

Preserving and Enhancing the Quality of Criminal Advocacy

Equality Statement

Policy Summary

1.1 This Equalities Statement has been written to be read alongside the Preserving and Enhancing the Quality of Criminal Advocacy Consultation, to which this statement is an Annex. The changes proposed in the consultation document are:

- **The introduction of an Advocacy Panel for publically funded criminal defence advocacy in the Crown Court and above**, to provide valuable quality assurance and enable the government to have greater confidence in the quality of publicly funded defence advocacy in the most serious cases. This could also include the potential for a geographical structure along the same lines as the current Crown Prosecution Service Quality scheme and a numerical limit for all or some of the panel levels.
- **A Statutory Ban on Referral Fees**, to guard against financial incentives being allowed to dictate the choice of advocate in publically funded criminal cases. Referral fees can be described as fees paid, by an advocate, in exchange for instruction¹. We are told by the regulators and the profession that such fees are frequently paid. This is despite a prohibition by the Bar Standards Board (BSB), and a restriction by the Solicitor's Regulation Authority, and a ban in the standard Legal Aid Agency Contract.
- **Protecting Client Choice and safeguarding against conflicts of interest**, through an addition to the Legal Aid Agency's standard contract. This would enshrine within the contract the existing responsibility of the litigator to provide clear and impartial advice when their client's case requires representation by an advocate. We also wish to make sure that there are no conflicts of interest in the litigator's advice on choice of advocate; this could be achieved, for instance, by restricting the instruction of advocates within the same firm.

Equality Duties

2.1 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).

¹ Section 56 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 sets out the existing definition of a referral fee in full.

- 2.2 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

- 3.1 Adhering to guidance published by the Equality and Human Rights Commission (EHRC), our approach to assessing the potential for particular disadvantage resulting from the proposals has been to identify the individuals whom the proposals would impact (the 'pool'), and then draw comparisons between the potential impacts of each proposal on those who share particular protected characteristics, with those who do not share those characteristics.
- 3.2 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 are self-employed or employed.
- 3.3 This distinction is relevant not only when assessing the effect of introducing an Advocacy Panel on various sections of the criminal advocacy market, but also in relation to the policy to restrict conflicts of interest.

The Demographics of the Publicly Funded Criminal Advocacy Market

The Advocates

- 4.1 As of 2014, there were 15,716 barristers practicing in England and Wales, an increase of 5% from 2010.² 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.
- 4.2 In 2014 there were 3,361 solicitor advocates with Higher Rights of Audience who solely practiced in the criminal courts, and a further 1,550 practicing both civil and criminal advocacy³. This provides a total of 4,911 solicitors with Higher Rights of Audience practising in criminal courts, a figure that has increased by 12% since 2010. Overall, therefore, there were approximately 10,000 criminal advocates in 2014.
- 4.3 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 in the market can be drawn from the statistics below. It should be remembered that this consultation is seeking initial thoughts from the profession, we are seeking relevant information to further inform our analysis and we will be updating this statement once we have considered all relevant responses and information.

² Bar Standards Board statistics available at: <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics/>

³ Solicitors Regulation Authority statistics available at: http://www.sra.org.uk/sra/how-we-work/reports/data/higher_rights_of_audience.page Data included is August 2014

4.4 Figures outlining the demographics of different branches of the legal profession demonstrate that barristers are more likely to be male and white than their other legal counterparts, and the general population. There is a higher proportion of white, male barristers amongst the Queen’s Counsel compared to barristers overall, see Table 1. In 2014 there were a total of 1,658 QCs.

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

	Gender		Ethnicity	
	Male	Female	White	BAME
Queen’s Counsel* (2014)	87%	13%	94%	6%
Barristers* (2014)	67%	33%	87%	13%
Solicitors (2012)	53%	47%	86%	14%
Legal Executives (2013)	26%	74%	Unknown	Unknown
General Population	49%	51%	86%	14%

*Excluding barristers where gender or ethnicity unknown

4.5 Barristers can be self-employed and linked to chambers (‘Self-employed’), directly employed in organisations (‘Employed’), or work independently (‘Sole practitioners’). Table 2 shows that the majority of barristers are linked to 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	Gender		Ethnicity	
		Male	Female	White	BAME
Self-employed	12,709	67%	33%	88%	12%
Employed	2,794	54%	46%	84%	16%
Sole practitioners	498	70%	30%	69%	31%

Percentages exclude barristers where gender or ethnicity unknown

4.6 Whilst similar working arrangements data for solicitors is unavailable, the litigator market is such that the majority of solicitors are employed within multi-practitioner firms rather than sole-practitioners. The 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 solicitors can also be identified.

⁴ Bar Standards Board statistics available at: <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/queen%27s-counsel-statistics/>

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

⁶ The Solicitor statistics relate to solicitors on the roll, rather than solicitor advocates exclusively, and includes registered European lawyers, registered foreign lawyers and exempt European lawyers.

⁷ Chartered Institute of Legal Executives (CILEx) ethnicity figures have not been provided because the ethnic group proportions published in the ‘CILEx Membership Diversity Statistics’ section of their website do not sum to 100%. Elsewhere on the CILEx website, it is estimated that 13% of CILEx members are of an ethnic minority – see http://www.cilex.org.uk/about_cilex/equality_and_diversity/cilex_and_social_mobility.aspx

⁸ These figures are for both Civil and Criminal Barristers, as no figures are available for Criminal alone.

The Clients

4.7 In recent years, eligibility for Legal Aid has been restricted for both civil and criminal matters. For criminal matters, whilst the eligibility criteria are far lower than other types of legally aided case, there does exist an interest of justice test when deciding whether an individual is eligible. However, when considering criminal legal aid clients at the Crown Court level, this interest of justice test is automatically passed.

4.8 From the table of diversity statistics below we can see that, like the professional statistics above, there is a clear over representation of non-disabled white males. In addition, 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 will inform the equalities considerations and any possible mitigations where it is considered that clients from groups with protected characteristics are likely to be affected.

Table 3: Demographics of Criminal Legal Aid Clients in the Crown Court, 2014-15⁹

Gender			Ethnicity			Disabilities		
Male	Female	Unknown	BAME	White	Unknown	Not considered Disabled	Considered Disabled	Unknown
76%	9%	15%	15%	59%	26%	61%	19%	19%

4.9 We have included questions within the consultation to better understand the potential effect of these policies on individuals with protected characteristics. We will use the responses received from the consultation to identify further possible discrimination risks, particularly to clients, however we do not anticipate any significant disadvantages to clients.

Equality Considerations- Impacts and Mitigations

5.1 Under the Equalities Act 2010, Government Departments have obligations to consider certain principles of equality when formulating policy. Considerations to the specific requirements of the Act are set out below, however certain equalities principles which are judged to be less affected by the proposals are dealt with separately at the end of this section.

5.2 Whilst specific mitigations will be explained below where appropriate, we will continue to engage with the professional bodies. This will allow the professions to raise any further equality considerations to inform our assessment of the proposals.

Advocacy Panel

Eliminating unlawful discrimination

Indirect discrimination

⁹ Legal Aid Agency figures available at: <https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2015>

- 5.3 As with any quality assurance scheme, this policy may restrict the market and exclude those who, whilst they may have been practicing in the market prior to the introduction of the scheme, do not meet the required quality standard.
- 5.4 Although the impact on equality may depend on the detailed features of the scheme, we recognise that the development of the Advocacy Panel has the possibility of particular disadvantage for people with certain protected characteristics, depending on the criteria applied. Quality schemes have been introduced in the past, such as the CPS Advocacy Panel, the impact of which may be relevant to the assessment of this proposal and an assessment of diversity data collected as part of the ongoing management of the CPS Panel will be conducted to inform the development of any Advocacy Panel.
- 5.5 Whilst the legal market's overall BAME statistics are broadly representative of the national demographics, as a whole 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 increases when the QC statistics are taken into account.
- 5.6 As stated previously, those from BAME groups make up a much higher percentage of those advocates operating as 'sole practitioners' (SPs) compared to self-employed or employed barristers. By definition, these SPs are at higher risk of significant impact should they fail to gain panel accreditation as they would be less resilient to a change in their ability to work within the criminal Legal Aid market. We therefore consider that this policy has the potential to disproportionately impact on the access of these groups to the criminal defence market, particularly their access to the higher levels of the profession as without accreditation it would be more difficult to gain experience and advance their careers. However, we consider any such particular disadvantage to be justified. In light of ongoing concerns about the quality of defence advocacy, the operation of the market, and the potential implications for defendants and the criminal justice system, implementation of a panel for criminal defence advocacy in the Crown Court and above represents a proportionate response to the legitimate aim of ensuring high quality of criminal advocacy in the most serious cases.
- 5.7 As this policy is attempting to give a measure to quality of advocacy, there is a chance that using a proxy, such as length of service, could disproportionately impact on younger members of the advocacy profession. To guard against this a mitigation has been suggested below, and will be considered during detailed policy formulation.
- 5.8 Potential safeguards and mitigations include:
- **A measure of complexity of case, rather than length of service.** Shifting the emphasis from the length of time someone has been an advocate, to what types of cases they have previously done, would reduce the chances of discrimination on grounds of age, or having taken a career break or maternity leave.
 - **A rigorous selection process for membership of the decision panels.** By making sure that the membership of the decision panels are appointed through an open selection process, this would help to promote a more diverse pool of decision makers.
 - **A fair and open selection process for the Advocacy Panel focused on quality.** In designing the selection process, emphasis will be given to having a fair and open competition. This will

give a clearer focus on individual applicants' skills and abilities, and may help to reduce any indirect discrimination to those groups with protected characteristics.

- **An opportunity for applications throughout the life of the Panel.** Allowing applications throughout the year, rather than at set times, will mitigate against the risk of indirect discrimination towards those not in a position to apply at the outset, e.g. on maternity leave, special leave or sabbaticals.
- **Collecting of Equality Data of the selection process and panel.** Whilst the detail of such a collection will need to be clarified, it is likely that as part of the administration of the panel, the LAA will monitor the impact on groups with protected characteristics.

Referral Fees

5.9 The main effect of this policy is the removal of these fees from the market, and removing the burden on advocates to pay them. Whilst this could be seen as a disadvantage to the litigators who will lose the income, it should be remembered that such practices are currently banned. We do not therefore consider this policy results in disadvantage. Were any particular disadvantage to persons with protected characteristics to result, given the potential to undermine selection of advocates on the basis of quality and the needs of the client and the attempts to regulate this behaviour to date, we consider a statutory prohibition to be a proportionate means of addressing the legitimate aim of ensuring the best interests of the client are paramount.

Protecting Client Choice and Safeguarding Against Conflicts of Interest

Eliminating unlawful discrimination

Indirect discrimination

5.10 It is a clear risk of this policy that, whilst this has the potential to increase equality of opportunity in access to publicly funded criminal advocacy, it will have an impact on those advocate who see their work fall as a result of the protecting client choice requirement. Whilst this may include those from groups with protected characteristic, given the necessity of clear and impartial advice in order to make an informed choice of advocate and the concerns expressed in the Jeffrey report about commercial pressures, we consider this a proportionate response to the legitimate aim of ensuring individuals can make an informed choice of advocate.

5.11 Any restriction of the use of in-house advocacy would, like the Advocacy Panel proposal, reduce access to work for those excluded by it and potentially the profits of instructing solicitors or firms. We will need to consider the potential Equality impacts if pursuing this proposal but depending on the make-up of the affected groups, it could disproportionately impact on persons with protected characteristics.

Advancing equality of opportunity

5.12 Although the focus of these proposals is on safeguarding and improving the quality of criminal advocacy, we consider that the introduction of a requirement to demonstrate clear and impartial choice of advocates to be potentially beneficial to groups with protected characteristics.

- 5.13 It is already a fundamental requirement of LAA contracts for litigators to give impartial advice. In addition, requiring clear evidence of reasons for the selection of advocates presented to the client, and reasons for recommending any one advocate in particular could encourage solicitors to recommend advocates from a wider range of sources than those normally used. A range of policy options will be presented so that how this policy affects equalities is fully considered.
- 5.14 Whilst the full policy option is still under consideration, this could also complement the work done by the MoJ to increase the diversity of the Judiciary. There is little current data to support this, it is a reasonable assumption that increasing the pool of advocates who may be instructed on a particular case could grow the practices of those advocates within some of the protected characteristics groups; this in turn could increase their prevalence at the higher levels of the profession, from which the judiciary draw the majority of their candidates. We are liaising with the CPS to assess whether any diversity data they hold on their Advocacy Scheme could be used as a proxy to validate this assumption.
- 5.15 There are limitations in the data we hold, which do not cover all protected characteristics. It is not possible to assess the impacts of the proposals in respect of all protected characteristics on a statistical basis, therefore. Where we lack the data to undertake statistical analysis, we have assessed the impacts on the basis of those which may be reasonably anticipated. We consider that the nature of the proposals is such that they are unlikely to put people with protected characteristics of gender reassignment, religion or belief and sexual orientation at particular disadvantage. However, were such disadvantage to materialise, we consider the proposals to be a proportionate means of achieving the legitimate aims as set out above. The consultation is calling for evidence and suggestions on what other equality impacts can be identified from implementing the policies as set out in the paper, and how those could be mitigated against and we will take into account all relevant information and responses provided to update this assessment.

Other Considerations

Discrimination arising from disability and duty to make reasonable adjustments

- 5.16 In so far as the proposals affect disabled advocates, we believe that the policies under consideration are proportionate, having regard to their aims, as set out above.
- 5.17 With regard to court users, it would not be reasonable to make an adjustment for disabled court users so that they are not affected by the proposals given the percentage of the overall client population and the projected impact, but it remains important to make reasonable adjustments for disabled court users where possible to ensure appropriate support is given.

Harassment and victimisation

- 5.18 We do not consider there to be a risk of harassment or victimisation as a result of these proposals.

Eliminating unlawful discrimination

Direct discrimination

- 5.19 The proposals are not directly discriminatory within the meaning of the Equality Act as they apply to all criminal defence advocates and instructing solicitors irrespective of whether or not they have a protected characteristic; we do not consider that the proposals would result in people being treated less favourably because of the protected characteristic.

Fostering good relations

5.20 Consideration has been given to this objective, and where possible the outlined scheme will be designed in such a way as to promote good relations. Where restrictions on numbers or other barriers are necessary to achieve the policy aims (e.g. the Advocacy Panel proposals), the scheme will be designed on merit and so will allow all an equal opportunity to succeed.