions adopted by KPMG? Please provide evidence to support your views.**
- 3. Do you have any comments on the analysis produced by KPMG? Please provide evidence to support your views.**
- 4. Do you have any views on the MoJ comments set out in this document? Please provide evidence to support your views.**

**Contract Numbers**

30. The independent research provided an important evidence base for determining an appropriate number of duty provider contracts to offer in each procurement area.
31. As we set out in the response to the Next Steps consultation, before determining what number of contracts to offer, from the range proposed by KPMG, we conducted further internal analysis on a number of matters highlighted by KPMG.

32. In determining the appropriate number of contracts, we took into account our own further internal analysis of the four factors listed in Next Steps:

- Sufficient supply to deal with potential conflicts of interest;
- Sufficient case numbers to allow fixed fee schemes to work;
- Market agility; and
- Sustainable procurement.

33. In addition, we took into account the need to ensure that the number of contracts was capable of being effectively and efficiently managed by the Legal Aid Agency. It was necessary to ensure that the number of contracts could be tendered successfully and that the overall number of contracts was a manageable size.

34. Applying the factors above, and taking into account the views of the Law Society, we decided in February to proceed with the maximum number of contracts. The Law Society argued that the maximum number of contracts possible was in the best interest of their membership as it would maximise the number of providers who were able to undertake duty provider work. We took the view at the time that these factors outweighed the consideration that a smaller number of contracts, with greater value, would help improve the financial viability of providers awarded a duty provider contract.

35. In the Next Steps consultation paper we originally proposed to split London into nine procurement areas using the Local Justice System areas. KPMG assessed such a model and highlighted that there are consolidation challenges and only a few incumbent providers of sufficient scale to meet the volume demands of nine areas. KPMG therefore looked at breaking London into 32 smaller zones, aligning procurement areas to the current police station duty scheme areas or boroughs. This approach still highlighted consolidation challenges but KPMG suggested it would allow some providers to grow to deliver smaller contract sizes and offered flexibility and choice for both large and small providers to remain in the market.

36. KPMG presented two options in their report as set out in table 1 below.

**Table 1: Options presented by KPMG on range of duty provider work contracts**

	Non-London	London	Total contracts
Option 1 (London 9 areas)	285–315	70–90	355–405
Option 2 (London 32 areas)		147–210	432–525

37. In line with the decision to proceed with the maximum number of contracts, we agreed in February to split London into thirty-two procurement areas rather than nine.

38. The questions in this consultation on the Otterburn and KPMG reports are designed to provide additional information for Ministers to be able to decide on the number of contracts to be offered. We recognise that, in light of consultees’ views on the assumptions and data used by KPMG, it may be appropriate to reconsider the recommendations provided by KPMG.

### Questions

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

## Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

- 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.**
- 2. Do you have any comments on the assumptions adopted by KPMG? Please provide evidence to support your views.**
- 3. Do you have any comments on the analysis produced by KPMG? Please provide evidence to support your views.**
- 4. Do you have any views on the MoJ comments set out in this document? Please provide evidence to support your views.**
- 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.**
- 6. Do you have any other views we should consider when deciding on the number of contracts? Please provide evidence to support your views.**

**Thank you for participating in this consultation exercise.**

## About you

Please use this section to tell us about yourself

<b>Full name</b>	
<b>Job title</b> or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
<b>Date</b>	
<b>Company name/organisation</b> (if applicable):	
<b>Address</b>	
<b>Postcode</b>	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

**If you are a representative of a group**, please tell us the name of the group and give a summary of the people or organisations that you represent.

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## Contact details/How to respond

Please send your response by 15 October 2014 to:

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102 Petty France  
London SW1H 9AJ  
Tel: 020 3334 3555

Email: [LegalAidReformMoJ@justice.gsi.gov.uk](mailto:LegalAidReformMoJ@justice.gsi.gov.uk)

### Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

### Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <https://consult.justice.gov.uk/>

Alternative format versions of this publication can be requested from [LegalAidReformMoJ@justice.gsi.gov.uk](mailto:LegalAidReformMoJ@justice.gsi.gov.uk)

### Publication of response

A paper summarising the responses to this consultation will be published at <https://consult.justice.gov.uk/>

### Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

### Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

## Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<https://www.gov.uk/government/publications/consultation-principles-guidance>

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