



Ministry of Justice

Reforming the Advocates' Graduated Fee Scheme Consultation

Equality Statement

Policy Summary

1. This Equalities Statement has been written to be read alongside the consultation '*Reforming the Advocates' Graduated Fee Scheme*' to which this statement is an Annex.
2. Whilst the substantive scheme is explained within the Consultation Document, the broad proposed changes are:
 - A move away from Pages of Prosecution Evidence and numbers of prosecution witnesses as 'proxies for complexity'.
 - Use of a detailed offence categorisation system, building in relativities between offences
 - Paying for all standard appearances separately, rather than 'bundling' them into the trial fee.
 - All standard appearances after the sixth appearance to be remunerated out of the brief fee.
3. We will update our equality considerations in light of the consultation responses.

Equality Duties

4. 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).

5. 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

6. 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.
7. 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.

The Demographics of the Publicly Funded Criminal Advocacy Market

The Advocates

8. As of 2015, there were 15,899 barristers practicing in England and Wales, an increase of 6% 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.
9. As of December 2015, there were 3,254 solicitor advocates with Higher Rights of Audience who solely practised in the criminal courts, and a further 1,482 practicing both civil and criminal advocacy². This provides a total of 4,736 solicitors with Higher Rights of Audience practising in criminal courts. Overall, therefore, it can be estimated that there were around 10,000 criminal advocates in 2015.
10. 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 views 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.
11. 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 compared to barristers overall, see Table 1. In 2015 there were a total of 1,608 QCs.

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

² 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 December 2015

Table 1: Legal profession demographics for whole legal profession^{3 4 5 6}

	Gender		Ethnicity	
	Male	Female	White	BAME
Queen’s Counsel* (2015)	87%	13%	94%	6%
Barristers* (2015)	64%	36%	87%	13%
Solicitors (2015)	51%	49%	85%	15%
Legal Executives (2015)	26%	74%	Unknown	Unknown

*Excluding barristers where gender or ethnicity unknown

12. 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 barristers⁷ with different working arrangements

	Number	Gender		Ethnicity	
		Male	Female	White	BAME
Self-employed	12,757	67%	33%	88%	12%
Employed	2,897	54%	46%	84%	16%
Sole practitioners	529	67%	33%	70%	30%

Percentages exclude barristers where gender or ethnicity unknown

13. 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.

The Providers

14. Legal aid services in England and Wales are delivered through various providers who are contracted by the LAA to do legal aid work. All criminal legal aid providers that employ advocates remunerated under the AGFS will be affected by these proposals. We

³ Bar Standards Board statistics available at: <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/queen%27s-counsel-statistics/>

⁴ Bar Standards Board statistics available at: <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics/>

⁵ Law Society ‘Annual Statistics Report 2015’ available at: <http://www.lawsociety.org.uk/support-services/research-trends/annual-statistics-report-2015/> 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.

⁶ 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%. Available at: http://www.cilex.org.uk/about_cilex/who_we_are/equality_and_diversity/diversity-statistics/cilex-membership-diversity

⁷ These figures are for both Civil and Criminal Barristers, as no figures are available for Criminal alone.

have limited availability of information on this subset of legal providers. 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 (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).

15. 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.
16. 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. We consider that the nature of the reforms is such that they are unlikely to put people with these protected characteristics at a particular disadvantage, as explained below.

The Clients

17. 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 is 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.
18. From the table of diversity statistics below, 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 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.
19. The percentage of those not considered disabled is significantly higher than those who either are considered disabled or where disability has not been established; however, again it is difficult to draw firm conclusions when compared to the general population data, given the large proportion of clients for whom disability status is unknown. 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, 2014-15⁸

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

⁸ Legal Aid Agency figures available at: <https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2015>

20. 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 change in service provision as a result of this reform and therefore do not anticipate any significant disadvantages to clients.
21. In respect of individual contributions to legal aid costs, as the proposals redistribute some money around the scheme, 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 will be required to make higher contributions towards their legal aid costs than under the current Crown Court fee schemes. Others will be required to contribute less. 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 will retain a cap to the maximum income contribution individuals can be asked to contribute for their legal aid costs. This will assist to mitigate against any rises in legal aid costs to individuals as a part of this reform.

Equality Considerations - Impacts and Mitigations

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

Eliminating unlawful discrimination

Direct discrimination

23. Our initial assessment is that the proposals are not directly discriminatory within the meaning of the 2010 Act. The proposals will apply to the whole of the criminal legal aid advocacy market. As there are no proposals to make any provisions that specifically impact on a protected group, there is no direct discrimination within the meaning of the 2010 Act.

Indirect discrimination

24. The key principle underpinning the reforms is paying fairly for work done. This has resulted in paying more for the more complex cases. As the most complex cases are predominantly conducted by QCs, this means that their receipts from AGFS are predicted to rise by around 10%. As can be seen from the diversity data, advocates with protected characteristics are under-represented in the QC group, either compared to the wider profession or the general population. This group also tend to be older, and predominantly male.
25. The more junior section of the profession contains proportionately more members with specific protected characteristics and this group is also likely to gain financially from the proposals. In addition, some of the under-representation at the QC level may be reduced as the junior members progress through their careers.

26. From data available within the Impact Assessment, the analysis conducted suggests that any impacts on specific groups are **not** statistically significant. Overall, there is no evidence that the scheme is favouring some groups over others to any substantial degree.
27. Whilst recognising the factors above, and acknowledging the limitations of the data available to us, we do not believe that our scheme discriminates against people with protected characteristics. Where impacts are uneven, we believe that our proposals are a proportionate approach to achieving our legitimate aims set out in the consultation document, of a reformed and modernised AGFS that pays for work done and supports the modernised Criminal Justice System.
28. We do not consider that the proposed changes to the AGFS will result in any discrimination in relation to disability for either clients or defence advocates. As mentioned, the proposals are considered to be a proportionate means to achieving our legitimate aim of modernising the AGFS to better reflect payment for work done and fairly remunerate for the more complex cases. We will continue to make reasonable adjustments for criminal legal aid clients with disabilities and also criminal defence advocates with disabilities.
29. We have used the available data and evidence sources we consider to be most relevant and reliable. Whilst we do not have data on certain protected characteristics such as sexual orientation, religion or married status, we consider that the nature of the reforms is such that they are unlikely to put people with any protected characteristics at a particular disadvantage. However, even were such a disadvantage 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 to the legitimate aim of a reformed AGFS that remunerates fairly for work done and supports the modernised Criminal Justice System.

Mitigation

30. The junior end of the advocacy profession tend to do many of the ancillary hearings, particularly in more complex cases. To protect this group, and mitigate against any age discrimination, a key feature of the new scheme is to 'unbundle' these ancillary hearings from the basic fee. This will have the effect of ensuring the junior advocacy profession has certainty as to their fee for these hearings and will mitigate against any potential age discrimination in other aspects of the scheme. In addition, the reforms propose to dedicate more money to ineffective trials, which currently impact on the junior end of the advocacy profession more so than others. This will provide greater protection for junior advocates in particular.

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 the reforms is such that they are unlikely to put people with these protected characteristics at a particular disadvantage. We consider that any uneven impact these reforms may have would be proportionate to our legitimate aim of paying fairly for work done but we will consider any evidence of potential discriminatory impact in light of the responses to the consultation. .

Advance Equality of Opportunity

32. Consideration has been given to how these proposals impact 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 need 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 among QCs.
33. Although the main aim of the proposed reforms is to refocus the scheme to pay for time in court, analysis has also shown that the scheme also better remunerates women of all levels of seniority. This has the potential not only to encourage the retention of female advocates, but could also promote diversity within the profession as a whole.

Fostering good relations

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

Types of impact

Impact on individuals

35. The individuals most likely to be impacted by these proposals 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 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 new scheme.
36. We do not believe that our scheme discriminates against individuals with protected characteristics. Where impacts are uneven, we believe that our proposals are a proportionate approach to achieving our legitimate aims set out in the consultation document, of a reformed and modernised AGFS that pays for work done and supports the modernised Criminal Justice System.

Impact on providers

37. All criminal legal aid providers that employ advocates remunerated under the AGFS will be affected by proposals, but they do not directly discriminate against a group sharing a protected characteristic, since the proposal will apply to all providers of criminal legal aid advocacy services, irrespective of 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 the proposal to disproportionately impact that group.
38. While all providers would be treated equally, the proposals therefore may have a disproportionate impact on providers with protected characteristics. Should any impact materialise as a result of these reforms, we consider any such impact to be justified for the reasons set out above.

Annex: Legal Aid Agency Client and provider characteristics

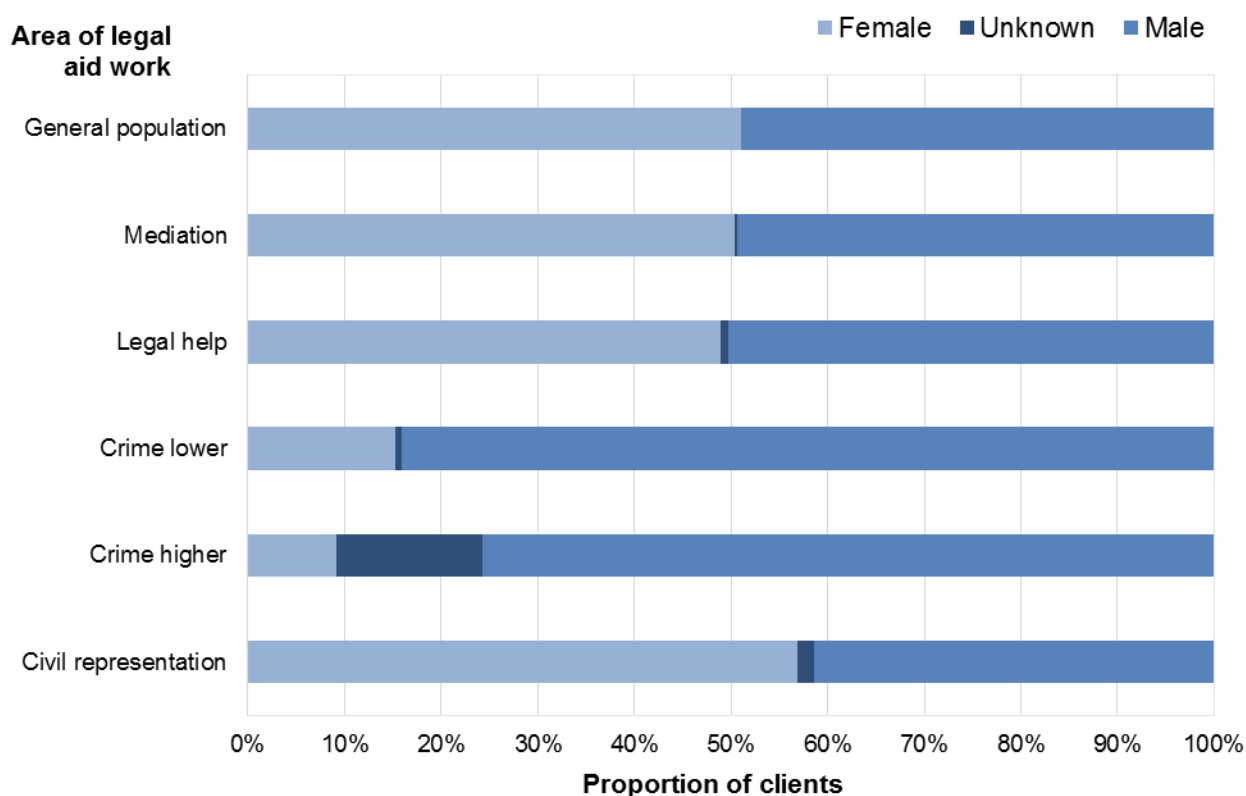
Client characteristics

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).

Gender

The gender profile of criminal legal aid clients differs from the national profile with a much greater proportion of male clients (Figure 43). This reflects the picture across the criminal justice system.⁹ The gender distribution across all areas of legal aid in 2014-15 is little changed from 2013-14.

Figure 43: Proportion of clients by gender (cases closed in 2014-15)¹⁰



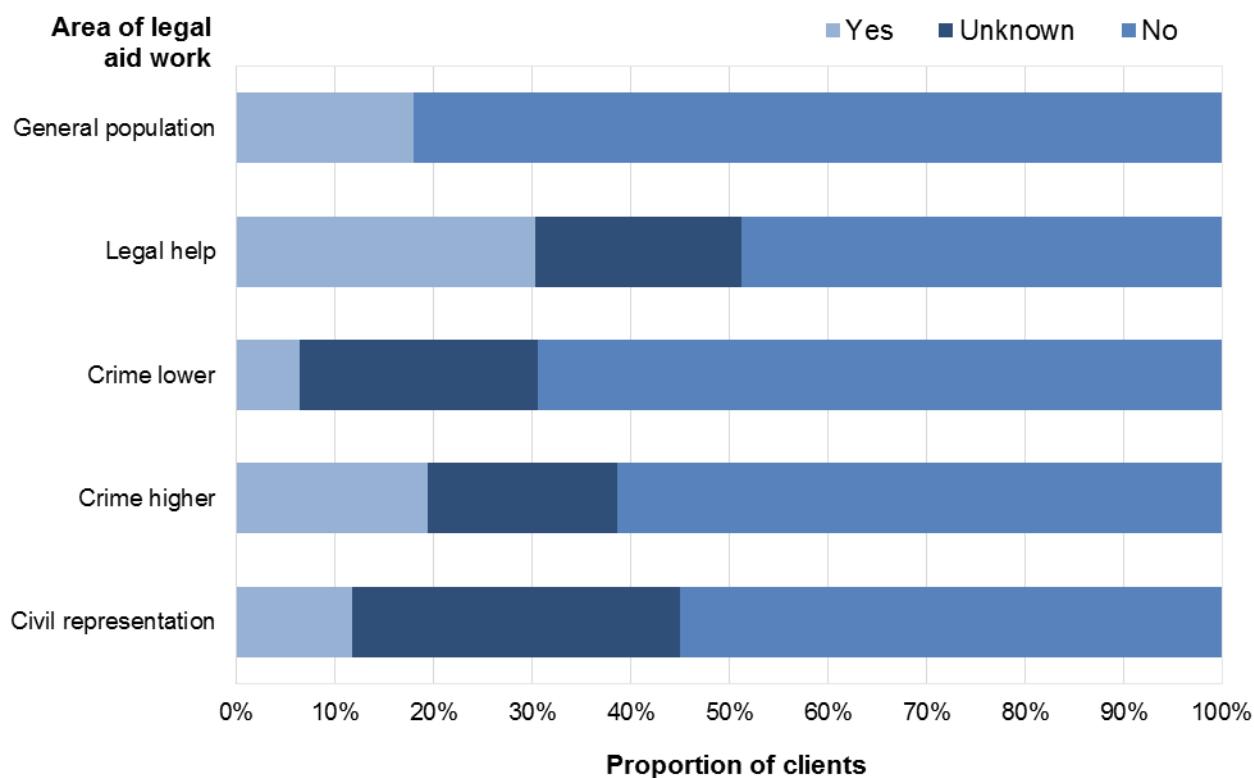
⁹ MOJ, Criminal Justice statistics quarterly: <https://www.gov.uk/government/organisations/ministry-of-justice/series/criminal-justice-statistics>

¹⁰ MOJ, Legal Aid Statistics in England and Wales: January to March 2015, available at: <https://www.gov.uk/government/collections/legal-aid-statistics>

Disability

Figure 44 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.. The overall picture of client disability status changed little between 2013-14 and 2014-15.

Figure 44: Proportion of clients by disability status (cases closed in 2014-15)¹¹



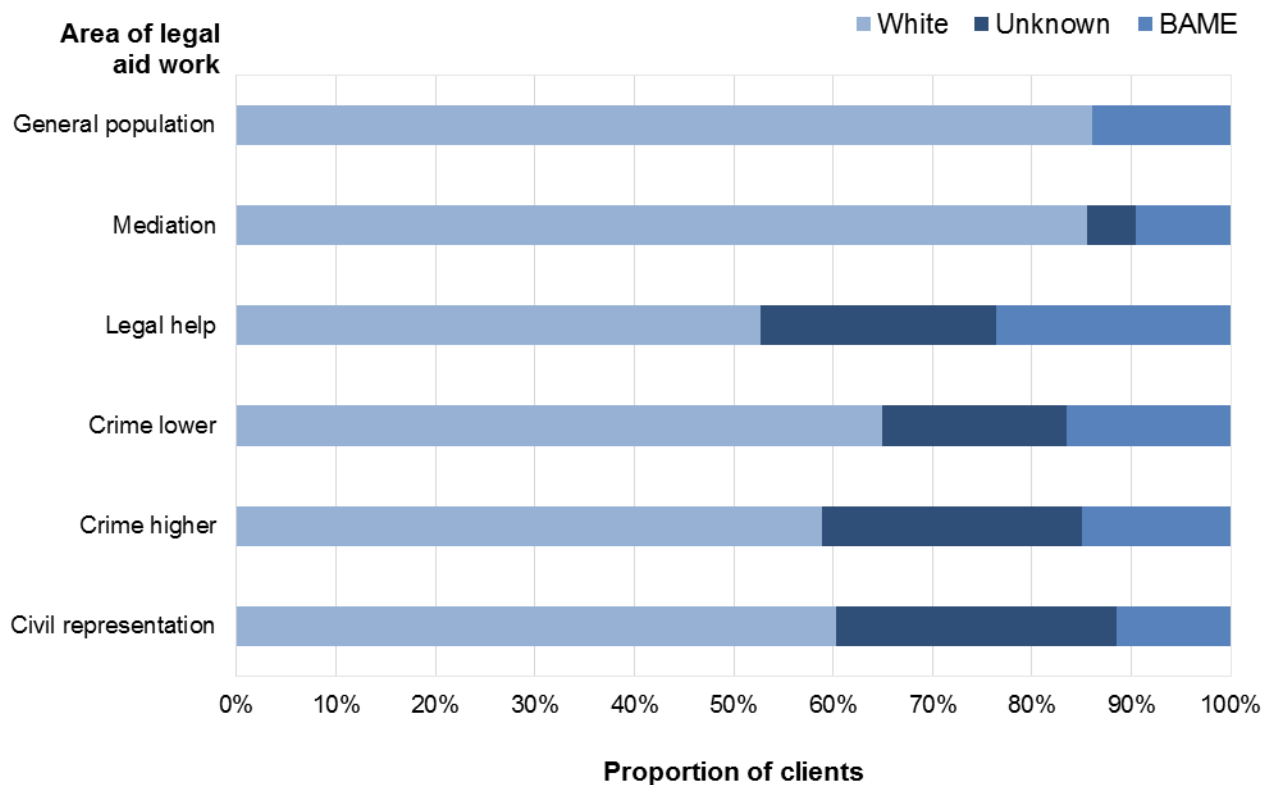
Note: Disability profile information is not available for mediation before March 2015 but will be available from 2015-16 onwards.

¹¹ MOJ, Legal Aid Statistics in England and Wales: January to March 2015, available at: <https://www.gov.uk/government/collections/legal-aid-statistics>

Ethnicity

Figure 45 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 2014-15 was similar to that in 2013-14.

Figure 45: Proportion of clients by broad ethnic group (cases closed in 2014-15)¹²

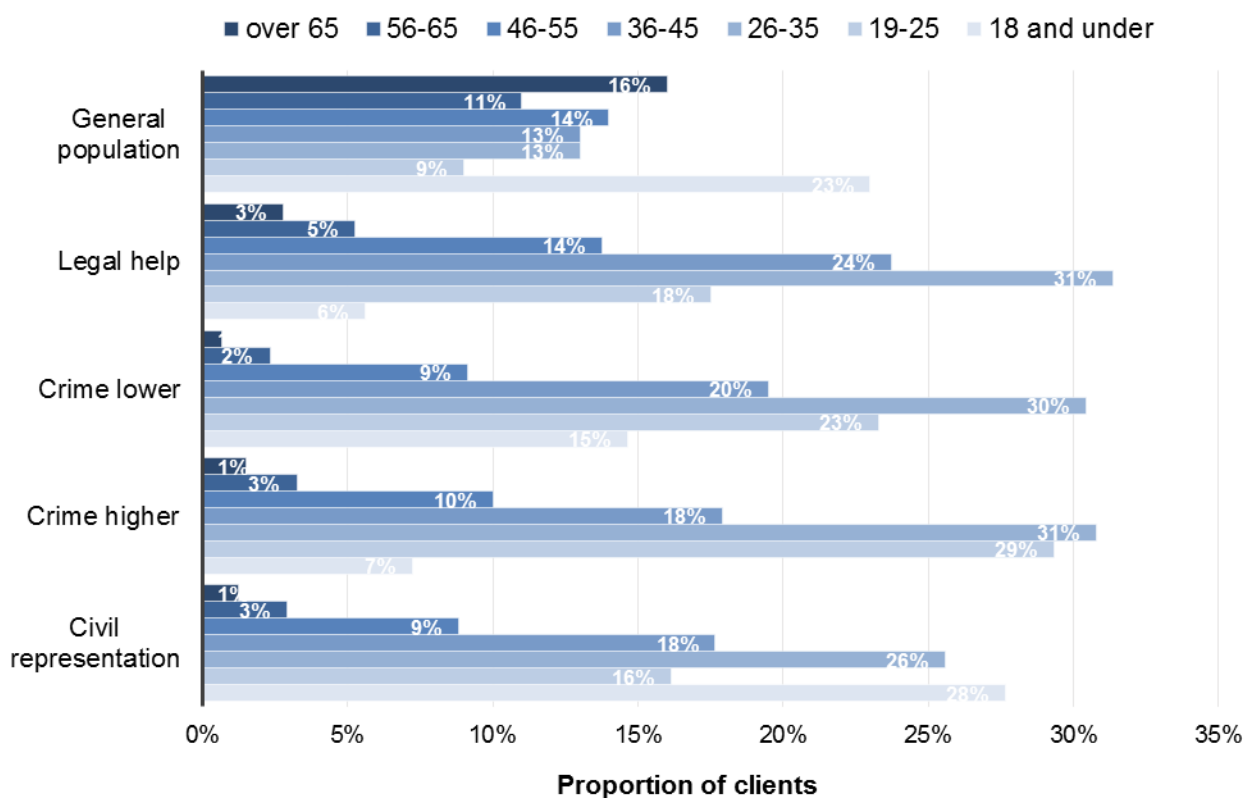


¹² MOJ, Legal Aid Statistics in England and Wales: January to March 2015, available at: <https://www.gov.uk/government/collections/legal-aid-statistics>

Age

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 2014-15 was similar to that in 2013-14.

Figure 46: Proportion of clients by age (closed cases in 2014-15)¹³



Note: age data for crime lower is taken from a different computer system to the other characteristics and only includes magistrates' court work.

Age data for mediation has not been included as it has not been collected on a comparable basis. Comparable data will be available from 2015-16 onwards.

¹³ MOJ, Legal Aid Statistics in England and Wales: January to March 2015, available at: <https://www.gov.uk/government/collections/legal-aid-statistics>

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.

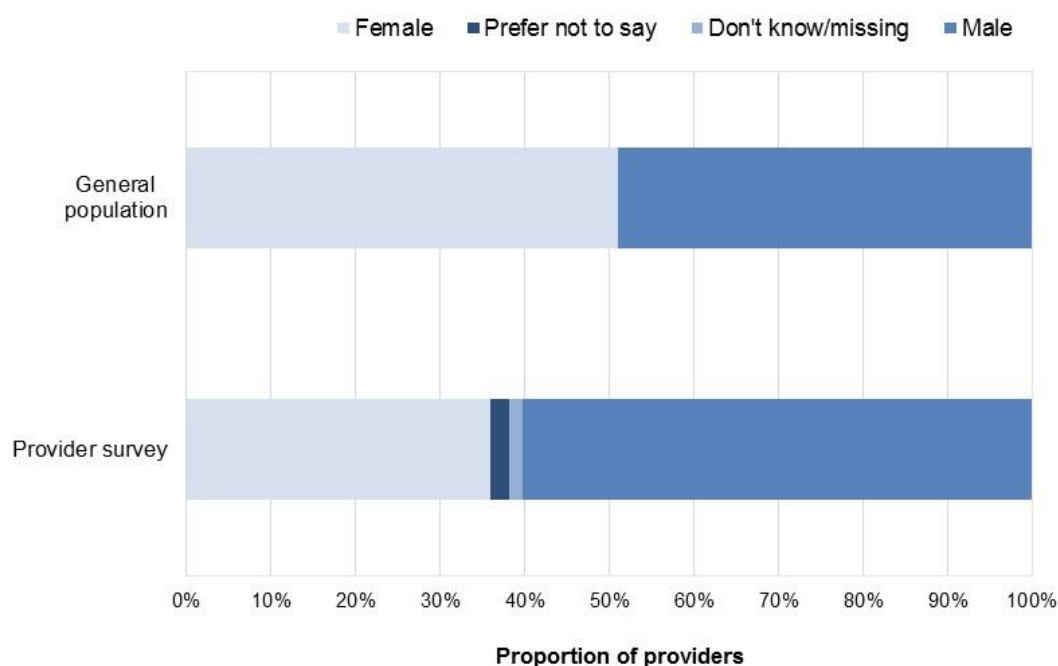
The survey was sent to all 2,262 legal aid providers to complete between 19 January and 27 February 2015. 644 providers completed the survey, a response rate of 28%, and this response rate should be taken into account when interpreting all results.

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.

Gender

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 22¹⁴.

Figure 47: Proportion of responding providers by gender, 2015¹⁵



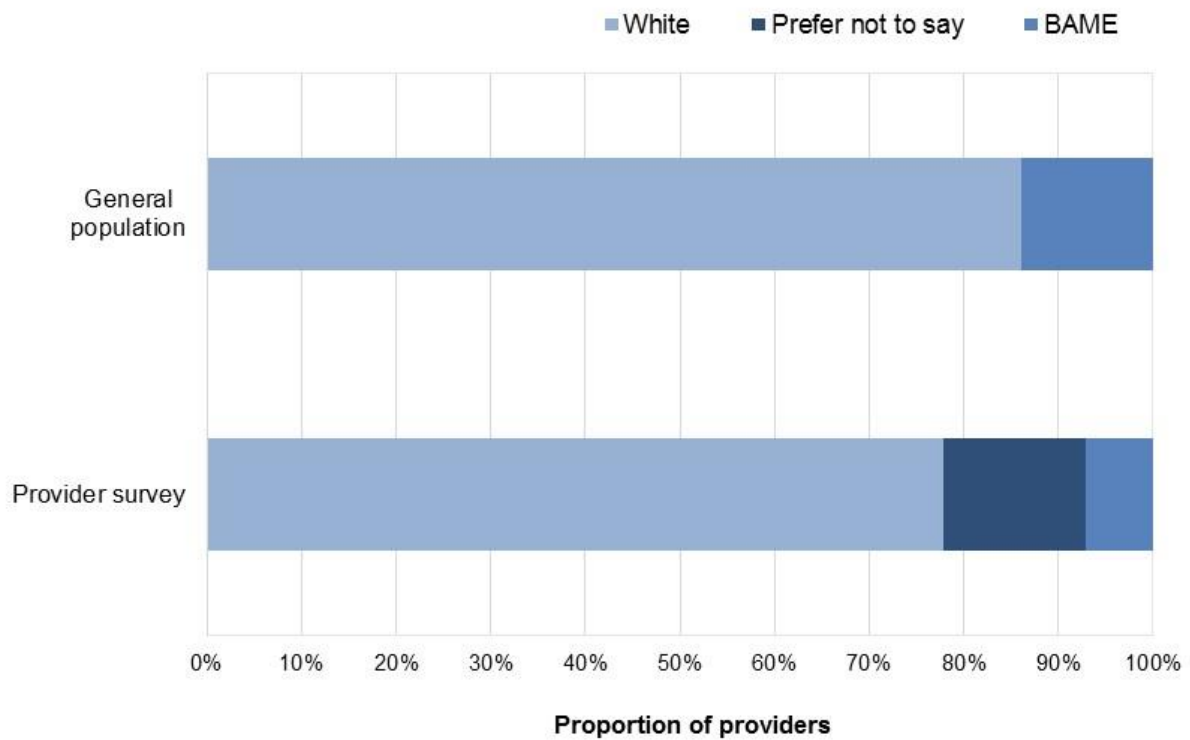
¹⁴ Women in the labour market, ONS, <http://www.ons.gov.uk/ons/rel/lmac/women-in-the-labour-market/2013/rpt---women-in-the-labour-market.html>

¹⁵ MOJ, Legal Aid Statistics in England and Wales: January to March 2015, available at: <https://www.gov.uk/government/collections/legal-aid-statistics>

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 48: Proportion of responding providers by broad ethnic group, 2015¹⁶

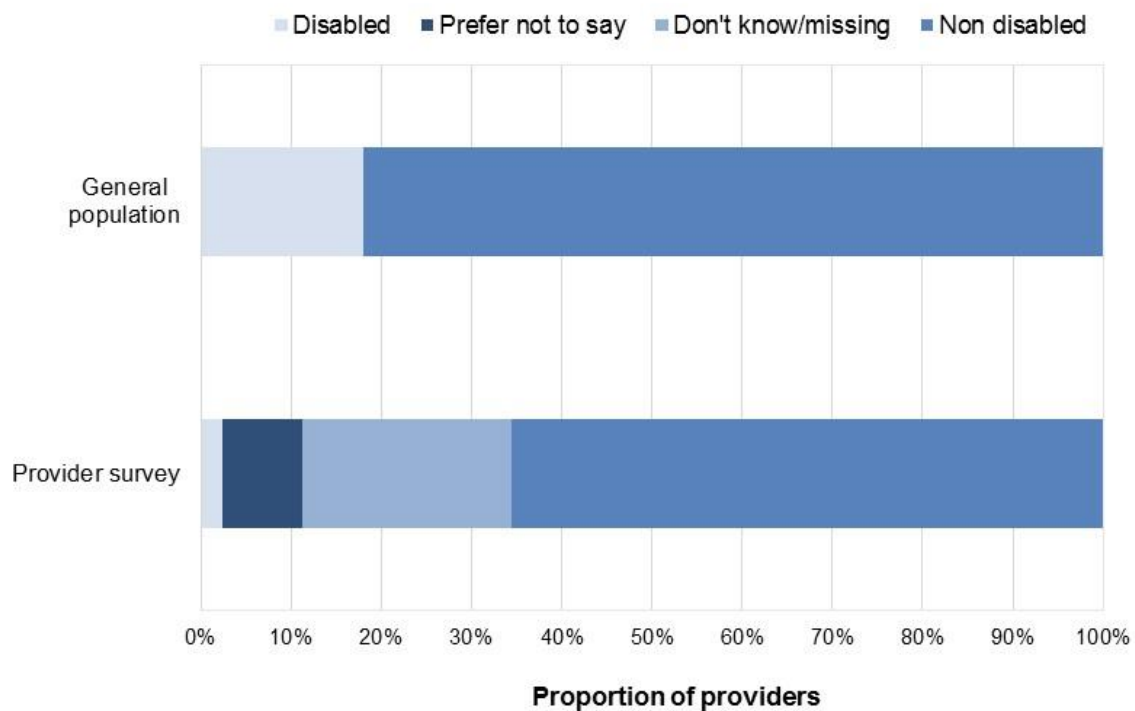


¹⁶ MOJ, Legal Aid Statistics in England and Wales: January to March 2015, available at: <https://www.gov.uk/government/collections/legal-aid-statistics>

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. The UK employment rate of working age disabled people is 52% compared to 78% of non-disabled people¹⁷.

Figure 49: Proportion of responding providers by disability status, 2015¹⁸



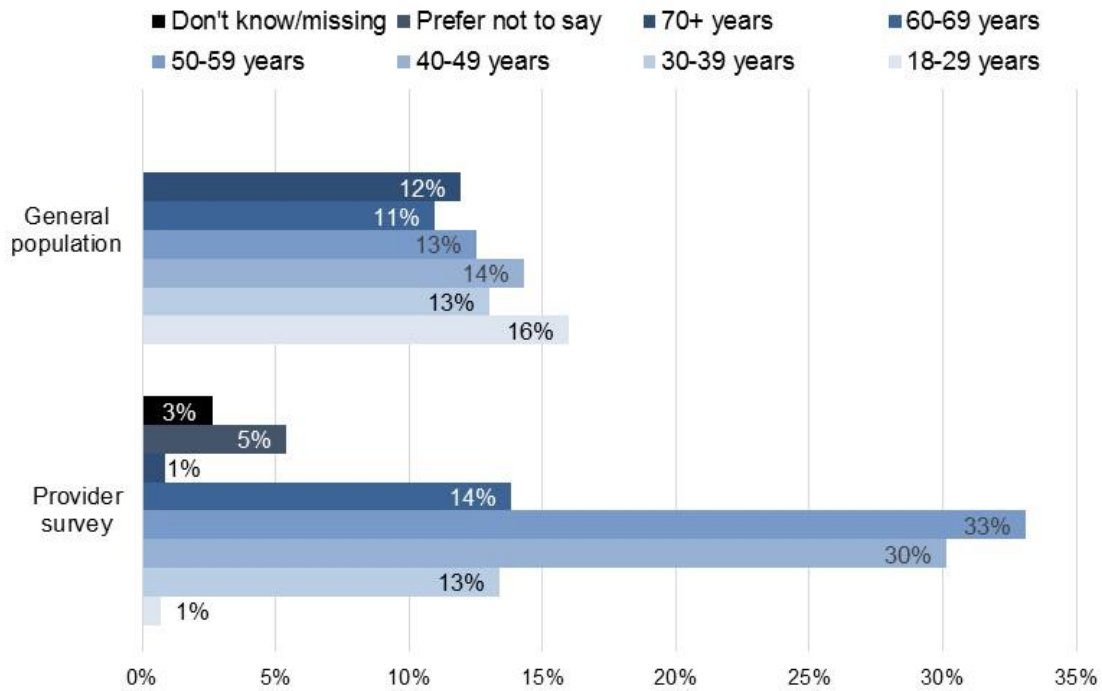
¹⁷ Figures for Jan-Mar 2013 <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-301417>, table A08

¹⁸ MOJ, Legal Aid Statistics in England and Wales: January to March 2015, available at: <https://www.gov.uk/government/collections/legal-aid-statistics>

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 50: Proportion of responding providers by age group, 2015¹⁹



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

Religion

As figure 51 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 51: Proportion of responding providers by religion²⁰

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 52 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 bi-sexual²¹ this is similar to the result of the survey, where about 2% of respondents said they were gay, lesbian or bi-sexual.

Figure 52: Proportion of responding providers by sexual orientation²²

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%

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

²¹ Figures are from the integrated household survey <http://www.ons.gov.uk/ons/rel/integrated-household-survey/integrated-household-survey/april-2011-to-march-2012/stb-integrated-household-survey-april-2011-to-march-2012.html>

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