

**RESPONSE OF THE CARTER DIVERSITY GROUP (“CDG”) TO  
LORD CARTER’S REVIEW OF LEGAL AID PROCUREMENT**

**CDG is made up of a broad cross section of black minority ethnic (BME) barristers and solicitors, including representatives from the Black Solicitors Network (“BSN”), the Society of Asian Lawyers (“SAL”), the Carter Group of BME barristers and solicitors, the South Eastern Circuit Minorities Committee (“SECMC”) and members of the Bar Council’s Race and Religion Committee. CDG is not a Bar Council or Law Society representative Group.**

**Response of the Carter Diversity Group (“CDG”) to Lord Carter’s Review of Legal  
Aid Procurement - July 2006**

**EXECUTIVE SUMMARY**

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Black and Minority Ethnic Communities

- **Lord Carter’s proposals for the reform of legal aid procurement threaten access to justice for the BME communities.**
- The proposals restrict the right of the BME client to choose which solicitor represents them.
- They do this through proposed changes to legal aid procurement which are likely to drastically reduce the routes through which BME communities access justice.
- 64% of BME firms will lose the right to represent their clients.
- Available data shows that clients from BME communities tend to choose BME firms for reasons of their geographic location, linguistic, cultural and religious affinities. These firms provide a crucial representational service to their respective communities in offering access to justice to often disadvantaged and marginalised people who hold little understanding or confidence in the legal system. The presence of such firms in the community provides reassurance to these communities, giving voice to their grievances and serving to boost social cohesion and confidence.

- The impact of Lord Carter’s proposals is likely to also severely reduce the numbers of new entrants to the legal profession from BME backgrounds, and of BME practitioners available for promotion to judicial office.

### Black and Minority Ethnic Firms

- Available data on the make-up of the criminal defence supplier base in London shows that 46% of criminal legal aid contractors are Black Minority Ethnic (BME) owned firms compared with 42% of firms which are White owned.
- BME firms in London are also overrepresented in the small firm category: 52% of small firms are BME owned compared to 33% for their white counterparts. This imbalance is replicated in other major cities where there are large BME communities, such as Birmingham, Bradford, and Leicester. BME practitioners then, are clearly overrepresented among criminal legal aid contractors in London and certain other large cities.
- BME practitioners and firms are likely to have a younger and less established profile than their white practitioner counterparts. It is also important to note that over half of all BME solicitors are women. Many BME firms were started from scratch by one or two people who felt their career progression had been blocked elsewhere, and found it necessary to leave those firms to set up their own practices. Others sought to start businesses with a view to stamping an ethnic and cultural identity on them which mirrors, not just their own, but also those of their BME clients.
- BME firms have flourished in an ultra-competitive legal market through entrepreneurial skill, hard work and a ready market of BME communities in desperate need for solicitors firms who understand their cultural and linguistic needs.
- Based on this demographic profile, Lord Carter’s proposed criteria for identifying his preferred suppliers of legal aid services in future, by assessing the quality of firms based upon “historic turnover” and “future capacity” will significantly disadvantage BME

firms. Further, there is no evidence that these small businesses are less efficient than larger ones or that moving to fewer larger firms will make the cost savings anticipated.

- It is important that a strong presence of BME firms is maintained in the legal services market place (rather than simplistically assuming that the presence of individual BME practitioners elsewhere would be adequate), as it is on the basis of their identity as BME-run organisations or institutions that BME communities are attracted and engaged.
- BME communities are attracted to and take pride in successful BME enterprises, which includes legal practitioners, who quickly establish a business and cultural identity with which the BME communities can identify and adopt as their own.
- Furthermore, research evidence also shows that BME firms do not service their communities alone, they provide vital advice and representation to a broad base of culturally diverse clients.
- To quote Lord Carter, his proposals clearly set a “direction of travel” designed to favour the larger and more established criminal legal aid contractors, the proposals made in his Report are therefore likely to disproportionately impact upon BME firms, practitioners and the BME community.
- The fact that a disproportionately high number of BME practitioners will be driven from the market place in a post Carter world, carries with it not just the danger of “market failure”, i.e the market not adjusting to meet the needs of the BME communities, but such an outcome will also damage “home grown” and creative community business success stories, which will take a generation to restore.

#### Adverse Impact

- There is no intention to pilot Lord Carter’s reforms in advance of their full, phased implementation. Nonetheless, the available evidence on the likely impact of the kinds of proposals that Lord Carter makes, (prepared for the Legal Services Commission by Managing Diversity Associates April 2006 - entitled “*Research on Ethnic Diversity*”

*Amongst Suppliers of Legal Aid Services*”), highlights the real danger of a significant adverse impact for BME practitioners and in turn for BME communities.

- So far as BME practitioners are concerned, it is vital to remember that there is a strong connection and inter-dependence between BME solicitors and BME barristers borne out of shared backgrounds and successes in adversity. The two sides of the profession are closely aligned and mutually supportive. Therefore, it is clear that an adverse impact upon the solicitors’ profession will equally mean an adverse impact upon the barristers’ profession.

#### The Philosophy of the Report, Equality of Opportunity and Access to Justice

- The philosophy of the Report calls for the imposition of a market-based approach on the provision of criminal legal aid, without first assessing what the needs of that market are amongst BME or any other communities, and how those needs might be best serviced. So far as BME communities are concerned, in cities such as London for example, the ethnic and religious mix of these communities is large and varied. It is important that those needs are properly recognised, assessed and serviced. This market-based approach is based upon a desire to control the supplier base as opposed to an assessment and understanding of demand, or need. This approach is likely to have the effect of “culling” numerous BME firms and practitioners from the market at a time when they are most needed by their communities.
- The Report presupposes a desire among BME firms for the establishment of “consortia” or consolidation amongst the BME legal services supplier base without any detailed proposals as to how this might work or any real understanding of why BME firms tend to set up and operate as small firms in the first place, offering as they do, a “niche” and flexible service to the BME communities.
- The Report fails to provide any evidence to support the assumption that a larger contractor is necessarily more efficient than a smaller one. In addition, it fails to take account of the real possibility of “market failure” in its approach in that it ignores the fact that, if reformed in the way outlined, the market will not necessarily adjust to meet the

needs of the BME communities.

- The Report takes inadequate account of this likely impact, and makes no proper assessment of its inevitable effect. In the absence of an acknowledgment of the crucial role played by BME firms, or of an assessment of the diversity impact on suppliers and consumers of criminal legal aid services, the implementation of the Report is likely to discriminate against small firms and BME practitioners, and may fall foul of important public sector duties imposed by the Race Relations Amendment Act.

#### Attack on Choice

- Lord Carter's proposals for block fixed priced contracts for police station work through to Magistrates and Crown Court only for a limited number of approved large suppliers, will severely restrict the choice of representation for BME clients, by simply by cutting the number of suppliers but also by drastically truncating the manner in which a BME client can procure the services of a BME firm, which has ly been through community links and referral.

#### Attack on Quality

- The Report recommends a move towards contracts based upon a system of price competitive tendering (PCT). In fact, the likely effect of PCT will be to encourage volume bids at a price which leads to an erosion in the quality of the service offered. Again, PCT will work to the advantage of the large supplier, with the capacity to bid for large volumes of work, whilst working to the detriment of small firms amongst whom most of the BME legal community are based. Lord Carter's preference for larger firms and a market-based approach will almost certainly decrease competition, which may in fact have the overall effect of driving up costs.

#### Public Sector Duties

- As presently outlined, the implementation of the proposals in Lord Carter's Report may not comply with duties on public bodies imposed by the Race Relations (Amendment)

Act 2000 to eliminate unlawful discrimination and to promote equality of opportunity and good relations between persons of different racial groups. Given also their likely impact on women practitioners from BME backgrounds, the proposals are also likely to adversely impact on the forthcoming statutory public sector duties to promote gender equality and avoid gender discrimination, recently introduced by this Government.

### Undermining other Government Policies

- The Government has adopted a range of policies such as a commitment to equality and diversity; a commitment to increasing diversity in the judiciary; supporting small businesses as deliverers of public services; and using public procurement to support public sector equality duties. In adopting an approach which is hostile to small firms, and necessarily so to the BME community and its practitioners, the Interim Report is at odds with these government initiatives.
- The emphasis should be on supporting and extolling the benefits which small businesses can bring to the market, such as an innovative, responsive, tailored and cost effective solution to what are often difficult and sensitive issues, no more so than in the area of access to justice for those accused of criminal offences.

### Recommendations

- In the light of the points made above, we recommend that any prospective reform to the procurement of legal aid services, and in this instance criminal defence services, does not:
  - threaten access to justice for the BME communities in the way that the proposals in the interim report have the potential to do;
  - restrict the right of BME clients to instruct the lawyer of their choice, and in whom they have confidence
  - discriminate against BME firms by imposing requirements on them which have the effect of preventing them from competing equally with larger more-established firms;

- seek to force a new business model based on ‘big is beautiful’ without any evidence to support the predicted cost-savings;
  - drive the vast majority of BME firms out of the criminal legal aid market, and severely damage the future for a diverse legal profession, by deterring new BME entrants to the profession who would otherwise have wished to work in the area of criminal legal aid.
- We recommend that any prospective reform of the procurement of criminal defence services:
    - takes into account the results of the MDA Research;
    - takes into account that BME firms play a vital role in underpinning confidence in the criminal justice system by providing an important service to the numerous members of the BME communities who chose to use them./ this representation does carry with it important cultural and social benefits for the BME communities;
    - includes in its criteria for the award of criminal legal aid a means of attributing ‘added value’ points to firms on the basis of differing qualities that different suppliers of legal services can bring to the community. ‘Added value’ is an essential requirement and the weighting attached to it has to be significant. ‘Added value’ is not the same as ‘diversity compliant’. ‘Added value’ in this context means providing added value through providing services from a firm firmly positioned within the community by providing services that are culturally specific, trusted, and in which clients have confidence;
    - allows BME clients to continue to be able to access justice through choosing a legal representative in whom they have confidence, whether this be by referral or presence in the community or by reason of cultural/linguistic affinity
    - ensures that all firms should be diversity compliant and adopt best practice policies on equality of opportunity and diversity. However, the treatment of fee-earning and other staff internally, is quite a different issue to that of appropriately servicing the needs of clients externally. At best, insisting on good equal opportunities and diversity practice alone will not change the composition of the profession for at least a generation.

- We would strongly encourage the DCA, as the accountable public authority, to consider carefully and draw upon examples of best practice in procurement elsewhere in the public sector that demonstrate the positive ways in which sensitive procurement is expected to enhance and support wider social outcomes, such as the Government's stated commitment to diversity.

## Conclusion

- We accept that reform is required to the system of procurement of legal services and in this particular instance, criminal defence services, in order to eradicate inefficiencies and maintain high standards of quality in the delivery of criminal legal aid. However, we reject the philosophy of a market-based approach in the Report which makes no attempt to assess the needs of the BME communities for legal aid services or how best those needs can be met.
- We reject the apparent premise of the Report, namely that large suppliers are by implication more efficient than small ones, and therefore to be favoured in the reform process. This premise is advanced without any evidence to support it.
- Above all, we reject all the proposals of the Report which deny access to justice for BME communities by disproportionately impacting upon BME firms and their ability to represent their communities.
- There is a strong link between a commitment to diversity, social inclusion, and access to justice. The political and social consequences of exclusion are unacceptably high and therefore the price of ensuring diversity to combat them is, we contend, a price worth paying.
- Legal aid is worth investing in as a key public service alongside health and education. A denial of access to justice is as damaging as a denial of access to education or healthcare.

## **Introduction**

1. On 5 July 2005, following the publication of the command paper ‘A Fairer Deal for Legal Aid’, the Lord Chancellor appointed Lord Carter of Coles to conduct an independent review into legal aid procurement. The review will ultimately produce a plan for a procurement system which ought to achieve maximum value for money and control over spending, whilst ensuring quality and fairness of the justice system. An Interim Report was published by Lord Carter on 9 February 2006.
2. In this 48-page Interim Report, Lord Carter proposes reforms to introduce price competition between law firms delivering publicly-funded criminal defence work and recommends a phased transition toward a market-based approach for the procurement of criminal defence services, deliverable nationwide, by 2009. This market-based approach includes moving to managed competition with fewer, larger firms with bigger volume contracts than is presently the case.
3. The Carter Diversity Group (“CDG”) is made up of representatives from the Black Solicitors Network (“BSN”), the Society of Asian Lawyers (“SAL”), the Carter Group of BME barristers and solicitors, the South Eastern Minorities Committee (“SECMC”), and representatives of the Bar Council’s Race and Religion Committee. The CDG exists to collectively represent the views of BME practitioners, whether solicitors or barristers, with regard to the potential impact of changes to legal aid procurement policy.
4. In preparing this response, CDG has consulted with BME barristers and solicitors, representatives of the Law Society and Bar Council. The group is prepared to also further consult with the Legal Services Commission, the Department for Constitutional Affairs, local communities, Members of Parliament, the statutory equality commissions and other relevant bodies.
5. This paper is therefore a response to Lord Carter’s Report with an emphasis on the potential diversity impact of its proposals as they affect BME practitioners and their communities, which in the CDG’s view, has so far been neglected in the face of overwhelming evidence of a likely adverse impact on BME practitioners and members of the public, should the policies flowing from the Report be implemented.

6. Legal aid is vital in guaranteeing minimum access to justice in England and Wales. The principle that free legal advice should be available for those who need it, but are unable to afford it, is one of the hallmarks of a free, fair and democratic society. We acknowledge openly the immense strain our current system of legal aid is under, due to the volume of work it's forced to accommodate, heavy pressure on resources and relentless changes in legislation and Government policy which have led Lord Carter to underscore "the urgent need for whole-system reform". We accept the need for reform and the need to eliminate inefficiencies, however, any reformed system must ensure:

- advice, help, support and representation continues to reach the most vulnerable and disadvantaged people in society;
- members of the public and particularly those members from disadvantaged groups continue to have access to justice.
- value for money and a fairer redistribution of the legal aid budget in a manner which does not disadvantage one group of society over another.

### **Black and Minority Ethnic Communities and Access to Justice**

7. Lord Carter's proposals for the reform of legal aid procurement threaten access to justice for the BME communities. The proposals restrict the right of the BME client to choose which solicitor represents them. They do this through proposed changes to legal aid procurement which are likely to drastically reduce routes through which BME communities access justice. 64% of BME firms will lose the right to represent their clients.

*"The data on the ethnic origin of civil legal aid clients shows that there is a clear relationship between the ethnicity of the client and that of the solicitor; BME clients are far more likely to have a solicitor from a BME managed firm and white clients are less likely to seek the services of a BME firm."*

*“Evidence from our interviews with BME criminal legal aid firms show that a significant proportion of their clients are from BME backgrounds. Proportions of BME clients ranged from 95% down to 50%.*

*“It can therefore safely be assumed that the pattern observed in the LSC’s data on BME clients of civil legal aid firms is the same for crime suppliers and possibly more pronounced.*

*“Although it is clear that a high proportion of the clients of a BME firms are also from a BME background, none of those interviewed provided services exclusively to those groups. They also do not define themselves as delivering specialist services to a particular community. Indeed some firms said that they resent the label ‘BME’ firm preferring to see themselves as professionals delivering services to the whole community in which they are based. These firms did however recognise and talked about the added value they can bring to the services to clients who come from the same cultural linguistic, racial or religious background as themselves.*

***“Assessment of impact***

*The evidence provided above does not support the LSC’s conclusion that its proposals for changing the way in which it contracts with crime suppliers will have no adverse impact on clients because adequate supply of services will be retained. Although the LSC does not collect data on the ethnic background of criminal legal aid clients, there is evidence to show that BME clients are more likely to choose BME firms to represent them.*

*The reasons for this choice relate to language, culture, race and geographical location and community networks. It is also likely that the factors influencing white clients’ choice of solicitor are materially different.”*

*(Source: MDA Research p.64-65)*

8. Available data shows that clients from BME communities tend to choose BME firms for reasons of their geographic location, linguistic, cultural and religious affinities. These firms provide a crucial representational service to their respective communities in offering access to justice to often disadvantaged and marginalised people who hold little

understanding or confidence in the legal system. The presence of such firms in the community provides reassurance to these communities, giving voice to their grievances and serving to boost social cohesion and confidence.

*There is therefore little doubt that the racial /cultural/religious background of solicitors in the firm does play a significant part in BME clients' choice of firm. If the adverse impact of the proposals for price competitive tendering identified in the previous chapters result in significant numbers of BME firms leaving the market then this will have an adverse impact on BME clients. These clients may no longer be able to instruct a solicitor of their choice or one that meets their cultural and linguistic need."*

(Source: MDA Research p.65)

*"The LSC's conclusion that there will be no adverse impact on BME service, is based on the assumption that 'access to justice will not be affected as sufficient supply will be retained' However, there is no evidence offered in support of the conclusion that there will be no adverse impact on BME clients. The assumption is that because there is evidence of oversupply, a reduction in supply will not cause detriment to any client, regardless of their ethnic background. This conclusion does not consider the possibility that the needs of BME criminal clients or their motivations for choosing a solicitor may differ in some qualitative way from the needs of non BME clients. If for example, there is evidence to show that BME firms bring 'added value' to the services provided to BME clients, then changes that reduce the diversity of the supplier base could limit the options for BME clients to consult a solicitor of their choice and therefore access to justice."*

(Source: MDA Research p. 25)

9. Members of the BME communities are overrepresented in the court and prison systems and continue to remain underrepresented in the higher echelons of society, including the magistracy and the judiciary. It is vital that those who are face criminal proceedings or who are incarcerated continue to receive advice from practitioners in which they have confidence. It is also essential that the pool of legal practitioners from BME backgrounds that are suited for promotion to judicial office is not reduced. The proposals restrict the right of the BME client to choose which solicitor represents them. Further, in "culling" substantial numbers of BME firms, Lord Carter's proposals are likely to also severely

reduce the numbers of new entrants to the legal profession from BME backgrounds, and of BME practitioners available for promotion to judicial office.

### **Black and Minority Ethnic Firms**

10. Available data on the make-up of the criminal defence supplier base in London shows that 46% of criminal legal aid contractors are Black Minority Ethnic (BME) owned firms compared with 42% of firms which are White owned.
11. BME firms in London are also overrepresented in the small firm category: 52% of small firms are BME owned compared to 33% for their white counterparts. This imbalance is replicated in other major cities where there are large BME communities, such as Birmingham, Bradford, and Leicester. BME practitioners then, are clearly overrepresented among criminal legal aid contractors in London and certain other large cities.
12. Based on this demographic profile, Lord Carter's proposed criteria for identifying his preferred suppliers of legal aid services in future, by assessing the quality of firms based upon "historic turnover" and "future capacity" will significantly disadvantage BME firms. Further, there is no evidence that these small businesses are less efficient than larger ones or that moving to fewer larger firms will make the cost savings anticipated.
13. BME practitioners and firms are likely to have a younger and less established profile than their white practitioner counterparts. It is also important to note that over half of all BME solicitors are women. Many BME firms were started from scratch by one or two people who felt their career progression had been blocked elsewhere, and found it necessary to leave those firms to set up their own practices. Others sought to start businesses with a view to stamping an ethnic and cultural identity on them which mirrors, not just their own, but also those of their BME clients.
14. BME firms have flourished in an ultra-competitive legal market through entrepreneurial skill, hard work and a ready market of BME communities in desperate need for solicitors firms who understand their cultural and linguistic needs.

15. The nature of legal services demands that the practitioner is genuinely representative of the client. This representative role is often provided in circumstances of immediacy and serious crisis which makes it all the more crucial that the consumer has confidence in the advice and service being provided. A shared experience and background between advisor and consumer provides a platform for confidence in the justice system and access to it, the value of which is impossible to quantify. BME providers' understanding of the language and culture of the communities they serve gives clients confidence in the legal system.
16. It is important that a strong presence of BME firms is maintained in the legal services market place (rather than simplistically assuming that the presence of individual BME practitioners elsewhere would be adequate), as it is on the basis of their identity as BME-run organisations or institutions that BME communities are attracted and engaged.
17. BME communities are attracted to and take pride in successful BME enterprises, which includes legal practitioners, who quickly establish a business and cultural identity with which the BME communities can identify and adopt as their own.
18. Furthermore, research evidence also shows that BME firms do not service their communities alone, they provide vital advice and representation to a broad base of culturally diverse clients.
19. To quote Lord Carter, his proposals clearly set a "direction of travel" designed to favour the larger and more established criminal legal aid contractors, the proposals made in his Report are therefore likely to disproportionately impact upon BME firms, practitioners and the BME community.
20. The fact that a disproportionately high number of BME practitioners will be driven from the market place in a post Carter world, carries with it not just the danger of "market failure", i.e the market not adjusting to meet the needs of the BME communities, but such an outcome will also damage "home grown" and creative community business success stories, which will take a generation to restore.

21. To quote Lord Carter, his proposals clearly set a “direction of travel” designed to favour the larger and more established criminal legal aid contractors, the proposals made in his Report are therefore likely to disproportionately impact upon BME firms, practitioners and BME communities.

### **Adverse Impact**

22. There is no intention to pilot Lord Carter’s reforms in advance of their full, phased implementation. However, there is some available evidence on the likely impact of the kinds of proposals that Lord Carter makes. This was prepared for the Legal Services Commission by Managing Diversity Associates April 2006 and is entitled “*Research on Ethnic Diversity Amongst Suppliers of Legal Aid Services*”. It highlights the real danger of an adverse impact that these proposals pose to BME practitioners and in turn for BME communities.

23. There is a strong connection and inter-dependence between BME solicitors and BME barristers borne out of shared backgrounds and successes in adversity. The two sides of the profession are closely aligned and mutually supportive. Therefore, it is clear that an adverse impact upon the solicitors profession will equally mean an adverse impact upon the barristers profession.

### **The Business Case for BME Firms**

24. BME clients do choose lawyers who share their background and culture. BME firms enjoy a strong correlation between the ownership and culture of these firms and the BME population whom they represent. They have a strong profile within their communities and service an existing need.

25. It is the presence of BME firms that reassures the BME communities. There is no evidence that the same comfort factor is offered by a policy of dispersal of BME lawyers among larger firms. A client will seek the reassurance of a firm’s BME identity rather than seek a BME lawyer within a large supplier identity.

26. The Report presupposes the establishment of “consortia” or consolidation amongst the BME legal supplier base, to facilitate “volume bids”, without any detailed proposals as to how this might work or any real understanding of why BME firms tend to set up and operate as small firms in the first place, offering as they do, a “niche” and flexible service to BME communities.
27. The practical consequences of “consortia” in these circumstances, are problematic. Firms and partnerships are already subject to professional rules and regulations, and it is difficult to see how liabilities and accountabilities will be fairly apportioned if problems are encountered in the execution of a successful “consortia bid.” There is no evidence that firms will have any desire to subject themselves to this level of regulatory uncertainty. There is no evidence that firms that have set up small concerns for understandable and justifiable reasons will wish to form consortia.
28. Furthermore, the answer does not lie in forcing BME practitioners into larger firms of providers because it fails to accord with aspirational issues such as career development issues, entrepreneurship, ambition and motivation. It is no response to suggest that those who are currently partners and sole practitioners become employees and assistants – crushing their ambition and motivation.
29. The following selected quotes from research published by the Legal Services Commission in April 2006 entitled “*Research on Ethnic Diversity Amongst Suppliers of Legal Aid Services*” undertaken by Managing Diversity Associates (“MDA Research”) underscore these points:

*“There was also little appetite for mergers as a way of expanding the firm. Some firms had already had bad experiences of merging with another firm, the partners had fallen out and the firms split up or had worked in a firm where this had happened. The quotes below are typical of the responses to the merger option:*

***‘Most firms will not want to merge, the partners here know each other well and to find someone else who fits our ethos may be problematic’***

*“Another theme emerging from our interviews with BME practitioners is the importance attached to owning their own businesses. Pride in owning their businesses is an*

*important factor. These practitioners invested their own money in opening and building up the practice and several described the risks and hard work they had put in. They also described their experiences and the obstacles they had faced in their careers, including possible racial discrimination, which had pushed them into starting out on their own.*

*Although the independence and pride in owning a business is clearly a 'pull' factor, most of those interviewed had not necessarily willingly chosen this route. Some said that they had been pushed down this career path because of the lack of opportunity to progress. However, having taken the risks and made the investment in their own business they were resentful that the government and the LSC were in their view proposing to destroy their livelihoods.*

*One interviewee said, 'the newcomers like my firm are being blamed for all the ills in the system and the old established firms want to 'pull up the ladder' to prevent new firms from climbing up'*

(Source: MDA Research, at p.44-45)

### **The Philosophy of the Report, Equality of Opportunity and Access to Justice**

30. The philosophy of the Report calls for the imposition of a market based solution on the provision of criminal legal aid without first assessing what the needs of that market are amongst BME or any other communities, and how they would wish those needs to be best serviced. The approach is driven by the management of supplier as opposed to an assessment and understanding of need. This approach is likely to have the effect of "culling" numerous BME firms and practitioners from the market at a time when they are most needed by their communities.
31. The Report fails to provide evidence to support the assumption that a larger contractor is necessarily more efficient than a smaller one. In addition, it fails to take account of the real possibility of "market failure" in its approach in that it ignores the fact that, if reformed in the way outlined, the market will not necessarily adjust to meet the needs of BME communities.
32. The Report takes inadequate account of this likely impact, and makes no proper

assessment of its inevitable effect. In the absence of an acknowledgment of the crucial role played by BME practitioners, or an assessment of the diversity impact on suppliers and consumers of criminal legal aid services, the implementation of the Report is likely to discriminate against small firms and BME practitioners. It will threaten BME communities' tried and trusted routes for accessing justice, and may fall foul of important public sector duties imposed by the Race Relations Amendment Act.

33. A purely “market based solution” , dominated by budgetary concerns, runs the very real risk of being ill-suited to a landscape which is complex and multi-layered, particularly so far as the BME consumers of legal services are concerned.
34. Therefore, whilst cost is clearly an important factor, and inefficiency, excess and imbalance in the use of public funds are matters to be urgently addressed. If, as was indicated by Bridget Prentice MP<sup>1</sup>, one of the priorities of government is to seek to ensure that criminal legal aid continues to be available to the vulnerable and disadvantaged members of society, (whether by race, religion, sexual orientation or poverty), then the approach of the Report does not sit easily with these avowed policy aims.
35. There is a strong link between a commitment to diversity, social inclusion, and access to justice. The political and social consequences of exclusion are unacceptably high and therefore the price of ensuring diversity to combat them is, we contend, a price worth paying.
36. It goes without saying that the added anxiety with the very narrow “market” approach, is that, once the legal landscape of BME suppliers has been altered it will be very difficult if not impossible to reverse.
37. In summary therefore, the Report :

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<sup>1</sup> “But because I want legal aid to continue to make a difference to people's lives for the next 50 years - I want it to be a better service for vulnerable people for whom legal advice can be a vital part of the jigsaw.” Bridget Prentice MP, Parliamentary Under Secretary of State, at the Legal Aid Practitioners' Group, Hyatt Regency Hotel, Birmingham, 7 November 2005

- (a) fails to provide evidence of the economic case in support of why big is necessarily better in these circumstances, whilst adopting an unjustifiably hostile attitude to small (and necessarily BME firms), in this regard;
- (b) shows no understanding of why many BME firms are set up in the way that they are, whether arising from historical racism or a desire to determine the cultural make up and outlook of the firm;
- (c) fails to take account of the business case for these firms which exist and thrive because there is a real need for the “niche” services provided by them;
- (d) fails to take account of the principal way in which their services are demanded and utilised by the community they serve, namely on the basis of trust and referral;
- (e) fails to sufficiently acknowledge the crucial role played by BME firms (strategically positioned within the community) in assisting in community cohesion and order by the provision of an important and flexible service, sympathetic to the specific needs of the BME client;
- (f) fails to take account of the real possibility of “market failure” in its approach in that it ignores the fact that, if reformed in the way outlined by the proposals, the market will not necessarily adjust to meet the needs of the BME community.

### **Key proposals in the Report**

38. Some key proposals in the Report are as follows:

#### In relation to Police Station work:

- *Fixed price contracts for group of stations*
- *Contracts to be awarded based on quality and volume bids*
- *Travel and waiting to be built into contracts*
- *Duty Solicitor scheme for magistrates’ court work to be built into contracts*

- *Price competition to be introduced over time*

In relation to Magistrates' Court work

- Fixed fees based on case type, offence type and region
- *Magistrates' court contracts will be linked to police station contracts*
- Travel and waiting to be incorporated within the fixed fee

In relation to Crown Court and Non-VHCC work

- All cases of 30 days or less paid through a graduated fee system barristers and solicitors
- The scheme will cover those cases over 30 days that the complex crime unit decides not to run under contract
- *Solicitors to gain work through panels matching police station contract areas*
- *Panel membership for firms/consortia of firms to be initially based on volume bids*
- Current graduated fee scheme for advocates to be simplified (base fee according the offence type with tapered uplifts applying after 2-3 days)
- New graduated fee scheme to be introduced for solicitors

39. The italicised proposals above are the ones that cause particular concern from a diversity point of view. A summary of these concerns are as follows:

*Fixed price contracts for group of stations*

40. Groups of stations banded together purely on geographical grounds are unlikely to mirror the pattern of need for BME communities, which often is not determined on geographical terms, but rather is determined on community and referral grounds.

41. The Report contains no detail on what constitutes a group of stations, what the mechanisms will be for estimating scale of need in an area, and how within that scale the needs of diverse communities will be provided for.

42. There is a danger that contracts let on the basis of geographical blocs of police stations alone, without aligning those groupings of stations more accurately with the issue of

communities' needs, and the presence of BME practitioners to meet those need, will disproportionately impact upon a large number of BME practitioners practising in crime.

### Quality and Volume Bids

43. The very real danger here is that the "cut price for volume" approach under which the successful, lowest or base bid will invariably not be a bid which best suits the interests of the BME client. In this regard the CDG places reliance upon the following quote from the MDA Research:

*"Responses to the consultation suggested a number of ways in which price competition could disadvantage small firms. These included:*

- *Larger firms are able to benefit from economies of scale particularly if they are successful in bidding for very large share of the market*
- *Larger firms will use the process to make expansion bids to effectively control the market and squeeze out smaller firms*
- *Larger firms have more assets at their disposal and will bid an uneconomic price as a 'loss leader' to secure a contract and with it access to more lucrative Crown Court work*
- *Larger firms are likely to have more knowledge about the formal tendering process, more sophisticated management information and more time and resources to be able to commit to the process of calculating a winning bid."*

(Source: MDA Research p 43)

### Price Competitive Tendering

44. It would appear that the aim of PCT is to ensure competition in the market. In reality the effect would be to reduce the number of suppliers dealing with LSC, thereby eradicating a number of small firms and in particular BME providers.

45. In addition there is a real danger quality will suffer where success is determined by volume of bid at minimum price (cf. LSC's Preferred Supplier consultation paper) – where you have cut price bids there is no guarantee that work will be done by fully-qualified lawyers, or meet important quality criteria.

46. PCT clearly favours the large scale providers to the detriment of small firms providing a niche service tailored to the needs in particular of BME communities. It is important to point out that small firms make up the majority of the market providing publicly funded criminal legal aid. The evidence that their consumers tend to be amongst the most vulnerable and disadvantaged members of the community is overwhelming and therefore cannot afford to be jeopardised.
47. There is a real danger PCT will lead to two-tier legal system in terms of quality of service and access to justice, where the bulk of cases (even the more difficult/complex cases) will receive minimal service for minimum price unless people are prepared to pay privately.
48. Again the MDA Research underscores these points:

*“Having examined the arguments put forward by firms their representative bodies and other stakeholders we are of the view that it is highly likely that the introduction of price competitive tendering will have a disproportionate adverse impact on small firms. As BME firms are significantly overrepresented in the small firm category they are more likely to lose out in the competition for contracts.”*

(Source: MDA Research p. 48)

#### Magistrates

49. There seems to be an assumption that the adviser at the police station will still be the most appropriate adviser when the client comes to court. There is no redress for a client who is ill-matched or ill-suited to a provider. A client may accept police station representation on a short term basis but will want to go to a trusted adviser in whom he or she has confidence based upon background, language and culture.

#### The MDA Research

50. The recently published MDA Research is a substantial document, well-researched, independent and prepared by established and respected leaders in the field of diversity. It addresses fully all the statutory elements of public sectors race equality duties in a systematic way, and usefully highlights the lack of an evidence-based approach to many

aspects of the policy proposals. Through detailed interviews with practitioners supported by quantitative equalities monitoring data collated over a period of years the MDA Research provides the first substantive assessment of the race equality impact of proposals for price competitive tendering etc. This is in stark contrast with the Legal Services Commission's own cursory and inadequate equality impact assessment appended to its recent Preferred Supplier consultation paper, published in March 2006.

51. There is no other research that compares with the MDA Research in terms of depth and comprehensiveness. In the absence of any other research the MDA Research must be taken as being conclusive and, in any event, overwhelming.

### **Attack on Choice**

52. Through its proposals for block fixed priced contracts for police station work through to magistrates and Crown Court by a limited number of approved large suppliers, the Report severely restricts choice of representation for the BME client by not simply cutting the number of suppliers but also by drastically truncating the manner in which a BME client can procure the services of a BME firm, a process traditionally relying upon community links and referral.

### **Attack on Quality**

53. The Report recommends a move towards tendering contracts based upon a system of price competitive tendering with a stated aim of ensuring competition in the market. In fact, the likely effect of PCT will be to encourage volume bids at a price which leads to an erosion in the quality of the service offered. Again, PCT will work to the advantage of the large supplier, with the capacity to bid for large volumes of work, whilst working to the detriment of small firms amongst whom most of the BME legal community are based.
54. References to quality abound in the Report, which on the face of it is a good thing, however, there is an over emphasis of cost as a determinant of quality. The real issue is how you define quality. Whilst cost is clearly very important, it is not the only factor.

Other factors are: who defines quality? What tools of assessment are used and on what criteria? Any criteria used have to be diversity compliant and robust enough to ensure a genuine understanding of its importance and the value to be placed on its role in the provision of legal services.

### **Undermining other Government Policies**

55. The Government has adopted a range of policies such as a commitment to equality and diversity; a commitment to increasing diversity in the judiciary; a commitment to increasing confidence in public institutions (such as the legal system) amongst BME communities; supporting small businesses as deliverers of public services; and using public procurement to support public sector equality duties. In adopting an approach which is hostile to small firms, and necessarily so to BME communities and its practitioners, the Report is at odds with these government initiatives.

56. The emphasis should be on supporting and extolling the benefits which small businesses can bring to the market, such as an innovative, responsive, tailored and cost effective solution to what are often difficult and sensitive issues, no more so than in the area of access to justice for those accused of criminal offences.

57. BME firms have flourished in an ultra-competitive legal market through entrepreneurial skill, hard work and a ready market of BME communities in desperate need for solicitors firms who understand their cultural and language. There is no evidence that these small businesses are less efficient than larger ones or that moving to fewer larger firms will make the cost savings anticipated.

### **Public Sector Duties**

58. The Race Relations (Amendment) Act 2000 makes it unlawful for a public authority in carrying out its functions to do any act which constitutes discrimination or inequality. The Department for Constitutional Affairs and Legal Service Commission are specified public authorities under the Act.

59. The duty under the Act is a three fold duty. It comprises a duty to eliminate unlawful discrimination; promote equality of opportunity; and promote good relations between persons of different racial groups. In addition to this general duty, specified public authorities are under further duties to assess the impact of their policy proposals and to consult on them.
60. As presently constituted, the implementation of the proposals in Lord Carter's Report may not comply with duties on public bodies imposed by the Race Relations (Amendment) Act 2000 to eliminate unlawful discrimination and to promote equality of opportunity and good relations between persons of different racial groups.
61. Under that legislation the DCA and LSC are each under a statutory duty to undertake a full race equality impact of these proposals before their implementation, to consult on the results of that assessment and to reconsider these proposals in the light of any impact assessment.

### **Good practice on diversity in public procurement**

#### The Commission for Racial Equality

62. To quote from the Commission for Racial Equality on procurement:

“Public authorities in Britain spend billions every year on contracts with private and voluntary organisations for goods, works, and services. It is vital, therefore, that they take full account of all the implications - both economic and social - of their investment. **They must also ensure that this investment is consistent with their race equality obligations** (emphasis added).

“The duty to promote race equality applies to procurement itself. Where a public authority's function is carried out by an external supplier on its behalf, the [public] authority remains responsible for meeting the duty.

“So, to comply with their duty under the Act, [public] authorities should make sure that public money is not spent on practices that lead to unlawful racial discrimination,

**but is used instead to support and encourage equality of opportunity and good community relations.”** (Emphasis added).

63. We would strongly encourage the DCA, as the accountable public authority, to consider carefully and draw upon examples of best practice in procurement elsewhere in the public sector that demonstrate the positive ways in which sensitive procurement is expected to enhance and support wider social outcomes, such as the Government’s stated commitment to diversity.

Office for Government Commerce

64. Earlier this year the Office for Government Commerce (an agency of Her Majesty’s Treasury) published its guidance to public sector procurers, “Social Issues in Purchasing” (February 2006). This guidance focuses on the different stages of the procurement process, and the way in which social issues can be legitimately incorporated into the purchasing cycle. This document underscores race, gender and disability equality as the main social issues to address. In terms of ensuring access to government contracts, the document goes on to reaffirm that:

*“An important Government agenda involves assisting bodies like SMEs [small- to medium-sized enterprises], including ... black and ethnic minority enterprises, women and disabled –owned businesses.*

*“Encouraging increased competition through assisting these kinds of bodies should help deliver value for money benefits to the contracting authorities, and at their best, these organisations can provide innovative, responsive and cost-effective solutions to the outcomes sought by public authorities through procurement. They operate in many sectors core to public service delivery and are often well placed to provide services in hard to reach areas. ... Failing to ensure the SME sector has equal access to government contracts could mean that a valuable source of supply is lost.”*

65. The Government’s recently launched single procurement portal – the “Supplying Government” website is replete with guides and other online advice exhorting public sector procurers to support small businesses. One such document is a “Report on the Benefits of Public Sector Procurement from Small Businesses” which states categorically:

*“This study has revealed or reinforced a number of lessons for government procurement. The small firms in our case studies provided all the types of benefit set out in the OGC/SBS publication *Smaller supplier ... better value?* The relative contribution to the different headings in that publication (competition, cost, innovation, responsiveness, flexibility, quality of service, specialism) varies from case to case. However the most striking feature of the studies is the commonality of nearly all the firms in respect of quality of service (for the same or lower cost), in specialism (which is particularly, but not only, relevant in IT and professional services) and in adding to competition for public contracts. Some also provided social or environmental benefits.”*

66. The OGC/Small Business Service leaflet referred to in the quotation (“Small Supplier ... Better Value?”) literally spells out for public service procurers why small businesses may be better value for money than larger suppliers:

***“Better value for money***

- *Bringing in more suppliers will often bring greater competition to the market place, so reducing the costs of procurement from all suppliers*
- *SMEs have lower administrative overheads and management costs than larger firms. Depending on the nature of the procurement, this can result in lower prices.*

***Better quality of service***

- *SMEs have short management chains and approval routes, so they can respond quickly to changing requirements. SMEs may also be highly focused on particular markets making them particularly responsive to changes in those markets*
- *Being a large customer of a small business means your business is important to the SME. This can result in a better, and often more personal, level of service and in a better relationship with the supplier*
- *The SME may also be more willing and able to tailor a product or service to meet specific customer needs than a large firm that sells an established offering*
- *Many SMEs, including social enterprises, VCOs and BMEs, supply higher quality specialist products or services than larger suppliers, either because larger suppliers are discouraged by the limited demand, or because the SME has skills,*

*originality and commitment in that field that are greater than those found in their large company competitors.*

*“Especially conspicuous, across a wide range of markets, is the ability and willingness of small firms to ‘go the extra mile’, in terms of commitment and service delivery.”*

#### London Development Agency

67. The LDA commissioned the Redefining BME-owned Business research in 2002 to determine the current position and contribution (and consequently the business needs) of London's Black, Asian, Chinese ethnic minority groups and other minority-owned businesses to London's economy.
68. Emerging evidence had indicated that the nature and position of these businesses was changing significantly but that this was not reflected in existing studies, business policy and business support provision.
69. The Redefining BME-owned Businesses research highlighted the fact that BME-owned businesses encounter disproportionate barriers to the development and growth of their businesses in specific thematic areas. To carry out the recommendations of the research, the LDA has developed a series of six deliverable, interconnecting and cross-cutting Action Plans focusing on the recommended themes within the research, namely:
- Business support and advice;
  - International partnerships and international trade development;
  - Public and private sector contracts;
  - Business finance;
  - Business premises; and
  - Information, data and research.
70. The Action Plan enables the LDA and its partners to develop joint and coherent business support strategies and programmes to support the growth, and to increase the growth potential of BME-owned companies in terms of business start up, business growth and jobs.

71. The LDA's Procurement Development Programme (PDP) is designed to create business opportunities for BME-owned SMEs in and around London through training and mentoring to provide the skills that will enable them effectively tender for, and to win, profitable public and private sector contracts.

#### GP's Contracts

72. The Law Society studied the new General Medical Services (GMS) contracts introduced for GPs in 2004, and concluded that this model should be examined closely by the LSC and the Government as a possible basis for an alternative way of funding legal aid services in some cases. Under the new GMS contracts, the GP package comprises funding for premises, quality services, enhanced services, general services (including out-of-hours work) and, at least for now, a minimum practice income guarantee. Funding is linked to the profile of the population in a practice's catchment area, so that resources are targeted at those most in need. GPs can choose not to do out-of-hours work, but their budget is reduced (about 6% is deducted from the general services' element of the budget) to reflect this.

73. GP practices know in advance what budget will be available to them and they are free to allocate expenditure as they see fit – for example, one practice could determine that it needs to employ another doctor on a salaried contract, whereas another might decide to invest in practice nurses or a third might decide to employ both.

74. Through the Primary Care Trust, GPs are provided with full financial support for Information Management and Technology and are free to choose the systems they invest in. There is a separate budget to cover work in developing Doctor Patient Partnerships. This might include, for example, education on self-management and basic triage, so that the GP is not seen as the first port of call, where other services (for example, pharmacists) might be able to deal with the problem.

75. Exploration of methods of funding based on this model, and the model proposed for dentists working in the NHS, is worthy of examination as part of a strategic review of the delivery of legal aid services. (London Law Review, Volume 1, October 2005, Issue 2: "Funding Access to Justice" Article by Kevin Martin, President of the Law Society)

## **Recommendations**

76. In the light of the points made above, we recommend that any prospective reform to the procurement of legal aid services, and in this instance criminal defence services, does not:

- threaten access to justice for the BME communities in the way that the proposals in the Report have the potential to do;
- restrict the right of BME clients to instruct the lawyer of their choice, and in whom they have confidence
- discriminate against BME firms by imposing requirements on them which have the effect of preventing them from competing equally with larger more-established firms;
- seek to force a new business model based on ‘big is beautiful’ without any evidence to support the predicted cost-savings;
- drive the vast majority of BME firms out of the criminal legal aid market, and severely damage the future for a diverse legal profession, by deterring new BME entrants to the profession who would otherwise have wished to work in the area of criminal legal aid.

77. We recommend that any prospective reform to the procurement of criminal defence services:

- Takes into account the results of the MDA Research;
- Takes into account that BME firms play a vital role in underpinning confidence in the criminal justice system by providing an important service to the numerous members of the BME communities who chose to use them./ this representation does carry with it important cultural and social benefits for the BME communities;
- Includes in its criteria for the award of criminal legal aid a means of attributing ‘added value’ points to firms on the basis of differing qualities that different suppliers of legal services can bring to the community. ‘Added value’ is an essential requirement and the weighting attached to it has to be significant. ‘Added value’ is not the same as ‘diversity compliant’. ‘Added value’ in this context means providing added value through providing services from a firm

firmly positioned within the community by providing services that are culturally specific, trusted, and in which clients have confidence;

- Allows BME clients to continue to be able to access justice through choosing a legal representative in whom they have confidence, whether this be by referral or presence in the community or by reason of cultural/linguistic affinity
- Ensures that all firms should be diversity compliant and adopt best practice policies on equality of opportunity and diversity. However, the treatment of fee-earning and other staff internally, is quite a different issue to that of appropriately servicing the needs of clients externally. At best, insisting on good equal opportunities and diversity practice alone will not change the composition of the profession for at least a generation.

78. We would strongly encourage the DCA, as the accountable public authority, to consider carefully and draw upon examples of best practice in procurement elsewhere in the public sector that demonstrate the positive ways in which sensitive procurement is expected to enhance and support wider social outcomes, such as the Government's stated commitment to diversity.

## **Conclusion**

79. We accept that reform is required to the system of procurement of legal services and in this particular instance, criminal defence services, in order to eradicate inefficiencies and maintain high standards of quality in the delivery of criminal legal aid. However, we reject the philosophy of a market-based approach in the Report which makes no attempt to assess the needs of the BME communities for legal aid services or how best those needs may be met.

80. We reject the apparent premise of the Report, namely that large suppliers are by implication more efficient than small ones, and therefore to be favoured in the reform process. This premise is advanced without any evidence to support it.

81. Above all, we reject all the proposals of the Report which deny access to justice for BME communities by disproportionately impacting upon BME firms and their ability to

represent their communities.

82. There is a strong link between a commitment to diversity, social inclusion, and access to justice. The political and social consequences of exclusion are unacceptably high and therefore the price of ensuring diversity to combat them is, we contend, a price worth paying.

83. Legal aid is worth investing in as a key public service alongside health and education. A denial of access to justice is as damaging as a denial of access to education or healthcare.