



Ministry of Justice

Amending the Advocates' Graduated Fee Scheme Response to Consultation: Equality Statement

Policy Summary

1. This equality statement has been written to be read alongside *Amending the Advocates' Graduated Fee Scheme: Government Response*, to which this statement is an Annex.
2. As outlined in the consultation response, we intend to proceed with an amended version of the scheme consulted upon. This new scheme will be known as "Scheme 11", replacing the current "Scheme 10". In summary, Scheme 11 allocates an additional £23m of spending to the AGFS when compared against actual scheme spend in 2016-17, to better pay for the "work done" by Crown Court defence advocates. The new scheme focuses this additional expenditure on:
 - fee increases in the offence categories of sexual offences involving children (category 4), dishonesty offences (category 6), and drugs offences (category 9);
 - Fee increases for junior advocates, employed and self-employed; and
 - a 1% increase to all other fees.
3. The results of the consultation are set out in full in the Government's response. This includes details of the adjustments that we have made to our original proposals to address concerns raised by respondents.

Summary of equality impacts and mitigation

4. Our assessment is that Scheme 11 is not directly discriminatory within the meaning of the 2010 Act. Scheme 11 applies to the whole of the criminal legal aid advocacy market and do not directly discriminate. The key principle underpinning the Scheme 11 is more fairly paying for "work done". The more junior section of the profession contains proportionately more members with specific protected characteristics – with proportionately more younger, BAME and female members for example - and this group will gain financially from Scheme 11. Under Scheme 11 we are increasing fees for a number of cases and hearings more likely to be undertaken by junior advocates. We do not believe that the scheme discriminates on the basis of any of the nine protected characteristics. Where impacts are uneven, we believe that our proposed changes are a proportionate approach to achieving our objective of more accurately rewarding "work done".

Equality Duties

5. Section 149 of the Equality Act 2010 ('the 2010 Act') requires Ministers and the Department, when exercising their functions, to have 'due regard' to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct prohibited by the 2010 Act;
 - advance equality of opportunity between different groups (those who share a relevant protected characteristic and those who do not); and
 - foster good relations between different groups (those who share a relevant protected characteristic and those who do not).
6. Paying ‘due regard’ needs to be considered against the nine ‘protected characteristics’ under the 2010 Act – namely race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

Methodology to determine discrimination potential

7. Adhering to guidance published by the Equality and Human Rights Commission (EHRC), our approach to assessing the potential for particular disadvantage resulting from Scheme 11 has been to identify the individuals whom the Scheme 11 would impact (the ‘pool’), and then draw comparisons between the potential impacts of Scheme 11 on those who share particular protected characteristics, with those who do not share those characteristics.
8. Guidance from the Equality and Human Rights Commission (EHRC) states that the pool to be considered at risk of potential indirect discrimination should be defined as those people who may be affected by the policy (adversely or otherwise) and that this pool should not be defined too widely. Consequently, rather than simply looking at ‘the advocacy market’ or ‘barristers’ we have attempted to identify sub groups, such as those who do criminal advocacy work, and those who are self-employed or employed.

The Demographics of the Publicly Funded Criminal Advocacy Market

The Advocates

9. As of 2017, there were 16,435 barristers practising in England and Wales, an increase of around 10% from 2010¹. The Bar Standards Board (BSB) estimates that around 5,000, specialise in criminal law. However, it is difficult to establish reliable figures on the number of barristers by area of practice as it is not compulsory for barristers to disclose their area(s) of practice.
10. As of November 2018, there were 3,182 solicitor advocates with Higher Rights of Audience who solely practised in the criminal courts, and a further 1,429 practising both civil and criminal advocacy². This provides a total of 4,611 solicitors with Higher Rights of Audience practising in criminal courts. Overall, therefore, it can be estimated that there are currently around 10,000 criminal advocates.
11. Within the Ministry of Justice, statistics are not available on the make-up of the advocacy market as a whole. However, an indication of the types of ‘protected characteristics’ of individuals working within the market can be drawn from the statistics below. In addition, during the consultation process we have sought the views of the profession on the

¹ Bar Standards Board statistics available at: www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics

² Solicitors Regulation Authority statistics available at: www.sra.org.uk/sra/how-we-work/reports/data/higher_rights_of_audience.page.

impact of Scheme 11 on those with protected characteristics, and have updated this statement to reflect those responses.

12. Figures outlining the demographics of different branches of the legal profession demonstrate that barristers are more likely to be male and white than other branches of the profession, and the general population. There is a higher proportion of white, male barristers amongst the Queen's Counsel (QCs) compared to barristers overall, as set out at Table 1. In 2017 there were a total of 1,703 QCs (both employed and self-employed)³.

Table 1: Legal profession demographics for whole legal profession^{4 5 6 7}

| | Sex | | | Ethnicity | | |
|-------------------------|------|--------|----------|-----------|------|----------|
| | Male | Female | Unknown* | White | BAME | Unknown* |
| QCs (2017) | 85% | 15% | 0% | 89% | 7% | 4% |
| Barristers (2017) | 63% | 37% | 0% | 80% | 12% | 8% |
| Solicitors (2016) | 50% | 50% | 0% | 74% | 14% | 12% |
| Legal Executives (2015) | 26% | 74% | 0% | 86% | 12% | 1% |

*'Prefer not to say' responses, no data, or missing data

13. Barristers can be self-employed and a member of chambers ('Self-employed'), directly employed in organisations ('Employed'), or work as a 'Sole practitioner'. Table 2 shows that the majority of barristers are within chambers and relatively few are sole practitioners. There is a higher proportion of Black Asian and Minority Ethnic (BAME) sole practitioners compared to self-employed barristers, and the proportion of employed barristers that are female is higher than for the other groups.

Table 2: Demographics of barristers⁸ with different working arrangements

| | Number | Sex | | | Ethnicity | | |
|---------------------------|--------|------|--------|----------|-----------|------|----------|
| | | Male | Female | Unknown* | White | BAME | Unknown* |
| Self-employed (2017) | 13,076 | 65% | 35% | 0% | 81% | 12% | 7% |
| Employed (2017) | 2,970 | 53% | 47% | 0% | 73% | 14% | 13% |
| Sole practitioners (2017) | 585 | 63% | 36% | 1% | 61% | 28% | 12% |

*'Prefer not to say' responses, no data, or missing data

14. Whilst similar working arrangements data for solicitor advocates is unavailable, the wider litigator market (described below as 'Providers') is such that the majority of solicitor advocates are employed within multi-practitioner firms rather than sole-practitioners. The

³ Bar Standards Board statistics available at: www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/queen's-counsel-statistics/

⁴ Bar Standards Board statistics available at: www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/queen's-counsel-statistics/

⁵ Bar Standards Board statistics available at: www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics/

⁶ Law Society Annual Statistics Report 2016. The solicitor statistics relate to solicitors on the roll, rather than solicitor advocates exclusively, and does not include registered European lawyers, registered foreign lawyers and exempt European lawyers.

⁷ Chartered Institute of Legal Executives (CILEX) statistics available at:

www.cilex.org.uk/about_cilex/who_we_are/equality_and_diversity/diversity-statistics/cilex-membership-diversity

⁸ Bar Standards Board statistics available at: www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics/

litigator business model also allows for a number of partners within larger firms, who could be analogous to a ‘self-employed’ status. As there is a higher percentage of women working as solicitors than as barristers, a further group of employed female solicitor advocates can also be identified.

15. Consultees raised concerns about the impact of the proposed Scheme 11 on junior advocates: from the most junior advocates, including solicitor advocates, to more mid-to-senior level junior advocates. Some expressed concerns that the proposed fees would negatively impact the recruitment and retention of junior advocates. Several consultees noted that younger, female, and BAME advocates are disproportionately represented amongst this group and emphasised concerns about the impact of the fees on the diversity of the professions.

The Providers

16. Legal aid services in England and Wales are delivered through various providers. All criminal legal aid providers that employ advocates remunerated under the AGFS (either barristers or solicitor advocates) will be affected by Scheme 11. We have limited availability of information on these legal providers. In January and February 2015, the LAA carried out an online survey to learn more about the providers doing legal aid work⁹. The survey was sent to all 2,262 legal aid providers (across the entire legal aid market) to complete between 19 January and 27 February 2015. 644 providers completed the survey, a response rate of 28%. The survey asks about the protected characteristics of those who have ownership or managerial control of the firm (2,057 people), not the total headcount of the firms who responded (13,578).
17. This limited response rate, and the fact the data spans the entire legal aid market, rather than just those employing advocates who undertake work under the AGFS, significantly limits our ability to draw meaningful conclusions.
18. The information gathered through this survey indicated that in the positions of managerial control, there was an over representation of males, when compared to the general population, as well as an over representation within the age group 40-59. However, the above considerations, and the fact there were a significant number of respondents for whom the information was not provided, make it difficult to draw significant conclusions. Taking into account the extent of available information, we consider that the nature of Scheme 11 is such that they are unlikely to put people at a particular disadvantage, because of their race, sex, or age, as explained below.

The Clients (Defendants)

19. In recent years, and following the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, eligibility for legal aid has been more restricted for both civil and criminal matters. For criminal matters, whilst the eligibility criteria is broader than other types of legally aided case, there is an interest of justice test when deciding whether an individual is eligible. However, when considering criminal legal aid for defendants of Crown Court cases, this interest of justice test is automatically passed.
20. From the table of diversity statistics below, which shows diversity of defendants in the Crown Court, we can see there is an over representation of males in the sample when compared to the general population. Further information on general population statistics

⁹ MOJ, Legal Aid Statistics in England and Wales: January to March 2015, available at: www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2015

are available in the Annex. Whilst the majority of clients for whom information on ethnicity is available are white, it is difficult to draw firm conclusions from the ethnicity data given the large proportion of clients whose ethnicity is unknown.

21. The percentage of those not considered disabled is significantly higher than those who either are considered disabled or where disability has not been established. This data has informed equalities considerations and any possible mitigations where it is considered that defendants from groups who share particular protected characteristics are likely to be affected.

Table 3: Demographics of Criminal Legal Aid Clients in the Crown Court, 2017-18¹⁰

| Sex | | | Ethnicity | | | Disabilities | | |
|------|--------|---------|-----------|-------|---------|-------------------------|---------------------|---------|
| Male | Female | Unknown | BAME | White | Unknown | Not considered Disabled | Considered Disabled | Unknown |
| 86% | 10% | 5% | 17% | 62% | 21% | 73% | 26% | 0% |

22. We do not anticipate any change in service provision to defendants as a result of the changes and therefore do not anticipate any detrimental impact on them.
23. In respect of individual contributions to legal aid costs, as Scheme 11 increases fees, it may be that legal aid costs for particular offences rise, when compared to current levels. As such, it may be that particular groups of people would be required to make higher contributions towards their legal aid costs than under the current Crown Court fee schemes. However, since the contribution levels are subject to means-testing and are intended to recuperate a proportion of the cost of providing legal aid services, we consider any differences in impact to be proportionate to the legitimate aim of paying fairly for work done. However, we would continue to retain a cap to the maximum income contribution individuals can be asked to contribute for their legal aid costs. This would assist in mitigating any rises in legal aid costs to individuals as a part of the changes made under Scheme 11. Overall, the impact on defendants that pay legal aid contributions would be limited under the Scheme 11. Please see the accompanying Impact Assessment for further details.

Equality Considerations - Impacts and Mitigations

24. Whilst specific mitigations will be explained below where appropriate, we continued to engage with the professional bodies throughout the consultation process. This allowed the professions to raise any further equality considerations which are included here and have informed our assessment of the equality considerations of Scheme 11.

Eliminating unlawful discrimination

Direct discrimination

25. Our assessment is that Scheme 11 is not directly discriminatory within the meaning of the 2010 Act. Scheme 11 applies to the whole of the criminal legal aid advocacy market

¹⁰ MoJ, Legal Aid Agency figures available at: www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2018

and does not directly discriminate. There are no changes that make any provisions by reference to groups sharing a particular protected characteristic, therefore there is no direct discrimination within the meaning of the 2010 Act.

Indirect discrimination – impacts and mitigation

26. The key principle underpinning Scheme 11 is more fairly paying for “work done”. This includes paying more for the more complex child sexual offences, dishonesty, and drug cases. As the most complex cases are often conducted by QCJs, this means the AGFS expenditure on self-employed QCJs is predicted to rise by around 3% under Scheme 11 when compared with the current Scheme 10. As can be seen from the diversity data, advocates with certain protected characteristics are under-represented in the QC group, either compared to the wider profession or the general population. This group tends to be older, and predominantly male.
27. The more junior section of the profession contains proportionately more members with specific protected characteristics – with proportionately more younger, BAME and female members for example - and this group is also likely to gain financially from Scheme 11. Under Scheme 11 we are increasing fees for a number of cases and hearings more likely to be undertaken by junior advocates. For example, we estimate that expenditure on employed / self-employed junior alone advocates would increase by 13%/12% under Scheme 11 when compared with Scheme 10¹¹. In addition, some of the under-representation at the QC level may be reduced under the proposed scheme as the junior members progress through their careers.
28. Whilst recognising the factors above, and acknowledging the limitations of the data available to us, we do not believe that the scheme discriminates on the basis of any of the nine protected characteristics. Where impacts are uneven, we believe that our proposed changes are a proportionate approach to achieving our objective of more accurately rewarding work done.
29. However, even if such a disadvantage was to materialise or there were to be a disproportionate effect on a particular group, our conclusion remains the same; that this would be justified as a proportionate means of meeting the legitimate aim of Scheme 11.
30. Several of our changes are specifically designed to better remunerate junior advocates. For example, we are increasing the basic fee in standard cases by 32%, and the daily refresher fee by 33%. The standard cases category comprises more straightforward cases that span a range of different, less complex cases. Some current standard cases have been moved to other categories that have higher fees. These are more likely to be undertaken by the most junior advocates. Such changes may mitigate any potential age discrimination in other aspects of Scheme 11.

Discrimination arising from disability and duty to make reasonable adjustments

31. There is a lack of available data concerning disability in the advocacy market, and amongst providers. We consider that the nature of Scheme 11 is such that they are unlikely to put people with this specific protected characteristic at a particular disadvantage. We consider that any uneven impact of these changes would be proportionate to our legitimate aim of paying more fairly for work done.

Advance Equality of Opportunity

¹¹ Please see the accompanying Impact Assessment for a detailed breakdown of the expected impacts on all advocate types.

32. Consideration has been given to how Scheme 11 impacts on the duty to advance equality of opportunity by meeting the needs of advocates who share a particular characteristic, where those needs are different from the needs of those who do not share that particular characteristic. Whilst the legal market's overall BAME statistics are broadly representative of the national demographics, a lawyer is more likely to be a white male. BAME representation falls dramatically when looking at the statistics for more senior advocates, making a senior advocate less likely to be BAME. However, both solicitors and barristers are underrepresented by women compared to the population as a whole, and this trend is more pronounced amongst QCs.
33. As every Scheme 10 fee has been increased by at least 1% in Scheme 11, all advocates would benefit under Scheme 11. As juniors alone are estimated to receive a greater proportionate increase in spend than QCs, female and BAME advocates should receive a greater share of overall AGFS spend than they do under Scheme 10¹². This has the potential to encourage the retention of female and BAME advocates, and could promote diversity within the profession as a whole.

Fostering good relations

34. Consideration has been given to how Scheme 11 impacts on the duty to foster good relations, and we do not consider that there is anything within Scheme 11 that would have a negative impact regarding this objective.

Types of impact

Impact on individuals

35. The individuals most likely to be impacted by Scheme 11 are advocates who are paid under the AGFS. These individuals will be affected by changing levels of payment between different offences and case outcomes across the proposed scheme. In addition to this, clients may also be affected by changing levels of contributions paid towards legal aid costs as a result of differing costs of cases under the proposed changes.
36. We do not believe that Scheme 11 discriminates against individuals because of their protected characteristics. Where impacts are uneven, we believe that Scheme 11 is a proportionate approach to achieving our legitimate aims set out in the consultation document of an AGFS that more accurately pays for work done.

Impact on providers

37. All criminal legal aid providers that employ advocates remunerated under the AGFS will be affected by Scheme 11, but they do not directly discriminate against a group sharing a particular protected characteristic, since Scheme 11 will apply to all providers of criminal legal aid advocacy services, irrespective of their protected characteristics. However, if a group sharing a protected characteristic is over-represented amongst affected providers compared with the general population, then there is the possibility for Scheme 11 to disproportionately impact that group.

¹² Please see paragraph 26 for further details.

Annex: Legal Aid Agency Client and provider characteristics

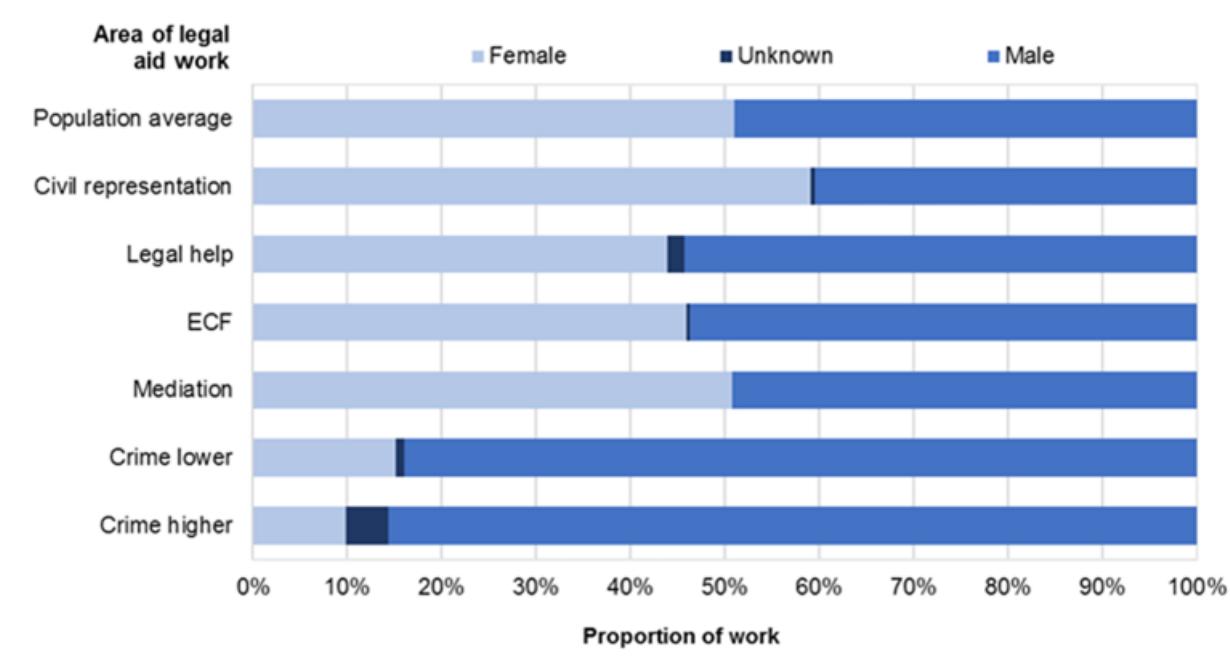
Client characteristics

The charts below show the breakdown of client characteristics over the different areas of legal aid compared with the national breakdown from the latest population estimates from the Office for National Statistics. The relevant section for these purposes in each of the following sections is “Crime Higher” (i.e. Crown Court).

Sex

The profile of criminal legal aid clients differs from the national profile with a much greater proportion of male clients (Figure 1). This reflects the picture across the criminal justice system¹³ and has been consistent throughout all the years for which we have data.

Figure 1: Proportion of legal aid clients in 2017-18 by sex¹⁴



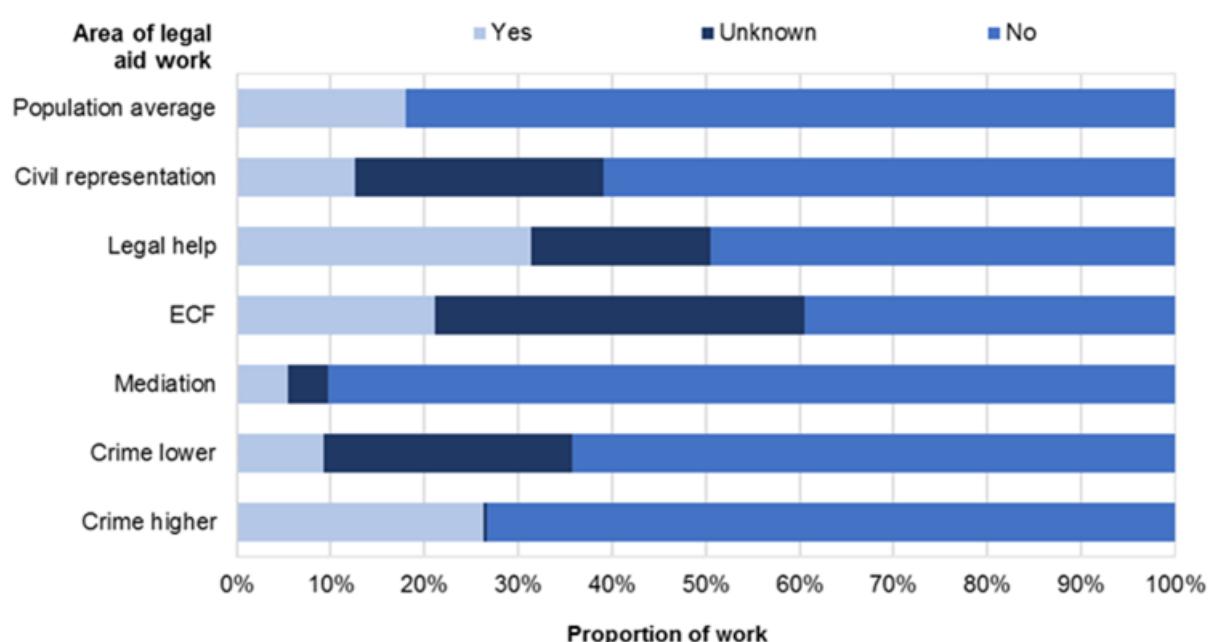
¹³ MOJ, Criminal Justice statistics quarterly: www.gov.uk/government/organisations/ministry-of-justice/series/criminal-justice-statistics

¹⁴ MOJ, Legal Aid Statistics in England and Wales: January to March 2018, available at: www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2018

Disability

Figure 2 shows the proportion of legal aid clients who consider themselves to have a disability. It is difficult to draw firm conclusions for most categories of legal aid because of the relatively high proportion for which disability is unknown, but this is less significant for Crime Higher. The overall picture of client disability status changed little between 2016-17 and 2017-18.

Figure 2: Proportion of legal aid clients in 2017-18 by disability status¹⁵

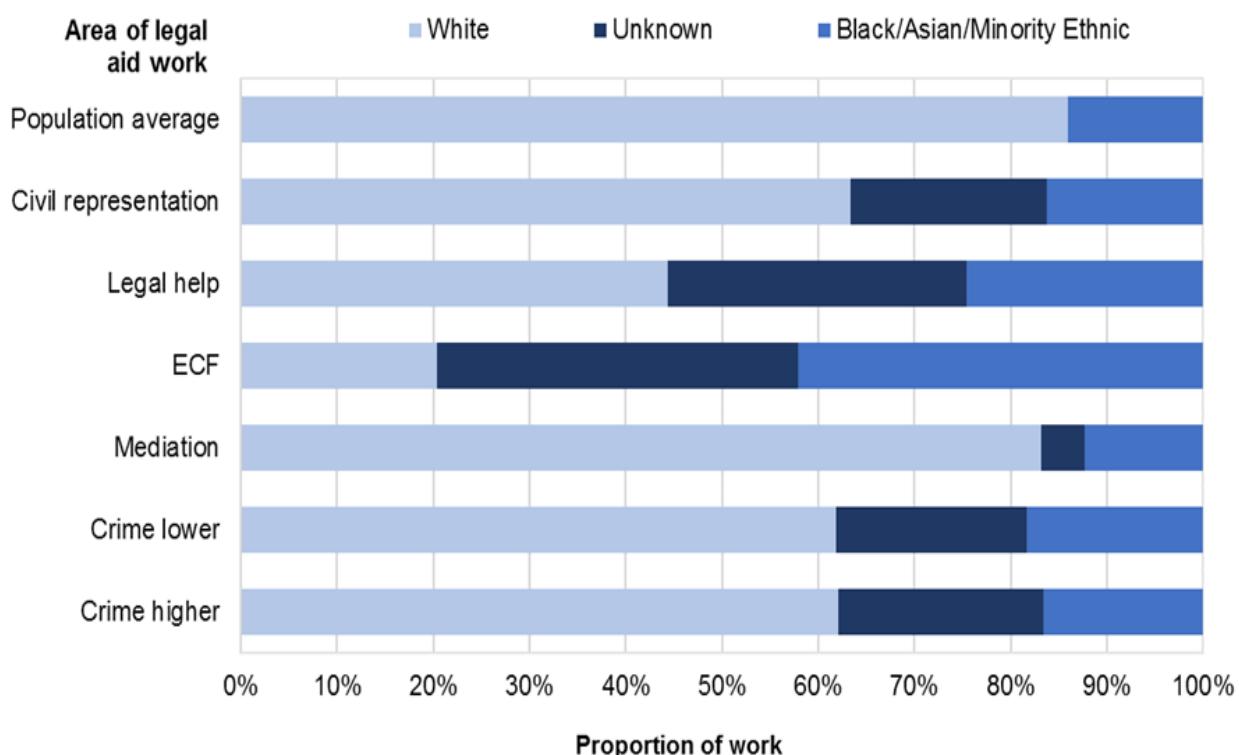


¹⁵ MOJ, Legal Aid Statistics in England and Wales: January to March 2018, available at: www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2018

Ethnicity

Figure 3 compares the proportion of legal aid clients who are from black and minority ethnic (BAME) origins with the general population. It is difficult to draw firm conclusions from this comparison because of the relatively high proportion for which ethnicity is unknown. The overall ethnicity profile of legal aid clients in 2017-18 was similar to that in 2016-17.

Figure 3: Proportion of legal aid clients in 2017-18 by broad ethnic group¹⁶

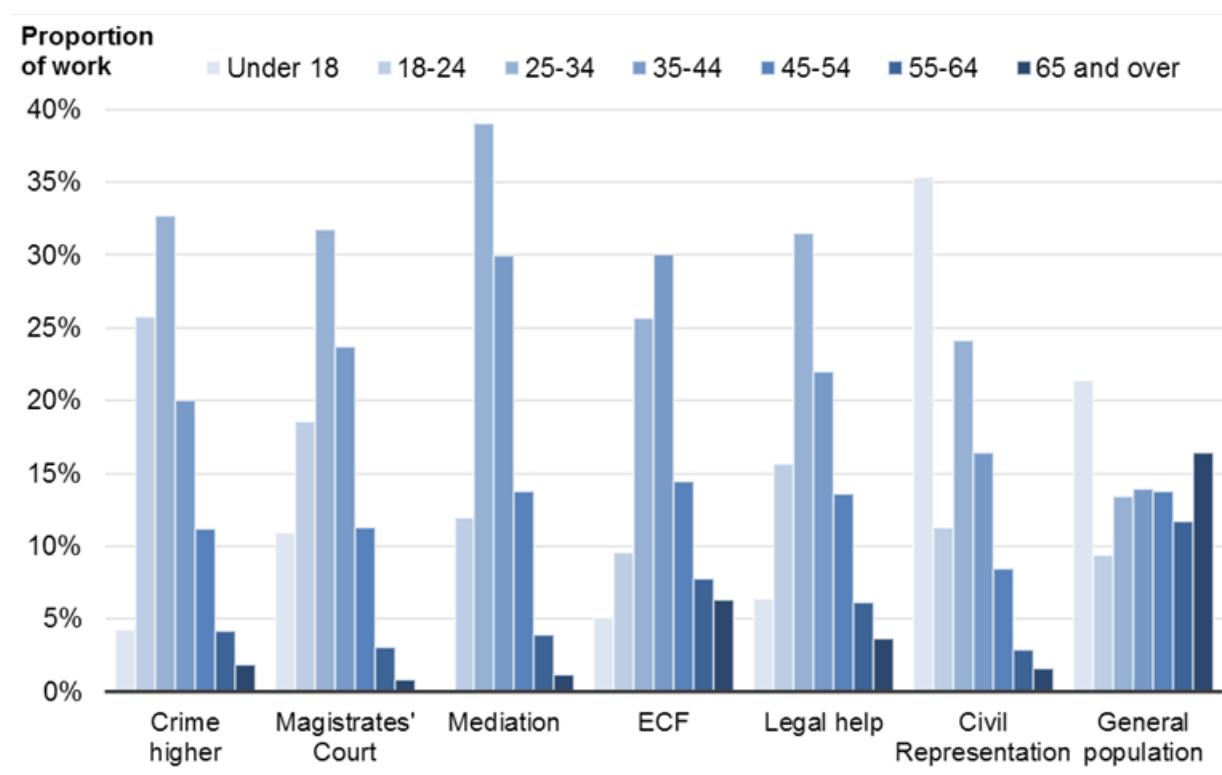


¹⁶ MOJ, Legal Aid Statistics in England and Wales: January to March 2018, available at: www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2018

Age

As Figure 4 shows, a much greater proportion of clients of criminal legal aid are from young adult age groups (aged 19-35) than in the general population, which reflects the pattern across the criminal justice system as a whole. The overall age profile of clients in 2017-18 was similar to that in 2016-17.

Figure 4: Proportion of legal aid clients in 2017-18 by age band¹⁷



¹⁷ MOJ, Legal Aid Statistics in England and Wales: January to March 2018, available at: www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2018

Provider characteristics

Legal aid services in England and Wales are delivered through various providers who are contracted by the LAA to do legal aid work. In January and February 2015, the LAA carried out an online survey to learn more about the providers doing legal aid work.

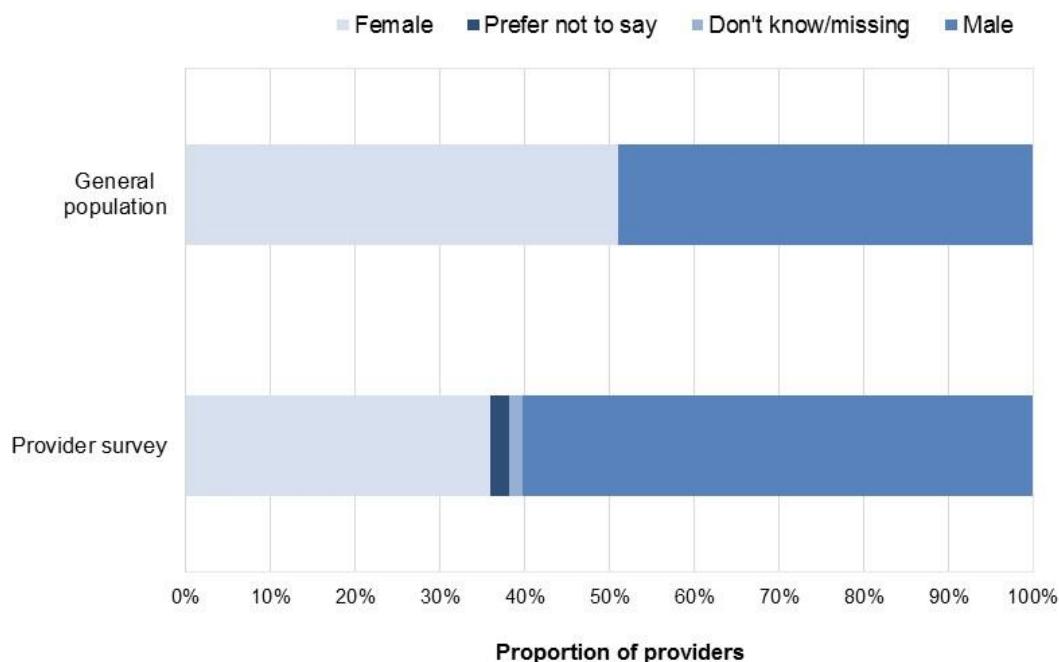
The survey was sent to all 2,262 legal aid providers to complete between 19 January and 27 February 2015. 644 providers completed the survey, a response rate of 28%, and this response rate should be taken into account when interpreting all results.

The survey asks about the protected characteristics of those who have ownership or managerial control of the firm (2,057 people), not the total headcount of the firms who responded (13,578). Here, the results for this group are presented alongside figures for the general population of England and Wales from the 2011 census for comparison.

Sex

60% of respondents were male, compared to 49% among the general population (Figure 47). This may partly reflect the fact that employment rates are higher for men than women, especially over the age of 22¹⁸.

Figure 5: Proportion of responding providers by sex, 2015¹⁹



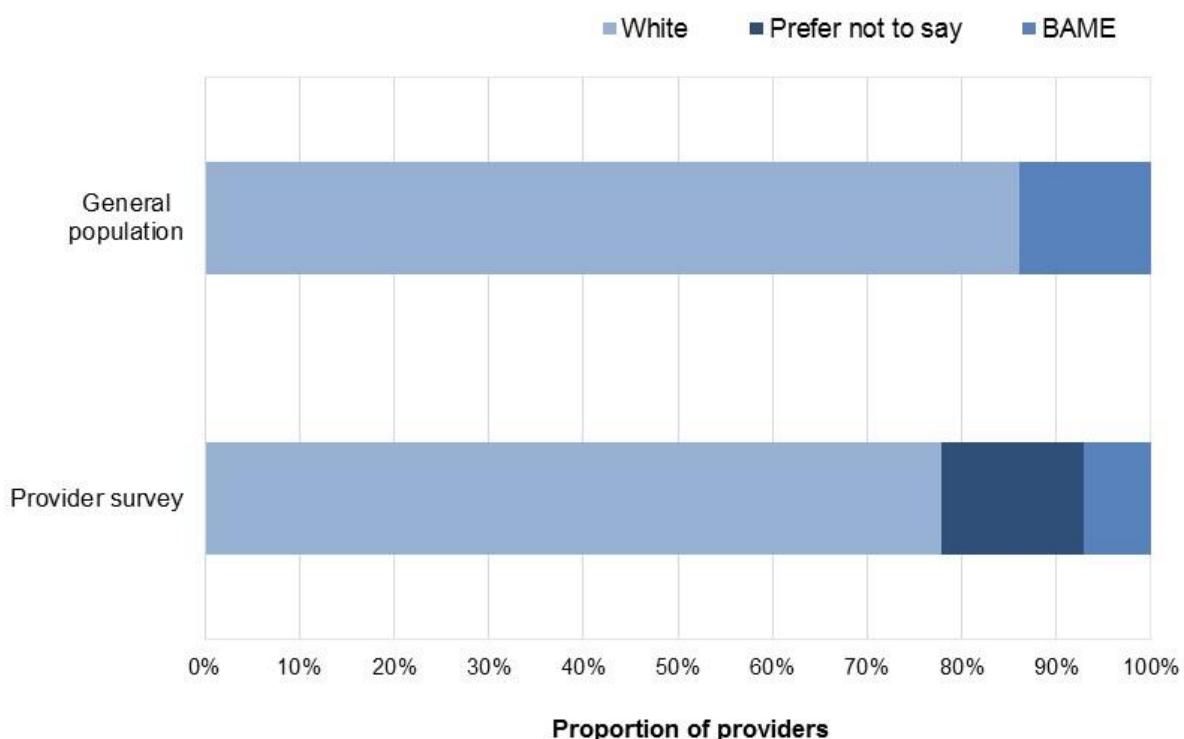
¹⁸ Women in the labour market, ONS, <http://www.ons.gov.uk/ons/rel/lmac/women-in-the-labour-market/2013/rpt---women-in-the-labour-market.html>

¹⁹ MOJ, Legal Aid Statistics in England and Wales: January to March 2015, available at: <https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2015>

Ethnicity

The proportion of respondents who reported being of BAME backgrounds is broadly similar to the general population, at 15%, but 7% of respondents preferred not to answer this question (figure 48).

Figure 6: Proportion of responding providers by broad ethnic group, 2015²⁰

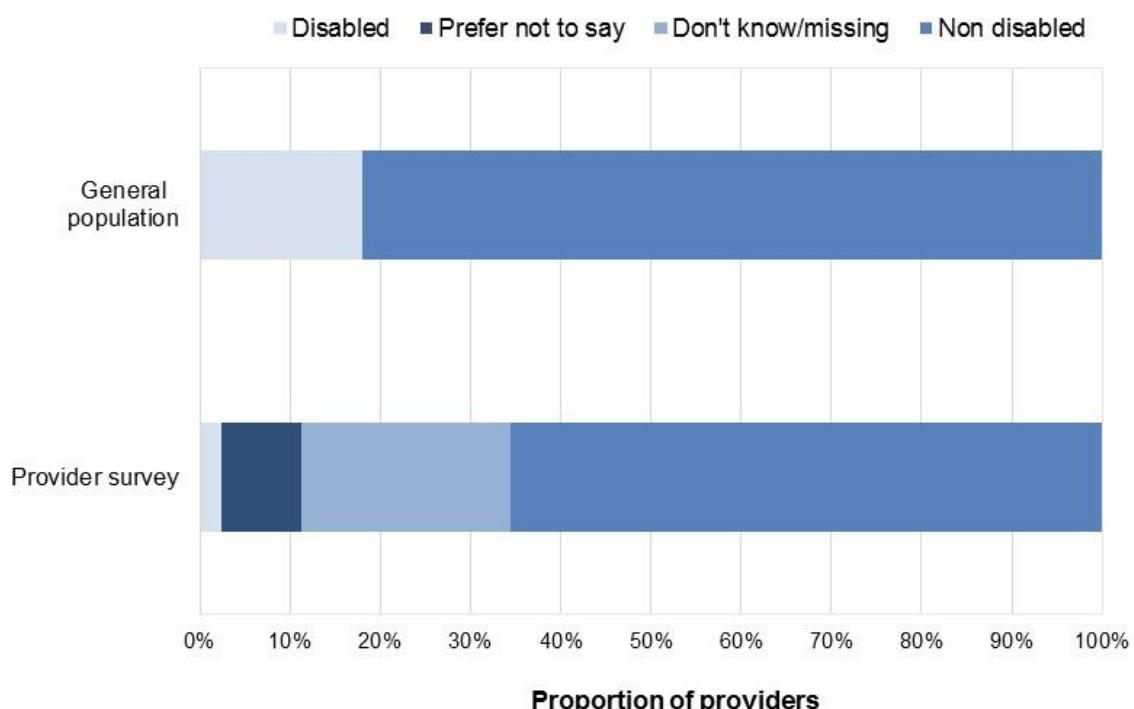


²⁰ MOJ, Legal Aid Statistics in England and Wales: January to March 2015, available at: www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2015

Disability

A large proportion (32%) of respondents did not declare their disability status (either prefer not to say or don't know/missing), so the results are difficult to interpret (Figure 49). Only 2% of respondents considered themselves to have a disability. This compares to 18% of the general population of England and Wales who stated they had a disability in the 2011 census. The labour market statistics show that disabled people are far less likely to be in employment than non-disabled people.

Figure 7: Proportion of responding providers by disability status, 2015²¹

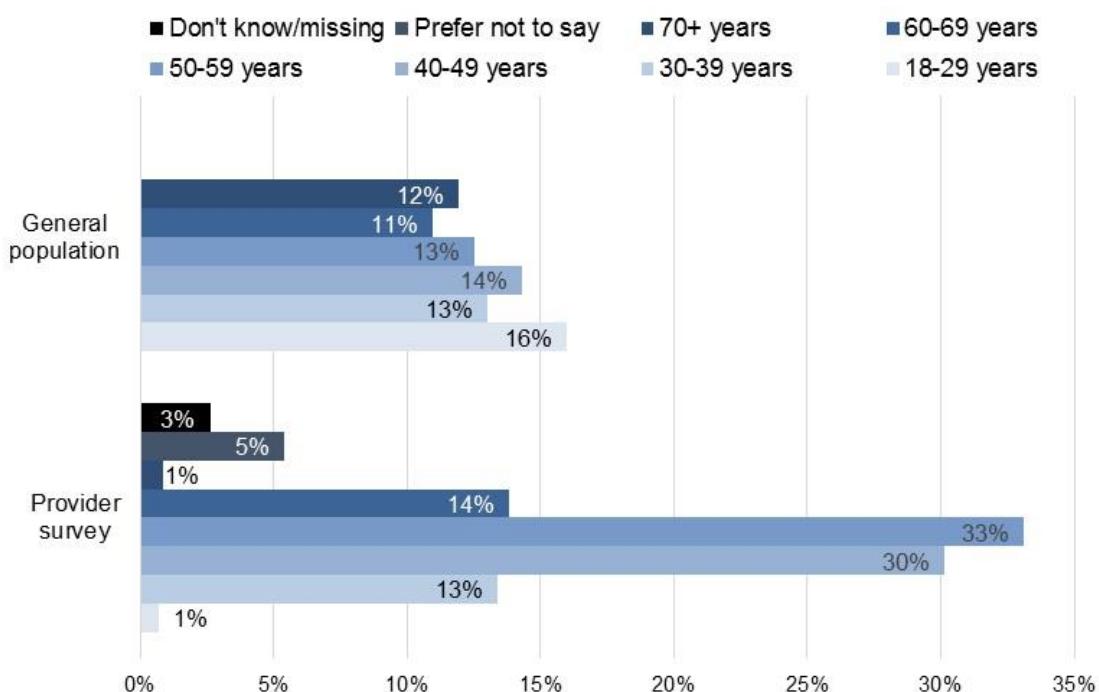


²¹ MOJ, Legal Aid Statistics in England and Wales: January to March 2015, available at: www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2015

Age

Looking at those aged over 18, the majority of respondents to the survey were aged between 40 and 59 (63%), this is much higher than the general population where around a quarter of over 18s are in this age group (Figure 50).

Figure 8: Proportion of responding providers by age group, 2015²²



²² MOJ, Legal Aid Statistics in England and Wales: January to March 2015, available at: www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2015

Religion

As figure 9 shows, a large proportion (43%) of respondents did not declare their religion (either prefer not to say or don't know/missing), which limits any interpretation of the result. However, the two largest groups, Christian (30%) and not religious (18%) were the same as those for the general population.

Figure 9: Proportion of responding providers by religion²³

| Religion | Provider survey | General population |
|-----------------------------|-----------------|--------------------|
| Christian | 30% | 59% |
| Not Religious | 18% | 25% |
| Muslim | 3% | 5% |
| Jewish | 2% | 1% |
| Hindu | 1% | 2% |
| Sikh | 1% | 1% |
| Any Other Religious Beliefs | 1% | <1% |
| Buddhist | <1% | <1% |
| Prefer Not To Say | 18% | 7% |
| Don't Know/Missing | 25% | 0% |

Sexual Orientation

Figure 10 shows that nearly a quarter of respondents did not declare their sexual orientation (either prefer not to say or don't know/missing), which limits any interpretation of the result. Figures on sexual orientation for the general population are not available from the census data, however, other studies have estimated that about 1.5% of the general population are gay, lesbian or bisexual²⁴ this is similar to the result of the survey, where about 2% of respondents said they were gay, lesbian or bisexual.

Figure 10: Proportion of responding providers by sexual orientation²⁵

| Sexual orientation | Provider survey |
|----------------------|-----------------|
| Hetrosexual/Straight | 73% |
| Gay Man | 1% |
| Gay Woman/Lesbian | <1% |
| Bisexual | <1% |
| Other | <1% |
| Prefer Not To Say | 16% |
| Don't Know/Missing | 8% |

²³ MOJ, Legal Aid Statistics in England and Wales: January to March 2015, available at: www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2015

²⁴ Figures are from the integrated household survey www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/sexuality/bulletins/integratedhouseholdsurvey/2012-09-28

²⁵ MOJ, Legal Aid Statistics in England and Wales: January to March 2015, available at: www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2015