"BEST VALUE TENDERING FOR CDS CONTRACTS 2010"

THE LEGAL SERVICES COMMISSION CONSULTATION PAPER

MARCH 2009

A JOINT RESPONSE

by

THE BAR COUNCIL

and

THE CRIMINAL BAR ASSOCIATION

Background to this Response

1. The Legal Services Commission ["LSC"] first issued a Consultation Paper on Best Value Tendering ["BVT"] in December 2007. That paper dealt with BVT throughout the whole criminal justice system including the Crown Court. The Bar Council responded in March 2008.[1] We had grave reservations about the scheme: chief among these were the lack of a proper assessment of the benefits and disadvantages of BVT; the lack of detail in the proposals; the failure to consider the position of the Bar; the riskiness of the proposals; the lack of a proper impact assessment and the threat to the criminal justice system.

2. The LSC issued a second Consultation Paper in March 2009. This time BVT is limited to crime lower work in police stations. The successful tenderer wins the right to the consequent (and in one option, all) Magistrates' Courts' work. However, the paper makes plain that if the LSC thinks BVT works, it will extend it. That can only mean tendering for Magistrates' Court work (the price for which is currently set administratively) and in due course, Crown Court work, so the paper raises the same issues for the Bar as before. Also as before, the LSC has entirely ignored the position of the Bar in relation to Magistrates' Court work and the wider ramifications which these proposals will have on not just the Bar but on the interests of justice. To assume, once again, there will be no impact on the Bar is indicative of how poorly thought through these proposals are.

3. The Consultation Paper is difficult to absorb and understand. A large amount of the content is of a technical nature. As a result and to assist all of those who read

[1] "*Best Value Tendering of Criminal Defence Services:* The Bar Council's response to the Legal Services Commission's Consultation Paper of 10th December 2007". www.barcouncil.org.uk/consultations/responsestoconsultationpapers/ResponsesToConsultationPapers2008/

this Response, including the Criminal Bar, the Consultation Paper proposals are summarised at Annex 1.

Authorship

4. This paper is the response of the joint Bar Council and Criminal Bar Association Working Group chaired by the Chairman of the Bar, Desmond Browne QC and the Vice Chairman of the Criminal Bar Association ["CBA"], Paul Mendelle QC. The group has been widely drawn from barristers and other professionals at various levels of seniority from across the country. The membership is set out in Annex 2.

5. We have been very greatly assisted in the analysis of the purported economic justification for BVT by Dermot Glynn and Bob Young of Europe Economics and their Report *"A critique of the evidence used by the LSC for its BVT proposals"* is at Annex 3.

6. In addition we have been enormously helped by the thorough and penetrating analysis by Kim Hollis QC, Oba Nsugbe QC, Dexter Dias QC and Professor Aileen McColgan of the Equality and Diversity issues raised in the LSC Paper. Their analysis is at Annex 4.

General Observation

7. Bearing in mind our views as expressed below, it is inappropriate for us to answer many of the Consultation Paper questions. However, there are some that we are able to answer. Before doing so, and before making a detailed response to the Consultation Paper, we would wish to make the following important observation.

8. We are very mindful of the current economic situation and fully understand the constraints under which the LSC will have to work. As architects of the Graduated Fee Scheme, the Bar Council has long supported the need for predictable spending on legal aid work. Instead of introducing BVT we would invite the LSC to consider working collaboratively with the Bar Council and other stakeholders in order to find other ways of reducing the spending on criminal legal aid. A recent and good example of where the Bar Council has provided constructive assistance relates to the tightening of the use of two trial advocates.

Executive Summary of Response

9. The Bar Council and the CBA are opposed to the concept of the proposals in relation to BVT set out in the Consultation Paper. In summary we are opposed because:

(A) No Economic Rationale

i. There is **no theoretical economic justification and no empirical evidence** that BVT is an appropriate and effective means of procuring legal defence services. The economic analysis which we have commissioned from Europe Economics (at Annex 3) demolishes the case for BVT [see paragraphs 10 – 12 below].

ii. The proposals are **not in fact BVT** but rather Price Competitive Tendering ["PCT"] with a minimal level of quality being a qualification to tender, rather than being at the heart of the tendering process [see paragraphs 13 - 18 below].

iii. There is **no evidence that the criminal legal aid budget is out of control** or unsustainable or that the inefficiency of providers is driving up costs [see paragraph 19 below].

iv. Such **proposals have never been successfully used in this jurisdiction** to tender for non-legal services requiring a high level of quality [see paragraph 20 below].

v. There is **no jurisdiction in the world which successfully funds criminal defence in this way**. Those tendering schemes which have been tried in the United States of America and have needed to rely heavily on the quality of the service provided have not provided expenditure savings [see paragraphs 21 – 23 below].

vi. The proposals are being driven through at a time when relatively **recent Carter-based reforms have already produced or are likely to produce cost savings** and there has been insufficient time to assess their long-term effects [see paragraph 24 below].

(B) Flawed Pilot Schemes

i. The **pilot schemes are being rushed** with no proper consideration of the effect on firms in those areas that do not obtain BVT contracts. The timetable seems to be driven by a desire to co-ordinate with theoretical changes to business structures consequent upon the Legal Services Act 2007 rather than the need of the market or any actual change to business structures. Indeed the proposals are being introduced before such structures have had time to develop [see paragraphs 25-28 below].

ii. **It is incorrect to refer to the introduction of BVT in Manchester and Avon and Somerset as "pilots".** If implemented, these proposals would necessitate a fundamental and irreversible shift in the way providers deliver their services to clients in the police station and beyond. No effective "pilot" has been undertaken and the scale and impact of these proposals is too great to be considered a "pilot". The chronology shows that Manchester and

Avon and Somerset are in truth Phase 0 of the national roll out of these proposals (see paragraphs 29-33 below).

(C) No Proper BME Impact Assessment

i. There has been **no proper impact assessment of the effect on Black and Minority Ethnic ["BME"] firms.** There has been a failure to comply with the positive statutory obligations to guard against discrimination. The pilot schemes are in areas where there are very few BME firms. It is likely such firms will be unable to compete when the scheme is rolled out and their numbers will be decimated, thereby reducing the diversity of the legal profession and in the longer term the judiciary. No account has been taken of the effect on BME clients [see paragraphs 34 - 39 below and Annex 4].

(D) Adverse Effects on Criminal Justice System

i. There has been **no impact assessment at all of the effect of these BVT proposals on the self-employed Bar.** Indeed the Bar is clearly regarded as an irrelevance in this Consultation Paper. The Bar is already suffering from the dramatic increase in Higher Court Advocates ["HCAs"] and employed advocates caused in part by the impact of the introduction of the Litigators' Graduated Fee Scheme ["LGFS"]. Such an impact on the Bar will have wider ramifications for the quality of representation and the administration of justice for years to come. A referral Bar is an integral feature of our criminal justice system and these proposals

will inevitably weaken and may even destroy such a Bar [see paragraphs 40 - 43 below].

ii. BVT is expressly designed to reduce the cost of legal aid to the LSC and hence the financial returns to providers. This will inevitably lead to lower quality representation in the police station and in the Magistrates' Court and **will thus significantly impair the quality of the criminal justice system as a whole.** Any savings are just as likely to be counterbalanced by increased costs to the system, for example, through delays, errors and appeals caused by such lower quality representation. There has been no proper regard to the interests of justice [see paragraphs 44 – 52 below].

Detailed Response of Working Group

(A) No Economic Rationale

No theoretical economic justification and no empirical evidence

10. Previous LSC Consultation Papers relating to the procurement of legal aid work reveal the following supposed justifications for BVT:

    (a) Reduction of costs to the Exchequer;
    (b) More detailed and relevant information about cost levels;
    (c) Encouragement for suppliers to become more efficient; and
    (d) Provision of sufficient money for the supply of legal aid to continue to be available.

11. Those justifications boil down to one single reason – they will improve value for money. As Europe Economics make clear, at paragraphs 2.4 and 2.5 of their Report *"In order to show that its proposals would improve value for money, the LSC would have to show that these predictable changes in the nature of the service would be either desirable in themselves, or a worthwhile price to pay for the reduced prices paid per case. We have found nothing in any of the official documentation that establishes this or even attempts to address the question in a rigorous way."*

12. Accordingly there is no theoretical economic justification and no empirical evidence that BVT is an appropriate and effective means of procuring legal defence services. An analysis of the LSC's previous Consultation Papers reveals that the concept of tendering is no more than an unreasoned mantra. There has been no rigorous examination of the likely balance of the effects of BVT. It is no answer to say that the proposed "pilots" are such a rigorous examination.

Not in fact BVT

13. The BVT proposals assume a minimum level of quality but thereafter treat quality as irrelevant. In those circumstances BVT is a misnomer. It is plain and simple Price Competitive Tendering.

14. As Europe Economics state at paragraphs 2.18 – 2.20 of their Report *"The basic principle of best value tendering is that different aspects of the tender should all be considered, and appropriately weighted, so as to give the best overall value for money. This is not necessarily the cheapest tender since a slightly cheaper tender might be far worse in quality of output. If a tender is to deliver best value and to meet requirements (such as those of EU procurement law) for transparency an invitation to tender would need to be reasonably explicit about the weight to be given to different dimensions of quality and to price, so that it could be demonstrated that the winning tender would offer the best value. An auction or other competitive tender requiring a standard of quality for bidders to enter the market, but then with an outcome determined solely by price could not be correctly defined as a BVT tender unless there were no value to aspects of quality of the serve other than the minimum standard."*

15. We note with interest the Report of LECG commissioned by the Law Society which, when considered in conjunction with the analysis of Europe Economics, reveals these BVT proposals to be incontrovertibly flawed.

16. The proposed quality requirements are set out at page 14 of the Consultation Paper. These are insufficient. It is suggested that a Peer Review rating of level 3 or above will be sufficient. This would mean that less than 5% of the current providers would fail such a Review on the first review and less than 1% of the current providers would fail such a Review on the second review. The remaining

quality threshold requirements are illusory rather than real. In this regard the LSC is ignoring the opinion of Lord Carter, who he stated in his Report: *"it is important to note that any procurement system that seeks to reward efficiency … must have in place strict safeguards to ensure efficiency is not gained through compromising quality"*.

17. It is not just in relation to quality that the LSC has cherry picked from Lord Carter's Reports. In his Report entitled *"Procurement of Criminal Defence Services Market Based Reform"*, Lord Carter recommended the need to have a lower price limit for police station and Magistrates' Court cases *"to prevent unrealistic bids destabilising the market"*. This is unsurprising as Lord Carter's Report made clear that *"To be sustainable in the long term the supply of independent quality legal services must come from an efficient market structure, that must provide the appropriate quality of service at minimum cost. Such a market structure will mean the prices paid for each part of the criminal defence service reflect the costs of delivering that part of the service while allowing good and efficient suppliers to operate profitably"*.

18. The requirement that the bid must reflect the costs of delivering the service are entirely ignored in the proposals with the real likelihood of what the Consultation Paper calls 'suicide bids'. We consider that it is likely that firms will make suicide bids to do the police station work as a loss leader in order to seek to obtain a profit from the other work. There will be no restriction on firms from outside the bid zone making a speculative bid, without actually committing any money to the bid (other than the time it takes to produce the tender documents and investigate property prices in the areas in which they intend to bid).

The criminal legal aid budget is under control

19. The LSC has provided no empirical evidence to justify its proposals. Claims that prices resulting would be more sustainable, more accurately reflect local costs, and provide improved incentives have not been justified by evidence. There is no reason to think that public expenditure on this type of legal aid is increasing too rapidly.

PCT unsuccessful in this jurisdiction for professional services

20. The current BVT proposal is entirely untested in this jurisdiction for the provision of a professional service to a third party for which quality is an integral part. However, a proposal for the provision of Home Care Agency Contracts involving a variation of the online auction system of bidding has had disastrous consequences (see the Europe Economics Report). BVT will be no different.

No other jurisdiction successfully funds criminal defence in this way

21. Despite the competitive tendering that has taken place in the United States of America the precise BVT proposals contained in the Consultation Paper for the provision of legal services are, so far as we can ascertain, entirely untested in any other jurisdiction.

22. What experience in other jurisdictions has shown is that contracting for the provision of legal services does not in fact save money **when** there are sufficient quality safeguards in place. We note that at Chapter IV of the US Department of Justice's special report[2] it was stated *"contract systems that do not jeopardize the quality of representation to indigent clients often do not produce the cost savings sought*

[2] *Contracting for Indigent Defense Services: A Special Report* U.S. Department of Justice, April 2000

by the county, regional and state funders". It is therefore our view that if sufficient quality standards were to be part of the BVT proposals, there would be no real savings with these proposals. The start-up costs of designing, impact assessing, consulting, piloting, impact assessing again, consulting again and rolling out these proposals will far outweigh any short term costs savings.

23. Bearing in mind all the other criticisms which we make, the LSC is exposing the entire provider base to an unacceptable and unjustifiable risk by venturing into such uncharted territory in this difficult economic climate.

Recent Carter-based reforms have already produced or are likely to produce cost savings

24. The Revised Advocates Graduated Fees Scheme ["RAGFS"] has already produced savings which have been taken by the LSC and has stabilised the spend and ensured predictability in budgeting for higher crime work. The recently-introduced LGFS was intended to produce substantial cost savings and is currently expected to deliver these.

(B) Flawed Pilot Schemes

Pilot schemes are being rushed

25. Even ignoring the flawed nature of the proposals it is our view that the timetable is being rushed. Moreover this is at a time when the impact of the LGFS and the fixed fees in the Magistrates' Court have not had an opportunity to work through and for the changes to be costed. Lord Carter stated that *"A detailed assessment of where and when areas are ready for the introduction of best value competition will be needed. This should have a high threshold for the quality of services being provided…"*. At a time when solicitors are only just coming to terms with the impact of the LGFS it is impossible for any meaningful detailed assessment to be undertaken.

26. Despite this the LSC is intent on moving headlong in to a system of BVT in the absence of any evidence that their procurement process will produce any real savings. This absence of evidence is aggravated by the fact that there will be no time to learn any lessons from the so-called pilot schemes.

27. Based on the Indicative Timetable, by January 2010 all firms in Manchester and Avon and Somerset will know whether they have been successful or not in their bid. Those firms will then have until July 2010 to ensure they are able to profit from the bid. Firms will be restricted to the amount of work they can get from the scheme and will not be able to expand beyond 12.5% of the market (the absolute maximum based on a minimum requirement of 8 contracts in each area). The only way for a firm to increase their amount of work will be by moving into other areas of law or retaining the advocacy elements of the case in-house. There is a risk that firms will take on advocacy not because they believe that they are better at it or can deliver a better service to clients, but because it is the only way

the firm can profit from cases and increase the volume of work beyond 12.5%. This is even more likely if the firm has placed a suicide bid and therefore relies on elements of the case beyond police station work for its profit margin.

28. Those firms would then seek to obtain contracts in other areas owing to the artificial cap on their ability to expand in their current area. The current proposals for BVT are very likely to bring about a drastic reduction in the number of firms of solicitors providing criminal work. This is particularly likely to occur if option 1 at paragraph 4.2 of the Consultation Paper were instituted. Within a relatively short period of time there would not be a competitive market because of the reduced number of firms. This is likely to increase the risk of what the Impact Assessment calls "collusion". The reality will be that it will be practically impossible for new entrants (including the Bar) to enter the market and the consequences will be highly counter-productive.

Introduction of BVT in Manchester and Avon and Somerset not true pilot schemes

29. The Consultation Paper suggests that the BVT proposals will be 'piloted' in Greater Manchester and Avon & Somerset. The LSC promised in 2008 that the pilot would be a 'proper pilot'. It is, however, incorrect to call this a 'pilot' let alone a 'proper pilot' for four reasons.

30. First, the LSC has made it clear that BVT will go ahead. Carolyn Regan has stated *"We have looked at different options to the future and have **concluded** that Best Value Tendering is the best way forward to meet our joint aims"* [emphasis added]. This quotation does not appear to have been a mistake as Lord Bach has stated *"Best Value Tendering is a key part of the Government's programme of Legal Aid reform."*

31. Second, the indicative timetable for the roll out for Phase One commences in June 2010. This is a month before the pilot contracts even commence. In those circumstances the "pilot" should really be called Phase 0.

32. Third, an effective pilot is predicated on the basis of the piloted scheme or service being able to return to the same position from which it started if the pilot is unsuccessful. The nature of this pilot makes it impossible for providers to return to the status quo because they will have changed their business structure, potentially retrained and redeployed staff, opened or closed new premises, left or entered the market or taken numerous other irreversible steps according to whether they obtain a contract or not.

33. Fourth, there is a real risk that bidders from outside a pilot area could distort the auction process through cross-subsidising unrealistic bids by revenue derived from their profitable practice outside the area.

(C) No Proper BME Impact Assessment

34. The LSC must undertake a full equalities impact assessment before the formulation of any concluded policy and not as a rearguard action following the formulation of policy, as appears to be the case here. Without an impact assessment it is impossible to know if the proposals will have a discriminatory impact. The BVT proposals as outlined in the consultation are potentially discriminatory and, if implemented, may well be unlawful.

35. A proper equalities impact assessment of the BVT proposals would include an assessment of their potential impact on all relevant groups, including BME women; BME men with mental illness; and women with mental illness.

36. The policy of BVT as set out in the Consultation Paper will have a disproportionately discriminatory impact upon a number of relevant groups such as the BME community and BME lawyers providing legal aid assistance. Yet all this is in effect wholly ignored by the LSC.

37. The LSC has ignored its positive statutory duty to promote equality of opportunity as well as to eliminate unlawful discrimination.

38. The LSC has failed to explore whether there are other alternative ways of achieving the desired aim without bringing about the undesirable consequences identified.

39. These issues are more fully examined in the Equality and Diversity analysis at Annex 4.

(D) Adverse Effects on the Criminal Justice System

No Impact Assessment at all of the effect of these BVT proposals on the self-employed Bar.

40. The LSC's website contains a document relating to the Consultation Paper entitled *"Some Common Questions and Answers"*. Question 1 is *"Do these proposals affect the Bar?"* The answer given to that question includes the following:

"This consultation is clearly focused upon the proposal to tender elements of criminal lower work (police station and magistrates' court cases). We have also expressly ruled out the possibility of tendering Crown Court work at this time. Any proposals to extend tendering to cover this type of work would be subject to further consultation. On this basis we do not consider that the Bar will be directly impacted by the proposals or that there will be any restriction on the ability of clients to instruct a barrister of choice as their defending advocate".

41. Similar remarks as to the effect on the Bar are made at paragraph 7.13 of the Impact Assessment at Annex 1.

42. The reality is very different. In our response to the previous Consultation Paper we said that the LSC had failed to address the position of the Bar in the operation of any scheme of BVT. That failure has been repeated in the current Consultation Paper.

43. The insuperable obstacles to barristers participating in any BVT process remain, and are likely to remain, for some time to come. The Bar Standards Board is currently considering the responses to its Consultation Paper on *"The Legal*

Services Act 2007 – Legal Disciplinary Practices and Partnerships of Barristers". Alternative Business Structures are unlikely to be operational until at the earliest 2011. By that time not only will the proposed pilot be complete but BVT will have been rolled out under either the preferred timetable or the alternative timetable (see Annex 4 of the Consultation Paper). By 2011 the number of firms of solicitors is likely to have reached or be reaching the minimum level. The Bar will simply be unable to compete. It is not that there then would be no level playing field for the Bar, there would be no playing field at all. If our concerns are realised, the LSC will have ensured the devastation of the Criminal Bar and thereby the removal of high quality representation for the most difficult cases. The long term implications of these proposals have plainly not been thought through.

Significant impairment of quality of the Criminal Justice System as a whole

44. It is inevitable that the BVT proposals in the Consultation Paper will lead to lower quality standards and representation in the police station and in both the Youth and Magistrates' Court. It should be noted that the Youth Court regularly hears cases of the utmost gravity. It is not just common sense that quality will sink if these proposals are introduced: the report *"Contracting for Indigent Defense Services"* made the point that *"To function properly, the criminal justice system needs all components – prosecution, adjudication, corrections, and defense – operating effectively"*. We raised those concerns in our previous Response and they do not appear to have been addressed by the LSC. We note that at page 15 of the Consultation Paper there is a list of difficulties that have been experienced with tendering in other jurisdictions. The Consultation Paper is silent on any of the details as to which specific jurisdictions are being referred to. As a result we cannot respond to the LSC's bland assertion that they have considered difficulties which have arisen in other jurisdictions.

45. Firms of solicitors under pressure of reduced incomes will be forced to use unqualified or under-qualified members of staff to perform much of the work obtained as a result of BVT. Where the liberty of individuals is at risk and at a time when the Government continues to introduce rafts of changes to the criminal law, such an enforced de-skilling of those undertaking this type of work is wholly against the public interest. Recent history demonstrates that when fixed sums of money are paid to solicitors firms they will be likely to restrict their level of service.

46. A good example of this is the lack of assistance now provided to an advocate during Crown Court trials following the introduction of the LGFS. Whilst such attendance is meant to be covered by the litigators' fixed fee, such assistance is now rarely provided, whereas before the introduction of LGFS it was provided in 97% of Crown Court cases. Similar problems will arise with the introduction of BVT.

47. This de-skilling is being encouraged by the LSC's plans when it is plain that just the opposite is needed. The recently published Prison Reform Trust paper ***"Children: Innocent until proven guilty?"*** says at page 6: "*Children are frequently represented by solicitors or junior barristers who have little experience of working with vulnerable children and/or of defending in the youth court. Children at risk of being locked up on remand need to be defended by experienced practitioners who understand both youth justice and childcare law, and can competently oppose an inappropriate proposal for refusing bail. All solicitors and barristers who defend children need enhanced training in the relevant law. As with the family courts, there should be a panel of solicitors who specialise in youth court matters or solicitor's firms should be accredited for child defence work".*

48. At pages 17 – 18 of the Consultation Paper the question of expanding the LSC's telephone advice service is discussed. It is unrealistic and unhelpful to draw comparisons between the United Kingdom and other common law jurisdictions in this regard because of Section 34 of the Criminal Justice and Public Order Act 1994.

49. This fundamental inroad into the right to silence means that the quality of the advice that a suspect receives in the police station is paramount. Unsound or inexperienced advice will have significant repercussions for the liberty of the suspect. Other common law jurisdictions such as Canada, the United States of America, Australia and New Zealand have no statutory provision comparable to Section 34.

50. Our concerns in relation to the quality and nature of the advice given in the Police Station do not only relate to telephone advice. Any form of payment structure for the provision of advice at the Police Station which creates even the risk of suicide bids, as these BVT proposals do, will inevitably impact on the quality of advice given to suspects. Inadequate advice provided at the police station can have disastrous consequences for innocent individuals.

51. For example an innocent suspect in a rape case who is wrongly advised to answer 'no comment' to police questions by an inadequately experienced representative is put at risk of wrongful conviction because an inference of guilt can be drawn from his silence.

52. This will have additional cost implications for the LSC's budget as well as for other Departments. Those additional costs will be generated by factors which may include more applications to transfer legal aid, more arguments as to the admissibility of interviews and other evidence and as well as more appeals. This

in turn will have wider ramifications for the listing of cases, leading to delays and loss of cooperation of witnesses.

Conclusion

53. **We maintain our reasoned stance that BVT should not be implemented in this or any form.** This was previously expressed in our Response to the LSC Consultation Paper of 10th December 2007 entitled *"Best Value Tendering of Criminal Defence Services"*. There is nothing within the current Consultation Paper which causes us to change that stance.

54. Bearing in mind the objections we have raised, not least the absence of an economic justification for BVT and the fact that without a proper impact assessment the proposals if implemented would be potentially discriminatory and unlawful, the Bar Council and the Criminal Bar Association strongly urge the LSC suspend its proposals. This would allow the LSC to study the practical effects of the changes recently made to the procurement of criminal legal aid and to consider whether there is any empirical evidence to justify BVT. In the meantime the Bar Standards Board will have formed a view about amending the Code of Conduct. There is no point in piloting any BVT unless and until the Bar could compete in it.

Consultation Paper Questions

55. We now turn to consider the questions in Consultation Paper that we are able to answer. We do so having made clear that we regard these BVT proposals to be fatally flawed.

Question 1 *Do you agree that the creation of 'blocks' will assist providers in bidding for work in more than one area?*
Question 2 *What comments do you have regarding the way in which we are proposing to calculate blocks?*
Question 3 *In your view are the block sizes proposed for Manchester and Avon & Somerset CJS areas reasonable? Please comment.*

Questions 1 - 3 relate to the blocks of work that will be the subject of BVT. Our initial view is that blocks appear to be designed simply to make matters easier for the LSC, as opposed to providing any material benefit to the firms of solicitors who are tendering for the work. We are concerned that the block and bidding system will allow firms of solicitors from outside Manchester and Avon & Somerset to make suicide bids, whilst maintaining their local work under the existing CDS contracts. Whilst this might provide the LSC with a short term financial gain, the longer term impact on the quality, viability and sustainability of the work undertaken in that area must be questionable.

Question 4 *Do you have any comments on the proposals for a minimum bid size?*
Question 5 *Which of the two options for a minimum bid size do you prefer?*
• *Minimum bid size is a single block*
• *Minimum bid is based on two or more blocks that give access to a volume of work that could generate a sustainable level of income for one fee earner*
Question 6
Do you have any comments on the proposals for a maximum bid size?
Question 7
Do you agree that the process should aim to secure a minimum of 8 providers per scheme in the majority of schemes?

Question 8
Do you agree that different approaches to the minimum number of providers should be taken in lower volume schemes?
Question 9
Do you agree that securing a minimum of 4 providers, and introducing additional back-up requirements will help ensure that conflicts are handled appropriately?
Question 10
Do you agree with the proposal to require back-up in all BVT contracts for contiguous schemes? Please explain your answer.

Questions 4 – 10 relate to bid sizes. We regard the imposition of minimum and maximum bid sizes as illustrating the flaws of imposing a supposedly market-based solution on the provision of criminal legal aid. Restrictions of minimum and maximum bid sizes are by their nature inconsistent with such a market. It is highly likely that the maximum bid size in different parts of the country will vary significantly. We can well understand why the LSC wishes to impose a maximum bid size. However, it does not appear to us that the figure of a 12.5% maximum bid size is based on anything other than a 'guesstimate' relating to potential conflicts of interest between local firms of solicitors. The fact that it is a 'guesstimate' is symptomatic of how ill-considered this scheme is.

Question 11
In BVT areas would you prefer that either:
• Option 1 - only those providers that secure a BVT contract in an area can undertake magistrates' court representation in that area
• Option 2 - providers that do not secure a BVT contract, but do hold a CDS Contract 2010, have the opportunity to undertake publicly funded magistrates' court work as they do now, ie with no restrictions?

We reject both options for the reasons outlined in our response although Option 2 is marginally less unattractive since it would allow greater access to the work.

Question 12
Do you agree with the proposal to unify the escape threshold for exceptional cases across a CJS area? Please comment.

We do not answer this question.

Question 13
Do you agree with the proposal to unify exceptional cases and magistrates' court fee levels? Please comment.

We do not answer this question.

Question 14
Are the general principles proposed for assessing how providers intend to fulfill their bids realistic and sensible?

We do not answer this question

Question 15
Would you prefer the price-setting mechanism to be:
• Option 1 - sealed bid?
• Option 2 - online auction?
Please explain your reasons.

Question 16
In Option 1 - sealed bid, do you consider a three-day window to enter bids reasonable? If not what length of days would you prefer?

Question 17
In Option 1 - sealed bid, what sort of support do you think is necessary in order to ensure you are able to participate in the process?

• *face-to-face training prior to the tender*
• *telephone helpline*
• *online support*
• *instruction DVD/webcast*
• *other – please give details.*

Question 18
In Option 2- online auction, please indicate your preferred option for making bids in rounds:
• *as quickly as possible with 30 minutes between bid windows*
• *bidding up to four times a day with at least 2 hours between bid windows*
• *bidding twice a day with at least 6 hours between bid windows*
• *bidding once a day with at least 12 hours between bid windows*
• *other – please give details.*

Question 19
When making your bids, what time windows would you prefer?
• *7am-10pm*
• *mornings*
• *afternoons*
• *weekends*
• *office hours only*
• *other (please specify)*

Question 20
In Option 2 - online auction what type of support do you think is necessary to ensure you are able to participate in the process?
• *face-to-face training prior to the auction*
• *telephone helpline*
• *online support*
• *instruction DVD/webcast*
• *access to the bidding platform at locations outside your office*
• *other – please give details.*

Questions 15 – 20 relate to the mechanics of sealed bids and online auctions. It seems to us that both options have profound drawbacks. The LSC is asked to consider the debacle caused by the online auction system of bidding for the provision of Home Care Agency Contracts.

Question 21
Do you have any comments on the proposed entry requirements to bid?

This is probably the most important question in the entire Consultation Paper as it relates to the quality requirements to enter the tendering process. As we have stated we regard the entry requirements as wholly inadequate. Level 3 is not a sufficiently rigorous assessment of quality. Much of that peer review relates to administrative efficiency as opposed to the quality of service. Once the entry requirement is met quality then becomes an irrelevance. Unless and until quality is put at the heart of the tendering process then these proposals are PCT pure and simple and not BVT.

Question 22
Do any of the proposals set out in this consultation document create an unreasonable restriction on new market entrants?

The proposals in the Consultation Paper represent significant and unreasonable restrictions on new market entrants. We cannot see how it would be feasible for a new firm of solicitors to set up business without having secured a contract. Furthermore, the position of the Bar as a potential new market entrant in years to come has been entirely ignored. With the current proposals, it is impossible to see that barristers could ever compete.

Question 23
To what extent do you consider that the principles set out for the scheme rules for BVT are appropriate?

We do not answer this question.

Question 24
Do you have any comments on the proposals to abolish panels in BVT areas?

We do not answer this question.

Question 25
What are your views on the additional requirements to ensure providers must deliver services at the magistrates' court where they have previously provided the police station element of the case?

We do not answer this question.

Question 26
Do you think that removing the requirement to report profit costs, travel and waiting on the majority of police station and magistrates' court cases under BVT would be of benefit to providers? Please comment.

We do not answer this question.

Question 27
Do you agree with the following proposals on risk sharing:
- *the ability for providers to request a re-tender in the circumstances set out?*
- *the introduction of change provisions when police stations close?*

We do not answer this question.

Question 28
Do you agree that the contract length should be 2 years (+ ability to extend by up to 2 years)? What would the ideal contract length be for you?

We do not answer this question.

Question 29
Do you agree with the way in which we propose to reallocate work should providers exit the market part way through a contract?

We do not answer this question.

Question 30
Do you agree with the proposal that under BVT contracts solicitors may only qualify as supervisors through CLAS accreditation?

We do not answer this question.

Question 31
Do you agree that the requirement for the supervisor to fee earner ratio should be not lower than 1:4? If not, what would the appropriate ratio be, and why?

We do not answer this question.

Question 32
Do you agree that the individual continuous qualifying requirements for duty solicitors should be amended as proposed?

We do not answer this question.

Question 33
What are your views on the area prospectus? Specifically:
- *the classifications of data used*
- *whether there is unnecessary information within the prospectus*
- *whether there are other types of information you would like to see incorporated*

We do not answer this question.

Question 34
Do you have any comments on the proposals for the scope of the pilot review?

Question 35
Do you have any comments on the proposals for the roll-out timetable?

For the reasons given above we regard the roll out timetable as being rushed, unrealistic and unwise. Part of that complaint is related to the lack of any detailed or meaningful pilot review. Any review of the pilot areas must take place **after** the pilots have been operational for at least 18 months. This is so that the inevitable impact on the quality of the service being provided can be properly measured. This can only be done once a sufficient number of cases have actually concluded. We suggest a period of 18 months because many cases in which police station advice will be given by a provider with a BVT contract may not result in charges for many months. The delay before charges are brought will be followed, in the event of a not guilty plea, by a delay before trial.
We repeat, the tendering for Phase One should not commence until a review (including a full Equality and Diversity Impact Assessment) of the pilots has

concluded. If the proposed timetable in the Consultation Paper is pursued by the LSC, it leaves them potentially open to successful legal challenge.

Question 36

Do you agree with the methodology and conclusions of the initial impact assessment that accompanies this consultation? If not, please give details of the aspects of the assessment you disagree with. Do you have any suggestions as to how the impact of the proposals should be assessed?

Question 37

Do you agree with the methodology and conclusions of the initial equality impact assessment, which sets out our assessment of the potential impact of the proposals on people because of race, gender, disability and age?
If not, please explain your objection. Can you suggest any other factors that should be taken into account and do you have any information that might assist the Commission in assessing whether the proposals in this consultation paper might impact disproportionately on particular groups?

Please refer to Annex 4 of this response.

Annex 1

Brief Summary of Consultation Paper[3]

Scope of Paper

1. The Consultation Paper is concerned **only** with police station and Magistrates' Court work. There are no proposals for the Crown Court but the paper is clear that, if successful, BVT will be extended to other parts of the legal aid budget.

2. Although it is only the price for **police station** that will be set by **tender**, the price for Magistrates' Court work being set **administratively**, as it is at present, the successful bidder for police station work wins the right to the Magistrates' Court work.

Police Station Work

3. A successful bidder for police station work will win the right to:

    a. a number of police station duty slots on a duty scheme (or schemes)
    b. a licence that allows them to undertake own client work at the police stations where they have slots
    c. Magistrates' Court duty slots in scheme areas;
    d. a licence to undertake Magistrates' Court representation anywhere, if they have represented the client in the police station.

4. It is important to note that only those providers that have obtained a BVT contract will be able to represent clients at police stations under public funding in

[3] We are grateful to Vicky Ling of the Legal Action Group for permission to draw upon her article in the May 2009 edition of *Legal Action* in producing this summary

BVT areas (see Consultation Paper, paragraph 4.44); otherwise, a defendant who wishes a non-BVT firm to represent him at the police station must pay privately or the firm must act *pro bono*.

5. The LSC proposes to divide police station work into blocks. These blocks are numbers of duty solicitor slots grouped to give access to similar volumes of cases. It is hoped that this will make it possible to compare bids between different schemes. However, firms may need to be on duty for different lengths of time to generate these similar volumes of work, depending on how busy a scheme is, so the costs to the firm of blocks of cases will vary across schemes.

6. The block size in any given Criminal Justice System area ["CJS area"] is calculated by reference to the number of cases that can be obtained from one slot on the busiest scheme. The method the LSC has used to calculate blocks is illustrated on page 29 of the Consultation Paper.

Bidding for Blocks

7. All schemes within a CJS area will be tendered at the same time. Although firms can bid for more than one scheme the LSC will only accept one bid per firm per CJS area. If a firm has more than one office within the CJS area, the bids must be combined.

8. A bid will be for the number of blocks the firm wants at a price per case. The LSC is proposing minimum and maximum bid sizes.

   Minimum bid sizes there are two options: either a single block; or the number of blocks that could generate a reasonable income for one fee-

earner. The LSC considers this to be between £50,000 to £100,000 of police station and magistrates' court fees.

Maximum bid size: the LSC is proposing to set this at one-eighth of the total number of blocks on a scheme. Therefore, there will be at least eight providers on most schemes.

9. Firms will need to demonstrate the viability of their bids by supplying detailed information about proposed staffing arrangements (see page 41 of the Consultation Paper).

Pricing Police Station Work

10. Police station fees will be set by tender (see pages 43-56 of the Consultation Paper). Two options are proposed: a single online sealed bid or an open online auction.

11. A sealed bid would contain the number of blocks of work and a price per police station case.

12. In the open online auction system the LSC would open the bidding by setting a price equal to twice the current highest fixed fee in the CJS area. Firms would be asked to state the total number of blocks they would be prepared to take on at that price. A firm could only make one bid for blocks of work in a CJS area, although this could be on a number of police station duty schemes. The round would close at a predetermined date and time.

13. If there were more bids than work available, the LSC would reduce the price per case by a fixed amount and open a second round of bidding. Firms could

decrease the volume of work they were prepared to take on (but not increase it or enter a bid for the first time in the second bidding round). They could also switch bids between schemes within a CJS area. At the lowest price they were prepared to accept, firms would register exit bids. Further bid rounds would take place until the volume being bid at the LSC offer price is equal to or lower than the volume of blocks being offered. Any firm bidding at the LSC's price in the final round will be successful.

Magistrates' Court work

14. The rates are fixed administratively as at present but the rates will be simplified: there will be national higher and standard fees (see page 40 of the Consultation Paper).

15. The LSC is consulting on **two options** for Magistrates' Court work:

    Option One: only BVT contract holders can represent in Magistrates' Courts; or

    Option Two: holders of a 2010 CDS contract will be able to represent in the Magistrates' Court without restriction ie the present system.

16. If the first option is adopted, firms that were not successful in obtaining a BVT contract (but did get a 2010 CDS contract) would only be able to do Crown Court work in the BVT areas. They would only be able to do own client police station (private or *pro bono*) and Magistrates' Court work outside the BVT areas.

Timetable

17. The consultation period runs from 27 March 2009 to 19 June 2009. The LSC's preferred timetable for pilot and roll out and an alternative timetable running

from October 2009 to February 2012 can be found in Annex 4 ('Indicative timetable for any rollout') of the Consultation Paper.

Pilots: Avon & Somerset; Greater Manchester

October 2009: tender opens

July 2010: pilot contracts go live.

Phase 1: London, Merseyside, Northumbria, Derbyshire, Warwickshire, Hampshire, South Wales, Essex

June 2010: tender opens

January 2011:

Phase 1 contracts go live.

Phase 2: Sussex, Surrey, West Yorkshire, South Yorkshire, Northamptonshire, Lincolnshire, West Midlands, Nottinghamshire, Leicestershire, Lancashire, Dorset, Gloucestershire, Wiltshire, Devon & Cornwall, Dyfed-Powys, Hertfordshire, Cleveland

September 2010: tender opens

April 2011:

Phase 2 contracts go live.

Phase 3: Kent, North Yorkshire, Durham, Humberside, Bedfordshire, Norfolk, West Mercia, Cheshire, Cumbria, Thames Valley, Gwent, North Wales, Suffolk, Staffordshire, Cambridgeshire

December 2010: tender opens

July 2011: phase 3 contracts go live

Annex 2

The members of the group were as follows:

Desmond Browne QC	Chairman of the Bar
Paul Mendelle QC	Vice Chairman of the Criminal Bar Association (CBA), 25 Bedford Row, London
Dexter Dias QC	CBA, Garden Court Chambers, London
Kim Hollis QC	CBA, Vice-Chair of the Equality and Diversity Committee, 25 Bedford Row, London
Oba Nsugbe QC	CBA, Pump Court Chambers, London
Dermot Glynn	Chairman, Europe Economics
Bob Young	Principal, Europe Economics
Tom Little	CBA, 9 Gough Square, London
David Anderson	Development Manager, St John's Buildings, Manchester
William Baker	Criminal practitioner, St John's Buildings, Manchester
Sarah Buckingham	CBA, No.5 Chambers, Birmingham
Paul Cook	Criminal Practitioner, Albion Chambers, Bristol
Fiona Jackson	CBA, 33 Chancery Lane, London
Eleanor Mawrey	CBA, 9 Gough Square, London
David Hobart	Chief Executive, Bar Council
Mark Hatcher	Director of Representation and Policy, Bar Council

Annex 3

Report from Europe Economics [separate document]

Annex 4

Equality and Diversity Analysis

Introduction

1. From an Equality and Diversity point of view, the proposals set out in the Consultation Paper are seriously flawed and if implemented as proposed are potentially unlawful. The importance to minorities of having both access to, and confidence in, a legal aid system cannot be underestimated. These proposals threaten these fundamental principles.

Principles

2. The essential principles are as follows:

   i. It is unlawful for a public authority, such as the LSC, to carry out any act that constitutes discrimination;[4]

   ii. There is a two-fold statutory duty to have proportionate regard to the need (1) to eliminate race discrimination; and (2) to promote equality of opportunity[5] and good relations between persons of different racial groups. Thus there is both a negative and positive quality to the core duties;

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[4] Race Relations Act 1976, section 19B

[5] 'The twofold obligation to eliminate discrimination and positively to advance equality was imposed by the Race Relations (Amendment) Act 2000. It followed the Stephen Lawrence Inquiry Report (Cm 42621) of February 1999. It was intended to enact a major change from the previous statutory provisions contained in the old Section 71. Those old provisions were perceived as lacking content as to steps organisations such as local authorities were required to take to comply. In addition, they were difficult to enforce. The new duty to have regard to the twin needs of elimination of discrimination and to promote equal opportunity and good relations for all is described within Schedule 1A to the 1976 Act (as amended) as a general duty imposed on the bodies specified in that Schedule'
per Moses LJ in the Ealing case: *Kaur & Shah v LB Ealing* [2008] EWHC 2062 at [15]

iii. Additionally, the LSC by its founding and governing provisions has a specific obligation to conduct race equality impact assessments of its policies in relation to its public duty to promote equality;[6]

iv. The purpose of an equality impact assessment ["IA"] is to examine critically and challenge the assumption that a policy affects all parties identically;

v. An IA provides the implementing organisation with the opportunity to ensure that different groups are equally served and not discriminated against or disproportionately disadvantaged by the policy, whether directly or indirectly. Put another way, does the policy put some racial groups 'at a disadvantage'?[7]

vi. An IA should examine the unintended adverse effects surrounding equality issues before the policy is introduced: it is unlawful to formulate a policy contingent upon an assessment;[8]

vii. In particular, an IA should not be a 'rearguard action following a concluded decision'[9]; it should be and be seen to be an integral part of the formation of policy, not a justification for its adoption;

viii. An IA should be rigorous as opposed to superficial or tokenistic: a 'conscientious assessment of future impact';[10]

ix. An IA undertaken at the initial planning or at the review stage should provide a mechanism for anticipating the consequences on different relevant groups, to assist in ensuring that (1) negative consequences are eliminated or minimised and (2) opportunities for promoting equality are maximised;

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[6] See, e.g., Consultation Annex 1, [11.5], p25
[7] *Ealing* case [18]
[8] *Ealing* [36]
[9] *R (BAPI and Another) v Secretary of State for the Home Department and the Secretary of State for Health* [2007] EWCA Civ 1139 at [2] and [3]
[10] See, e.g., *Ealing case* misc, but esp. at [20] and [25]; and RRA 1976, section 71

x. If the results of the analysis suggest a differential adverse impact on an identifiable relevant group, consideration must be given to whether the proposal could amount to unlawful indirect discrimination;

xi. Any departure from the two-fold core duties must be on a basis that is 'clear and cogent';[11] in other words, it must be capable of justification;[12]

xii. In addition to the statutory duties, the Equality Commission has issued a non-statutory guide "Duty to provide and to promote Race Equality, a Guide to Public Authorities 2002".[13] This guide sets out the stages which a local authority should follow in issuing a race quality impact assessment. Those stages emphasise the need for consultation with particular groups who might be affected and also emphasises, before deciding whether to adopt the proposed policy, the need to have that decision based upon the "results of your race equality impact assessment";[14]

xiii. A proposal may constitute unlawful indirect discrimination where the objects of the proposal cannot be justified on non-discriminatory grounds and/or there are other non-discriminatory ways of achieving the same objectives;

xiv. The test is whether the proposed changes are a proportionate response, when evaluated against the adverse impact on the relevant group under consideration;

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[11] *R (Munjaz) v Mersey Plan NHS Trust* [2006] 2 AC 148

[12] per Moses LJ, in *Ealing*, at [22]

[13] The obligations imposed on public authorities such as the LSC are fed with recognisable content by the statutory Code of Practice (Code of Practice on the duty to promote Race Equality 2002 CRE). The Equality Commission is empowered by Section 14 of the Equality Act 2006 to issue a code of practice

[14] Guide, p49

xv. If the proposal cannot be justified in these terms, then it must be abandoned and alternative options explored: the consequences of the IA cannot simply be ignored or airbrushed out of the process;

xvi. Where there is unavoidable adverse impact on a relevant group, there must be due regard to steps which can mitigate that negative effect;

xvii. In such circumstances there must be consideration of building in safeguards to ensure equality of opportunity. Consideration must be made of alternative steps to achieve the desired aim and avoid the undesirable consequences identified.

Analysis

3. It seems clear that by these proposals the LSC does not – and cannot conceivably - comply even with its minimal statutory duties to avoid discrimination and promote equality of opportunity. The proposals also run contrary to the LSC's own discrete and specific diversity policies and requirements.

4. What is required is that there be a <u>full</u> Race Equality Impact Assessment prior to the implementation of these proposals, and that the evaluation be rigorous and robust, meaningfully and fairly taking into account the evidence and responses elicited. The data sets assembled by the LSC thus far suffer from a number of serious omissions, and the LSC displays no inclination to remedy this deficiency.

5. The LSC chooses to shut its ears to advice: from MDA, the consultants it commissioned to advise on equality impact, and who concluded it was '*essential*' for an IA to be conducted before the tendering process began; and from the House of Commons Constitutional Affairs Committee, which considered that it was *'imperative'* that reforms potentially affecting BME clients disproportionately should be 'robustly assessed' in the light of a full IA.

6. This must be viewed in the context of the LSC's admission that BME firms *'tend to have smaller contracts than those with White British ownership'*, and in the past *'this has given rise to concerns that BAME* [sic] *firms might be necessarily disadvantaged by the introduction of competition'*.[15] Although the LSC says it *'believes'* that BME firms are unlikely to be adversely affected,[16] the inescapable reality is that BME firms will be indirectly discriminated against, being unable to compete on an equal footing. Thus the proposals do not promote but rather substantially erode equality of opportunity.

7. It appears clear that the LSC is proceeding with its policy regardless of its discriminatory consequences; this is fundamentally at odds with Equality Commission guidance that whether a policy is adopted at all should be based upon the results of the race equality IA.

8. MDA's research, commissioned by the LSC in April 2006, concluded that changes to legal aid work in London would not only adversely affect BME firms, but would also have a negative impact on the employment prospects of BME solicitors.

9. There would also be a commensurate adverse impact on the BME Bar and the young Bar, since both sectors of the profession have particularly close links to BME firms. These considerations would damage the aim of creating a more diverse judiciary.

[15] Annex 1, [11.18]
[16] Annex 1, [11.33]

10. It is disingenuous to contend, as the LSC does, that the proposals have been designed to *'avoid any potential discrimination by firm size'*,[17] when it is strikingly obvious to any impartial observer that it is precisely the economic advantage of large firm size which will permit firms to bid below realistic rates in order to 'win' tenders as loss-leaders. BME firms are not in a position to absorb artificially low bid levels.

11. The House of Commons Constitutional Affairs Committee was of the firm view that the introduction of minimum contract thresholds would disproportionately affect BME providers in London, Birmingham, Leicester and Bradford, since BME firms are over-represented among small legal aid providers. Despite this, and the express representations of the Black Solicitors Network, the Society of Asian Lawyers and the Carter Diversity Group, the LSC proposes a minimum bid of £50,000.

12. Adverse impact having been identified, the LSC has not gone on to perform the next step in its obligations, namely consideration of whether this constitutes unlawful indirect discrimination.

13. The offer of *'support'*[18] in the bid process to BME firms is of little consolation when the intrinsic structure of the proposals builds in competitive disadvantage. The removal of *'the cost of finding out about tender opportunities'* provides no comfort when the scheme disproportionately discriminates against smaller firms unable to benefit from economies of scale or deep pockets which can subsidise low-level bids.

[17] Annex 1, Box 2 at p25
[18] Annex 1, [11.19]

14. There is no room for reconciling these unequal consequences with the LSC's own diversity goals: to set a 'level playing field so everyone has the opportunity to realise their potential'.[19] The inconsistent standards the LSC adopts in this area are clear from a consideration of its published aim to *'meet the diverse needs of our clients'* by 'commissioning legal services from a diverse group of providers'.[20] These proposals will inevitably have the opposite effect.

15. One of the ways the LSC claims to promote its legal duties is to *'preserve client choice'*.[21] However, the closure of significant numbers of BME firms will undoubtedly diminish client choice, particularly where culturally-sensitive and linguistically-attuned lawyers add value to the service provided to the lay client. Close cultural connection between lawyer and client enhances confidence and results in advice being accepted more readily. There is also the cost benefit of avoiding expenditure on interpreters.

16. BME clients are more likely to engage the services of a BME firm for the above reasons: as the LSC duly recognises.[22] Thus the impact of the closure of BME firms will be felt particularly sharply by BME lay clients. The consequence of that will be the erosion of public confidence in the justice system, or at the very least, the serious risk of undermining the confidence of BME constituent communities, which are over-represented at every stage of the criminal justice process, and thus have a significant stake in this issue. Lord Carter acknowledged in his Final Report that a diverse supplier base is essential to public confidence.

17. For these reasons, the proposals jeopardise social cohesion in an important respect.

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[19] LSC published Diversity Goals: 'Our Commitment to Diversity – What diversity means to us'
[20] LSC: 'Leading by Example'
[21] Annex 1, [11.6]
[22] Kemp, V & Balmer, N.J. (2008), p39, quoted at Annex 1, [11.9]

18. It is a matter of concern that the LSC has chosen to pilot the scheme in two areas with low proportions of BME firms.[23] Thus the results generated by such pilots are unlikely to be representative of the actual impact on BME firms in areas with greater concentrations, such as London or the West Midlands. Extrapolating from these test areas is bound to be speculative; it does not follow from a lack of adverse impact in Manchester and Bristol that there would be no such impact elsewhere.[24] Such a conclusion would be partial, artificial and would offend against the fundamental obligation of 'conscientious' and rigorous advance assessment.

19. Furthermore, as far as the race impact assessment of the impact on *providers* is concerned, this focuses almost entirely on the question of firm size. Of particular concern is the fact that, notwithstanding the LSC's citation (paragraph 11.14) of the MDA's comments, in respect of London Competitive Tendering, that *"[m]uch depends on how the process is structured, how complicated it is and on what criteria the LSC uses to distinguish between the different types of bid"*, the LSC is not proposing to pilot BVT in those areas (London and the West Midlands) with the largest proportions of BME owned and controlled offices. At paragraph 11.23 the LSC states that *"firms that are owned and controlled by BAME solicitors are more likely to do more than £50,000 of crime lower work than firms owned and controlled by White British solicitors outside London… In London the reverse is true".* At paragraph 11.25 the LSC states that *"by proposing to pilot tendering in other areas first, we will be able to draw on experience of how the system works in practice to inform any decision about the introduction of tendering in London".* It is difficult to understand how piloting the scheme in areas other than those in which BME firms are concentrated can possibly be helpful in determining what the impact on those firms will be. There

[23] Annex 1, [11.17]
[24] See, e.g., LSC's 'commitment' to conduct a formal evaluation of the pilot scheme before its extension: Annex 1, at [11.2]

may be particular issues operating in BME firms which will affect their ability to tender for, or chances of success in tendering for, contracts and a pilot scheme which eliminates a disproportionate number of such firms from consideration will risk giving the "green light" to a discriminatory system.

20. There is no evidence that the inevitable departure from the two core duties has been based on a 'clear and cogent' basis. It cannot thus be justified as being proportionate.

21. There is no evidence that the LSC has complied with its obligation to give meaningful consideration to other schemes which would have led to a less damaging impact on BME firms.[25]

22. Nor does the LSC appear to have modified its proposed scheme sufficiently to mitigate the impact on BME firms. Measures such as *'pre-qualification questionnaires'* will count for little when weighed against the effect of BME firms which would follow implementation.

23. The assertion that solicitors' firms will *"take the need to promote equality seriously when submitting bids"* does not itself meet the LSC's obligation to (inter alia), promote equality. It is clear from the decision of the Administrative Court in *R (Kaur & Shah) v Ealing*[26] that race neutral action by service providers, even targeted action by generic service providers, is not necessarily adequate to comply with the requirements of the RRA. The issue at the heart of the *Ealing* case, recognised by Moses LJ, is that the RRA's requirement that services be provided on an equal basis for BME clients may not be satisfied by the provision of those services, however "sensitively", by non-BME providers. This was

[25] Where is the comparative analysis of the adverse impact on equality as between BVT and the MoJ's other candidate solutions, cuts to scope and payment: ibid [1.2]
[26] [2008] EWHC 2062 (Admin)

acknowledged to be the case in *Kaur & Shah* in the context of domestic violence service provision. It may also be true in the case of solicitors' services for BME clients. The Initial Equalities Impact Assessment conducted by the LSC does not adequately engage with this possibility.

24. In addition, the LSC's assertion that *'equalities monitoring will help to ensure that the system is fair'*[27] does nothing to address the true vice, which is that the structure of the scheme itself will operate to discriminate indirectly. In this regard, formal monitoring is of secondary, or lower, value. There is no or no satisfactory evidence that safeguards to promote equality have been built into the scheme, as is required.

25. Concern about the LSC's commitment to rigorous and meaningful IA arises additionally from its fundamental misconstruing of the MDA report it commissioned in relation to Price Competitive Tendering (PCT). MDA very clearly identified four specific areas of the LSC's proposals for Price Competitive Tendering (PCT) of criminal legal aid contracts which could potentially have had an adverse impact on BME owned/controlled criminal practices and their clients. However, in its report on family advocacy fees the LSC claimed the following:

'The LSC commissioned Managing Diversity Associates to produce a report to analyse the impact of LSC reforms on Black & Minority Ethnic (BME) firms within the London area. The findings, Research on Ethnic Diversity amongst suppliers of Legal Aid Services, found no evidence of unfavourable impact on BME suppliers. However, it did recognise that the proposed reforms could present "barriers to growth and entry for BME solicitors". [28]

[27] Ibid.
[28] Annex G para 2.5 P6

26. This was wrong, as MDA has subsequently pointed out.[29] Errors such as this, and in relation to work that the LSC has itself commissioned, reveal the flaw in the LSC's approach. It is not open to the LSC to limit its engagement with the question of equality and diversity to the extent necessary to achieve a predetermined goal, irrespective of the consequences to BME firms. This is not the approach required by law.

Disability

27. The approach of the equalities impact assessment to disability is also fundamentally flawed. The LSC assumes that the only relevant question for the purposes of the disability duty relates to the disability status of those owning or managing solicitors firms.[30] The impact assessment goes on to invite submission of evidence *"that would assist in assessing the possible impact of the policy on disabled people and any suggestions regarding positive steps we could take to promote equality through these proposals"* but the LSC's own "analysis" is limited to asserting that:

"We do not believe that any pilot tender would disadvantage firms that are owned or controlled by disabled people and we will ensure that any tender system … is accessible and support is available to allow all firms to participate…"[31]

(referring to evidence from the Bar Council and Law Society that disabled clients may be more expensive to service, and from the Law Society that the cost of travel for disabled fee earners may be higher) "*it is a general feature of the service that the time taken to deliver it will vary from client to client and from case to case. Providers … would have to assess the overall cost of providing the service [and their travel costs] across their entire caseload when calculating their bids… Providers have a*

[29] MDA report to FLBA: 3 April 09
[30] Paragraph 11.37
[31] Paragraph 11.39

legal obligation not to discriminate against clients or staff in an attempt to avoid incurring costs. To help ensure that this does not happen, contract management processes allow us to monitor the behaviour of firms and hold them to the service requirements in the criminal contract. We are also proposing introducing equalities monitoring into the pre-qualification stage of any tender". [32]

28. What is manifestly absent from the LSC's Initial Equality Impact Assessment is any attempt to investigate the possibility that criminal defence services to disabled clients may in fact be disproportionately provided, and/or more effectively provided, by particular firms of solicitors whose costs may, as a result, be higher than those of other firms with less experience of this specialist type of service provision. The bare assertion that successful bidders will be required not to discriminate against their clients does not scratch the surface because it fails to engage with the experience of service providers who have built up expertise in making reasonable adjustments in this area. It is further apparent that the LSC does not engage at all with the Law Society's point about increased travel costs for disabled solicitors.

Gender

29. The LSC's sole reference to gender is to state, having pointed out that *"72.2% of offices have majority male ownership or control, 12.7% majority female ownership or control and 15.1% have split ownership or control"*[33] that *"We do not believe that any of the current proposals will have a differential impact on people based on their gender and invite respondents to the consultation to submit any evidence they have that would assist in assessing the possible impact of the policy. If we were to pilot a best value tender, the evaluation of the scheme would examine any impact on people based on their gender"*.

[32] Paragraphs 11.42-11.43
[33] Paragraph 11.47

30. The obligation is on the LSC to pay "due regard" to the need to eliminate unlawful discrimination and harassment based on gender and to promote equality of opportunity between men and women. A central aspect of that role concerns impact assessment. Here, as in relation to disability, the LSC has effectively ignored the duty placed upon itself to conduct an adequate impact assessment and invited others to raise any potential equality issues. Had the LSC itself undertaken conscientious evaluation of possible disability and gender impacts of the scheme, the fact that it invited further comments in addition would be welcome. But instead it has abdicated its own responsibility to scrutinise the potential impacts of its proposals in relation to gender (for example, on the ability of firms having specialist experience with women experiencing domestic violence, who have used violence or engaged in other criminal activity).

Other comments

31. The separation of race and gender, race and disability and gender and disability in the LSC's equalities impact assessment illustrates the compartmentalised thinking that underpins it. BME women, for example, are likely to have specialist needs which will not be capable of being met by "mainstream" solicitors' firms. Domestic violence provides one particularly stark example of this, as indicated by *Kaur & Shah*. The LSC proposals have the potential to damage smaller solicitors' firms which have special expertise in dealing with BME who are accused of offences arising, for example, against a backdrop of domestic violence. The fact that the statistics outside London are claimed not to demonstrate any race disparity as regards low value work does not say anything about the ability of specialist service providers to tender for contracts of any particular minimum size.

32. The importance of specialist service provision was recognised by Moses LJ in *Kaur & Shah* and the failure of the equalities impact assessment even to recognise that BME women might have such specific needs suggests an inadequate approach to that impact assessment. Religious differences which are not addressed (other than in passing) by the LSC will give rise to similar difficulties. And while religious differences as such are not the subject of positive obligations under the RRA or other equality legislation, the extent of overlap between religion and race means the need to cater for such differences cannot be overlooked.

33. A proper equalities impact assessment of the BVT proposals would include assessment of their potential impact on groups such as BME women, BME men with mental illness and women with mental illness. Rates of mental illness among some BME groups are far higher than the average, and many BME men who become involved in the criminal justice system will have mental-health related needs which will differentiate the services they require from those required by persons with no such needs. Similarly women in the criminal justice system are disproportionately likely to be suffering from mental health problems. No attempt has been made even to consider whether the BVT proposals would have a disproportionate impact on people in these groups.

34. It is clear from the above that the approach taken by the LSC to equality impact assessment is altogether too crude to satisfy the requirements imposed upon it by the positive duties. In addition, as Munby J stressed in *R (E) v Governing Body of JFS; R (E) v Office of the Schools Adjudicator,*[34] compliance with the positive obligations requires that due regard be paid *both* to the need to eliminate unlawful discrimination and harassment *and* to the need to promote equality of

[34] [2008] EWHC 1534/1536 (Admin)

opportunity (in the case of race also good relations and in the case of disability also the participation of disabled persons in public life etc). There is no evidence in the Initial Equalities Impact Assessment that the LSC has turned its attention at all to the promotion of equality on any of the grounds to which the positive duties apply.

35. The proposals in their present form will so adversely affect the diversity of the profession that it will reverse the considerable progress that has been made over the last decade. Just at the moment when the numbers of women and BME practitioners entering the profession at all levels are higher than they have ever been, the present proposals strike at the heart of the publicly funded criminal fields of practice. This in turn will deter women and BME practitioners from remaining within the profession; and hopes for the creation of a judiciary reflective of the society it serves will be dashed.

36. As solicitors' firms understandably change their behaviour in response to the introduction of competition, (for example, by undertaking more advocacy work in-house), the impact upon the Bar will manifest itself in a further reduction of work. The impact upon the BME Bar will be disproportionately dramatic. Recent statistics (Legal Services Research Centre, February 2008) show that 44.7% of BME self-employed barristers and 35.6% female self-employed barristers practice in crime. Those self-employed barristers who practise in crime derive more than 91% of their income of their total practice in crime from publicly -funded work. In other words, the 44.7% of BME self-employed barristers who practise in crime derive more than 91% of their incomes in crime from publicly-funded work. The added threat to the BME Bar is the fact that much of the source of that work has traditionally been small BME firms. The reasons why BME clients and firms instruct BME barristers are well known and were rehearsed fully in the last responses to the previous consultation paper.

37. Additionally it is proposed that travel and waiting costs should be rolled up/ included in the overall bid price/ fees so that there will no longer be any separate payments for them. Similar considerations apply to rolling up of file review work. The effect on smaller BME firms will be that they will not be able to subsidise these costs to the extent that the larger firms will or at all and thus will be driven from the market place.

38. The LSC have acknowledged in the previous consultation paper that BME lawyers are more likely to work in BME firms than non-BME lawyers. However it was stated that more or less the same number of BME lawyers are employed in non-BME firms. Even if this were true, the LSC data fails to distinguish the level at which the BME fee earners operated or what proportion of fees the firms' income was generated by them.

39. Anecdotal evidence suggests that there are very few BME earners working at senior levels in larger firms. The LSC recognises that the maintenance of the number of BME lawyers does not necessarily address concerns about career progression thus implicitly accepting that the retention of BME lawyers under the proposed scheme is a matter of future concern. The impact upon those BME lawyers presently within the professions and their future career progression will be disproportionate compared to their white counterparts.

Conclusion

40. The LSC has acknowledged that *"… it is likely that not all current providers would secure a future contract, this is the nature of competition.. ".* However implicit in that acknowledgement is that not only is there evidence that smaller firms will be unable to compete and thus secure a contract but that the impact will be felt more keenly by the BME firms as the LSC have acknowledged at paragraph 11.18 of the Annex to the Consultation paper.