

EQUALITY IMPACT ASSESSMENT RECORD

Title of policy/ practice/ strategy/ legislation etc	Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2013	
Minister	Cabinet Secretary for Justice	
Lead official	Catriona Mackenzie	
Officials involved in the EQIA	name	team
	Denise Swanson Felicity Cullen Julie Guy	Access to Justice SGLD Criminal and Civil Justice Analytical Unit
Directorate: Division: team	Justice Civil Law and Legal System: Access to Justice	
Is this new or revision to an existing policy?	Revision to an existing policy	

Screening

Policy Aim

The legal aid system contributes to the Safer and Stronger Strategic Objective. Particularly, it contributes to the National Outcome of “strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others” by ensuring that individuals can be held to account for their actions and can enforce their own legal rights through the effective functioning of our civil and criminal courts.

Since 1999 a solicitor providing “relevant” criminal legal aid in summary proceedings has been entitled to the fixed payments prescribed in Schedule 1 the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 (“the principal Regulations”). “Relevant criminal legal aid” means criminal legal aid provided by a solicitor in relation to summary proceedings other than excluded proceedings. A solicitor can also apply to the Scottish Legal Aid Board (“the Board”) where he or she feels that the case may be exceptional. It is for the Board to determine whether the case can be granted exceptional case status as set out in regulation 4A of the principal Regulations.

However, unlike for criminal legal aid, there is no provision for payment to solicitors over and above this fixed amount where the circumstances of the case are exceptional in relation to Assistance By Way Of Representation (ABWOR). ABWOR is usually the available aid type in summary criminal proceedings where the accused pleads guilty. Fixed payments were extended to summary ABWOR proceedings in 2008.

The policy objective is therefore to make a provision for ABWOR cases which mirrors the current provision in relation to summary criminal legal aid cases and allow the Board to determine whether the case is exceptional. Exceptional circumstances will, as a result of the amendments made by the regulations, be prescribed in the same way as applies to summary criminal legal aid cases. The decision on exceptional case status will rest with the Board, as it does for those cases. This means that the Board can decide that the solicitor shall not receive fixed payments for this case, but shall instead be entitled to lodge a detailed account at the end of proceedings.

Who will it affect?

Many very complicated socio-economic and behavioural factors impact on the individual level of take up of criminal justice legal assistance, and give rise to the current 'typical' populations of users, for example, the high number of young men moving through the criminal justice system. There are also factors in the make up of the legal profession and the proportion of the protected characteristics within this, for example, the gender difference in civil and criminal practice.

The Board is the public body responsible for administering the legal aid fund in Scotland. Criminal legal aid is help towards the costs of legal advice and representation, paid for out of public funds. It is designed to help individuals on low and modest incomes gain access to justice. Legal aid is accessed through a solicitor.

There are two main types of legal aid help: advice and assistance, and legal aid. Together these are called legal assistance. Advice and assistance covers a wide range of matters, so long as they are matters of Scots law. It pays for advice from a solicitor and, apart from a few exceptions where ABWOR is available, it does not cover "representation" – that is, in relation to the case being heard in court. The present policy makes no change to the nature of advice and assistance.

Legal aid provides funding for a solicitor in relation to the hearing of the case in court and some tribunals. It covers the preparation work, as well as the hearing itself, and can provide funding for advocates, experts and other costs. (Cases often begin with advice and assistance before a case reaches court, and legal aid may be the next step if necessary.)

Broadly, those affected by the policy changes are those in the legal profession who provide publicly funded legal assistance and applicants for criminal ABWOR in a small number of cases.

The effect of the Regulations is that solicitors' firms who provide ABWOR in cases which have been classified as exceptional by the Board will not have to

meet significant costs of the cases themselves. Clients whose case was granted exceptional status would be able to continue to be represented by the same agent.

What might prevent the desired outcomes being achieved?

No factors were identified that might prevent the desired outcomes being achieved.

Stage 1: Framing

Results of framing exercise

Some groups may be more likely to be affected by the changes than others due to the current 'typical' population of those in receipt of criminal ABWOR, most specifically young men.

The criteria for a case being granted exceptional status by the Board may mean that some protected groups will benefit more than others, specifically with regard to age, disability and race (as it relates to the possibility of a person being unable to communicate adequately in English).

Extent/Level of EQIA required

The framing exercise suggests that there is likely to be little impact on the protected characteristics and therefore only a high level of assessment is required. Some small positive impact may be seen as regards age, disability and race (where this means that a person has difficulty communicating in English) so slightly more assessment as regards these characteristics may be appropriate.

Stage 2: Data and evidence gathering, involvement and consultation

Characteristic ¹	Evidence gathered and Strength/quality of evidence	Source	Gaps identified and action taken
AGE	Age of solicitors undertaking criminal work Data gathered for April 2010 to March 2011 in relation to the age of applicants for criminal ABWOR Age of general population in Scotland	SLAB SLAB 2011 census	
DISABILITY	Households in Scotland contain at least one person with a long-standing illness, health problem or disability Solicitors who consider themselves to have a disability Recipients of criminal A&A, ABWOR and legal aid who consider themselves to have a disability	Scottish Household Survey 2007 SLAB	
SEX	Gender of solicitors Data gathered for April 2010 to March 2011 in relation to the gender of applicants for criminal ABWOR Gender of general population in Scotland	SLAB SLAB 2011 census	
GENDER REASSIGNMENT	Solicitors who consider themselves transgender Recipients of criminal A&A, ABWOR and legal aid who consider themselves transgender	Law Society of Scotland SLAB	Proportion of general population in Scotland who consider themselves transgender. Not asked in census until 2011 – not yet available.

¹ Refer to Definitions of Protected Characteristics document for information on the characteristics

SEXUAL ORIENTATION	Sexuality orientation of solicitors Sexual orientation of general population Sexual orientation of recipients of criminal A&A, ABWOR and legal aid	Law Society of Scotland Stonewall SLAB	
RACE	Ethnicity of solicitors Ethnicity of recipients of criminal A&A, ABWOR and legal aid Ethnicity of general population	SLAB SLAB 2001 census	
RELIGION OR BELIEF	Religion of solicitors Religion of the general population Religion of recipients of criminal A&A, ABWOR and legal aid who consider themselves to have a disability	Law Society of Scotland 2001 Census Summary Report (Office of the Chief Statistician, February 2005) SLAB	

AGE AND GENDER

Solicitors

The Board's solicitor 2010 survey² shows that there were 416 respondents, and of those that specified their age (99.8% of respondents) 14% were aged between 25-34; 33% were aged between 35-44; 36% were aged between 45-55; and 17% were 55 or above. Of those who undertook primarily criminal legal aid work 13% were aged between 25 -34; 29% were aged between 35-44; 38% were aged between 45-54 and 20% were aged 55 or above.

In the same survey, 65% of solicitors were male and 35% female. Of criminal practitioners 85% were male and 15% female.

Data from the 2011 census shows that, in the general population in Scotland: 16% are aged 0-14; 32% are aged 15-39; 35% are aged 40-64; 12% were aged 65-79; and 4% were aged 80 and over. The census also showed that 48.5% of the Scottish population were male and 51.5% were female.

Criminal ABWOR applicants

Data gathered from SLAB for April 2010 to March 2011 show the following statistics in relation to the age and gender of applicants for criminal ABWOR:

AGE	MALE	FEMALE	BLANK	TOTAL	%
Unreliable	12	1		13	
16 and under	765	111	5	881	2.1
17-26	15436	2737	262	18435	43
27-41	13831	3336	249	17416	40.5
42-56	4224	1055	74	5353	12.5
57-66	491	103	3	597	1.4
67-77	148	10	2	160	0.4
Undetermined	30	1		31	0.1
Total	34937	7354	595	42886	100

The information above does not tie in exactly with the case numbers as shown in the Board's 2010-11 annual report. This is due to the nature of live data, different extraction times for the data and the detailed data cleansing that is linked to the production of the annual report.

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DISABILITY

The Scottish Household Survey 2007 shows that about one-third (34%) of households in Scotland contain at least one person with a long-standing illness, health problem or disability. This figure covers all members of the household including children. As would be expected, households comprised of older people are more likely to contain someone with a long-standing health problem or disability, with over half of 'older smaller' (54%) and 'single pensioner' (52%) doing so. In contrast, only 16% of small family households and 22% of single parent households contain someone with a long-standing illness, health problem or disability.

Solicitors

The Board's solicitor 2010 survey shows that of those that responded to this question (98.6%), 1% considered themselves to have a disability. Descriptions of disability responses included visual impairment, hearing impairment, physical co-ordination difficulties, chronic asthma and dyslexia.

Criminal ABWOR applicants

In 2012 SLAB carried out a survey of people who had received criminal legal assistance. This survey can be found at: www.slab.org.uk/about-us/what-we-do/research/stakeholder. Three hundred and sixty six responses were received, a mix of people who had received criminal A&A, ABWOR and legal aid. Those surveyed were asked for their equality characteristics. Thirty seven per cent of respondents said that they have a long standing illness, health problem or disability that limits their daily activity or the kind of work that they do. Some of the most common health problems described included mental illness such as depression and anxiety, back pain, arthritis and heart problems.

SLAB 2012 Criminal Applicant Survey: Do you have a long standing illness, health problem or disability that limits your daily activity or the kind of work that you do?

(Base = 363, NR = 3)	Frequency	Percent
Prefer not to say	15	4.1
Yes	133	36.6
No	215	59.2

This would seem suggest that solicitors as a group (and therefore those representing clients who qualify for criminal ABWOR) are less likely to consider themselves to have a disability than the general population, though the data is not directly comparable.

The data for those in receipt of criminal A&A, ABWOR and legal aid would seem to suggest that this group is likely to have a similar proportion of people who consider themselves to have a disability as the general population.

RELIGION

Solicitors

The Law Society of Scotland survey 2006³ on the whole of the legal profession includes this group and covered 3017 respondents. However, it covers solicitors that provide legal aid and those that do not. In this, an equal proportion of respondents considered they had no religion/faith (36%) or were Church of Scotland (37%); 13% considered they were Roman Catholic; 7% considered they were Other Christian; 1% or less considered they were in each of the categories of Buddhist, Hindu, Muslim, Jewish, Sikh and other; 3% did not state a religion/faith.

This compares to the analysis of religion in the 2001 Census Summary Report (Office of the Chief Statistician, February 2005) findings, which show: 42.40% Church of Scotland; 15.88% Roman Catholic; 6.81% Other Christian; 0.13% Buddhist; 0.11% Hindu; 0.13% Jewish; 0.84% Muslim; 0.13% Sikh; 0.53% Another Religion; 27.55% No Religion; 5.49% Not Answered.

This suggests that solicitors are more likely to consider that they have no religion, are less likely to consider themselves Church of Scotland and are broadly proportionate to the general population in terms of other religions and faiths.

Criminal ABWOR applicants

In the 2012 SLAB criminal applicant survey, the most common response to religious group was no religion (38% of those surveyed), followed by Church of Scotland (31%) and Roman Catholic (20%).

³ http://www.lawscot.org.uk/media/3421/Final_Survey_Report_24-04-07.pdf

SLAB 2012 Criminal applicant survey: What religion, religious denomination or body do you belong to?

(Base = 359, NR = 7)	Frequency	Percent
Prefer not to say	9	2.5
None	135	37.6
Church of Scotland	111	30.9
Roman Catholic	71	19.8
Sikh	2	0.6
Other	6	1.7
Other Christian	17	4.7
Muslim	3	0.8
Buddhist	3	0.8
Jewish	1	0.3

This suggests that those in receipt of criminal A&A, ABWOR and legal aid are slightly less likely to consider themselves Church of Scotland, slightly more likely to consider themselves Roman Catholic and are otherwise broadly proportionate to the general population.

GENDER REASSIGNMENT

Solicitors

Transgender and sexual orientation were dealt with as separate categories in the Law Society survey. Less than 1% of respondents considered themselves to be transgender with 6% not stating whether they considered themselves to be transgender.

Criminal ABWOR applicants

In SLAB's 2012 Criminal Applicant Survey two people said that their gender identity was not the same as the gender they were assigned at birth.

SLAB 2012 Criminal Applicant Survey: Is your gender identity the same as the gender you were assigned at birth?

(Base = 364, NR = 2)	Frequency	Percent
Prefer not to say	2	0.5
Yes	360	98.9
No	2	0.5

SEXUAL ORIENTATION

Solicitors

The Law Society of Scotland carried out a survey in 2006 includes this group. The survey covers solicitors that provide legal aid and those that do not.

Transgender and sexual orientation were dealt with as separate categories in the Law Society survey. The majority of respondents indicated they were heterosexual (95%); 2% indicated they were gay men; less than 1% indicated they were in the categories of lesbian, bisexual men, bisexual women, and other; 2% did not state their sexual orientation.

Between 5% and 7% of the population are estimated to be homosexual [Stonewall], however, as censuses did not ask people questions in relation to their sexuality until the 2011 Census (the results of which have not yet been released) it is difficult to produce accurate estimates.

This would suggest that solicitors are less likely to identify themselves as gay, lesbian or bisexual than the general population.

Criminal ABWOR applicants

The SLAB 2012 Criminal Applicant survey showed that 96% of respondents defined themselves as heterosexual, 1 % defined themselves as gay/ lesbian and 1% defined themselves as bisexual.

SLAB 2012 criminal applicant survey: Which of the following options best describes how you think of your sexuality?

(Base = 364, NR = 2)	Frequency	Percent
Prefer not to say	7	1.9
Heterosexual/Straight	350	96.2
Gay/Lesbian	4	1.1
Bisexual	3	0.8

This would suggest that those in receipt of criminal A&A, ABWOR and legal aid are less likely to identify themselves as gay, lesbian or bisexual than the general population.

RACE

Data from the 2001 relating to ethnicity in the Scottish population showed:

	% of total Population	% minority ethnic population	Base
White Scottish	88.09	na	4,459,071
Other White British	7.38	na	373,685
White Irish	0.98	na	49,428
Any other White background	1.54	na	78,150
Indian	0.30	14.79	15,037
Pakistani	0.63	31.27	31,793
Bangladeshi	0.04	1.95	1,981
Chinese	0.32	16.04	16,310
Other South Asian	0.12	6.09	6,196
Caribbean	0.04	1.75	1,778
African	0.10	5.03	5,118
Black Scottish or any other Black background	0.02	1.11	1,129
Any Mixed Background	0.25	12.55	12,764
Any other background	0.19	9.41	9,571
<i>All minority ethnic population</i>	2.01	100.00	
All population	100.00	na	5,062,011

Solicitors

The Board solicitor 2010 survey shows that 96% indicated they considered their ethnic background to be white with most considering themselves to be either Scottish or British. A further 3% of respondents did not disclose their ethnic background. The remaining 1% was spread across other ethnic minority backgrounds.

Criminal ABWOR applicants

Ethnicity is collected, but historically coverage and completion of this data has been too low to report. It is the solicitor who makes the application for legal aid on behalf of the person applying for legal assistance. The Board already has a system that allows individuals to disclose equalities information at the point of

applying for legal assistance. However, this information is not always returned to the Board and, as mentioned above, return rates are relatively low. The Board has, however, commissioned researchers to speak to individuals from different ethnic communities and it has been confirmed that on the whole individuals are comfortable being asked for equalities information. It should be noted that individuals applying for legal assistance, whether it be criminal or civil, are often in a highly charged emotional state and their primary concern is that of securing legal assistance. The Board will continue to work with solicitors who provide work under the legal aid system, and with the Law Society of Scotland in order to improve the rates of disclosure. This work is being addressed as part of the Board's Single Equality Action Plan.

In SLAB's 2012 criminal applicant survey the majority of respondents declared their ethnicity as 'White-Scottish' (88%), followed by 'White-other British' (6%) and 'Pakistani, Pakistani Scottish, Pakistani British' (1.1%).

SLAB 2012 Criminal Applicant Survey: What is your ethnic group?

(Base = 366)	Frequency	Percent
Prefer not to say	1	0.3
White – Scottish	322	88
White – Other British	23	6.3
White – Irish	2	0.5
White – Gypsy/Traveller	3	0.8
White – Policy	1	0.3
Other White ethnic group	3	0.8
Any mixed or multiple ethnic group	3	0.8
Pakistani, Pakistani Scottish, Pakistani British	4	1.1
Indian, Indian Scottish, Indian British	2	0.5
Other Asian group	1	0.3
African, African Scottish, African British	1	0.3

Stage 3: Assessing the impacts and identifying opportunities to promote equality

Do you think that the policy impacts on people because of their age?

One consideration in the Regulations for granting exceptional status is “whether the assisted person, or any witnesses, may be unable to understand the proceedings because of age, inadequate knowledge of English, mental illness, other mental or physical disability or otherwise.” This means that a person in this group, if having their case granted exceptional status due to the above, would be more likely to continue to be represented by the same solicitor, rather than have that their solicitor withdraw from the case due to excessive cost, leaving the person with the choice of representing themselves or being represented by the PDSO.

Aside from this, no specific positive or negative impacts on this group for legal aid solicitors or legal aid applicants have been identified.

Do you think that the policy impacts disabled people?

One consideration in the regulations for granting exceptional status is “whether the assisted person, or any witnesses, may be unable to understand the proceedings because of age, inadequate knowledge of English, mental illness, other mental or physical disability or otherwise.” This means that a person in this group, if having their case granted exceptional status due to the above, would be more likely to continue to be represented by the same solicitor, rather than have that solicitor withdraw from the case due to excessive cost, leaving the person with the choice of representing themselves or being represented by the PDSO.

Aside from this, no specific positive or negative impacts on this group for legal aid solicitors or legal aid applicants have been identified.

Do you think that the policy impacts on men and women in different ways?

No specific positive or negative impacts on this group for either legal assistance solicitors or applicants have been identified. Although the majority of criminal legal aid applicants are male, the changes will affect the assessment of applicants alike, regardless of gender.

Do you think your policy impacts on transsexual people?

No specific positive or negative impacts on this group for legal assistance solicitors or applicants have been identified.

Do you think that the policy impacts on people because if they are lesbian, gay or bisexual?

No specific positive or negative impacts on this group for legal assistance solicitors or applicants have been identified.

Do you think the policy impacts on people on the grounds of their race?

One consideration in the regulations for granting exceptional status is “whether the assisted person, or any witnesses, may be unable to understand the proceedings because of age, inadequate knowledge of English, mental illness, other mental or physical disability or otherwise.” This means that a person in this group who has difficulty communicating in English, if having their case granted exceptional status due to the above, would be more likely to continue to be represented by the same solicitor, rather than have that solicitor withdraw from the case due to excessive cost, leaving the person with the choice of representing themselves or being represented by the PDSO.

Do you think the policy impacts on people because of their religion or belief?

No specific positive or negative impacts on this group for legal assistance solicitors or applicants have been identified.

Stage 4: Decision making and monitoring

Identifying and establishing any required mitigating action

Have positive or negative impacts been identified for any of the equality groups?	Potential positive impacts with regards to age, disability or race (as it potentially relates to ability to communicate effectively in English)
Is the policy directly or indirectly discriminatory under the Equality Act 2010 ⁴ ?	No
If the policy is indirectly discriminatory, how is it justified under the relevant legislation?	n/a
If not justified, what mitigating action will be undertaken?	n/a

Describing how Equality Impact analysis has shaped the policy making process

The Scottish Government does not believe the regulations will give rise to any adverse impacts on groups with protected characteristics as defined in the Equality Act 2010. The policy is specifically designed to have a positive impact on some protected groups. No changes were therefore made to the policy as a result of the EQIA.

Monitoring and Review

The Board has an ongoing programme of research and analysis on supply of and access to legal aid and factors that might affect this.

⁴ See EQIA – Setting the Scene for further information on the legislation.

Stage 5: Authorisation of EQIA

Please confirm that:

- ◆ This Equality Impact Assessment has informed the development of this policy:

Yes No

- ◆ Opportunities to promote equality in respect of age, disability, gender, gender identity/transgender, sexual orientation, race and religion and belief have been considered, i.e:
 - Eliminating unlawful discrimination, harassment, victimisation;
 - Removing or minimising any barriers and/or disadvantages;
 - Taking steps which assist with promoting equality and meeting people's different needs;
 - Encouraging participation (e.g. in public life)
 - Fostering good relations, tackling prejudice and promoting understanding.

Yes No

Declaration

I am satisfied with the equality impact assessment that has been undertaken for the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2013 and give my authorisation for the results of this assessment to be published on the Scottish Government's website.

Name: Colin McKay
Position: Deputy Director, Justice Directorate
Authorisation date: 7 March 2013