

## **GETTING CARTER - WHAT YOU NEED TO KNOW ABOUT THE CARTER REPORT**

There are serious concerns raised by Black Minority Ethnic (BME) lawyers about the adverse effect of Carter on their livelihood and on the choice available to clients. The Association of Muslim Lawyers, Black Solicitors Network and the Society of Asian Lawyers etc joined forces to form the Carter Diversity Group (CDG) to highlight these concerns.

However, why Carter in the first place, what is it about, what is in it, where can you read the full report, what are the likely impacts and what can you and **must** you do about Carter? Our aim is to provide the answers to these questions below.

### **The Background to the Carter report.**

1. On 5 July 2005, following the publication of the 'A Fairer Deal for Legal Aid', the Lord Chancellor appointed Lord Carter of Coles to conduct an independent review into legal aid procurement aimed at producing a plan for a procurement system intended to achieve maximum value for money, control over spending, whilst ensuring quality and fairness in the justice system. A Preliminary Report was published by Lord Carter in February 2006 entitled Procurement of Criminal Defence Services.
2. This preliminary report pointed out that the cost of legal aid had risen from £1.5bn in 1997 to £2.1bn today. In the early days of legal aid, following WW II the system cost the taxpayer less than £1m per year at 2005 prices. Since 1998/9 the cost of the criminal justice system had grown by over 46% in real terms. In 2007 it is estimated that there will be an estimated over spend of over £100m. Inefficiencies were identified in the system and thus it was considered that whole system reform was needed.
3. Lord Carter's preliminary report proposed measures aimed at introducing price competition between law firms who did publicly-funded criminal work. It suggested a phased transition toward a market-based approach for the procurement of criminal defence services, to be operative nationwide, by 2009. The effect of this market-based approach would involve a reduction in firms

authorised to do publicly funded work, resulting in considerably fewer but larger firms with much bigger contracts than is the case today. At that stage, no figures were available and it was not clear what effect this would have on the legal profession, particularly, law firms and the Bar.

4. Lord Carter's final report was published on 13<sup>th</sup> July 2006 and the final report can be found at: [www.legalaidprocurementreview.gov.uk](http://www.legalaidprocurementreview.gov.uk). So far as the Bar is concerned it makes recommendations for a revised advocacy graduated fee scheme ("RAGFS") and for the rates to be payable under that Scheme. The rates make up for the effects of inflation since the GFS rates were fixed. RAGFS amounts to an increase of approximately 16% over GFS across the board. An important matter for the Bar is that Lord Carter recommends direct payment to the advocate instructed rather than via the solicitor.
5. In relation to Very High Costs Cases (VHCC) Lord Carter's proposals provide for solicitors and barristers to bid to get on a panel to undertake VHCC cases, and for better Case Unit control over expenditure. There will be no material changes to the rates or to the way barristers are paid for civil legal aid or under the Barristers' Family Graduated Fees Scheme.
6. Many questions remain however, including:
  - In relation to criminal work, what is going to be the effect of the recommendations insofar as competitive tendering by solicitors and the cutting down of the numbers of firms which will be offered contracts?
  - In relation to family and civil work, what will be the effect of the additional proposals of creating community legal advice centres (CLAC) and community legal advice networks (CLAN)?
  - Which firms are going to suffer the most from the proposals?
7. According to the figures taken from the Carter Diversity Group report, 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 over-represented 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 are clearly over-represented among criminal legal aid contractors in London and certain other large cities.

8. There are therefore clearly real and genuine concerns about the impact of the report on the very diverse community that the legal profession serves. Lord Carter's Interim Report barely considered the question of diversity, hence the very strong representations that were made by the CDG which he dealt with in his final report.
9. The final report does contain material on diversity. Chapter 5 deals with assessing the impacts of the reforms and managing the transition and the report acknowledges that it is essential that clients have access to good quality legal services and confidence in the service they are given. That a diverse and sustainable supplier base is essential for clients of diverse backgrounds to have confidence in their legal services. Lord Carter does not accept the premise of some of the submissions made to him, namely that a move towards larger firms and bidding by solicitors for police station, Magistrates' Courts and Crown Court work will disadvantage Black and Minority Ethnic (BME) firms, BME barristers and their clients. He says that the available data indicates that the recommendations should not have a negative impact on BME firms on a national basis.
10. It would appear that what Lord Carter did was to average out the impact of the cuts and come up with a figure which is in line with the BME population as a whole, but by diluting the figures like that, it distorts the figures in relation to provision in large cities where the BME population is high. He seems to accept as much when he acknowledges that there may be some disparity at regional level but he considered that the recommendations are justified by the need to control legal aid spending and to promote efficiency of service in the public interest. In his keynote speech at the Future of Legal Aid Conference at the Law Society on the July 2006, Lord Carter said that he had already taken legal advice on the issue of diversity.
11. What is debatable is how that proposition sits with the assertion that a diverse and sustainable supplier base is essential for clients of diverse backgrounds to have confidence in their legal services and the measures being taken to widen

the pool of applicants for judicial appointments and silks. Lord Carter does propose an LSC monitoring group to ensure that such disadvantage does not occur. He also recommends a transition period to allow small BME owned firms to restructure in time to compete effectively for work.

### **The Carter Diversity Group's response to the interim paper.**

Below was the CDG response to the Interim report which is still applicable to the final report:

12. Whilst accepting that reform is required to the system of procurement of legal services in order to eradicate inefficiencies and maintain high standards of quality in the delivery of criminal legal aid, they reject the philosophy of the market-based approach in the interim report which made no attempt to assess the needs of the BME communities for legal aid services or how best those needs can be met. They also 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. Most of all, they 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, they contend, a price worth paying.

13. They make number of main points:

- a) Lord Carter's proposals for the reform of legal aid procurement threaten access to justice for the BME communities as they restrict the right of the BME client to choose which solicitor represents them, estimating that 64% of BME firms will lose the right to represent their clients.
- b) Furthermore, research evidence also shows that BME firms do not service their communities alone as they provide vital advice and representation to a broad base of culturally diverse clients.

- c) 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.
- d) 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 and indeed to silk and partnership in firms. These are the role models for aspiring BME youngsters. 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.
- e) The report is an attack on quality as it recommends a move towards contracts based upon a system of price competitive tendering (PCT), the likely effect being to encourage volume bids at a price which leads to an erosion in the quality of the service offered. This 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.
- f) The proposals do not comply with public sector duties of avoidance of discrimination and undermines other government policies such as commitment to equality and diversity.

14. The CDG report ends by recommending that any prospective reform of the procurement of criminal defence services:

- takes into account the results of the MDA Research which support the contentions of the CDG about the adverse effect on BME firms and clients;
- 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.

### **What can you do about Carter?**

15. Support the CDG.
16. Respond to the consultations yourselves, either individually or as chambers or firms. There are two consultations which have started. There is the consultation period in relation to the final Carter Report itself which is until 12<sup>th</sup> October 2006.

But there is now a second consultation. On Wednesday 26<sup>th</sup> July, the Constitutional Affairs Committee announced the launch of an enquiry into the implementation of the Carter review. They invite submissions in relation to their terms of reference. These include the impact of the reforms on BME practitioners and clients. The deadline is 2<sup>nd</sup> October. You can find further details on the parliamentary committee's website.

17. You can also do much more. Many BME barristers and solicitors have little knowledge and understanding of what the Carter proposals are and the potential impact on their futures. The best thing you can therefore do is to spread the word. Make your colleagues aware of what is going on and encourage them to lend support to those who are working very hard on your behalf and on behalf of the communities they serve.
  
18. Plan for the future and do not bury your head in the sands. Have a worst case scenario contingency plan in readiness for the changes to come – even if there is some movement away from what is currently proposed, **there will be changes in the future and they will affect you.**