



FACULTY OF ADVOCATES

FAIR INSTRUCTIONS POLICY

1.0 The Faculty recognises that advocates should be instructed based on their skills, experience and ability. The Faculty is committed to ensuring that discrimination in the instruction of counsel does not take place. Accordingly, the business of stables should be conducted in a manner which is fair and equitable for all members of stables. This includes, but is not limited to, the fair distribution of work amongst members of stables.

Legislation and professional codes

2.0 Under the Equality Act 2010 it is unlawful for anyone - including solicitors, clients and clerks – to select counsel on the basis of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, or sexual orientation (these are known as the ‘protected characteristics’). Section 48(6) provides

“A person must not, in relation to instructing an advocate—

(a) discriminate against the advocate by subjecting the advocate to a detriment; ...”

2.1 The Law Society of Scotland’s Standards of Conduct provide at Rule B1.15.1 that a solicitor “must not discriminate on the grounds of (*any of the protected characteristics*) in your professional dealings with other lawyers, clients, employees or others”. Those in managerial or supervisory roles have responsibility to see that those whom they manage or supervise do not discriminate (Rule B1.15.2).

What is discrimination?

3.0 Discrimination can be

- (a) direct – that is treating someone less favourably because of a protected characteristic; or
- (b) indirect – where an apparently neutral provision, criterion or practice has a disadvantageous impact upon a particular group.

3.1 In general, direct discrimination cannot be justified, except by way of an ‘occupational requirement’. It is difficult to conceive of any occupational requirement which would arise in the context of legal instructions. An exception is direct age discrimination, which can be justified if it is a proportionate means of achieving a legitimate aim.

3.2 Indirect discrimination can be ‘objectively justified’ by showing that the provision, criterion or practice was a proportionate means of achieving a legitimate aim. For example, an agent asking to instruct a QC might be indirect age discrimination, but it could easily be justified by the need for someone with a particular level of experience.

3.3 Discrimination can result from ‘subconscious bias’. Subconscious bias can be defined as the stereotypes or biases everyone holds about others. These biases may be ‘for’ or ‘against’ particular characteristics, behaviours or groups. They are rarely explicit or deliberately discriminatory but are hidden and triggered automatically. Such biases can influence decisions made by those instructing counsel, including actions taken by clerks and others within stables.

3.4 In order to address bias, whether conscious or unconscious, and discrimination generally, the Faculty will ensure that all clerking staff have received suitable training (including refresher training, as necessary).

Examples of discriminatory instructions

4.0 An example of discriminatory instructions might include a request from solicitors to a clerk for a female advocate to defend a rape case, or for an Asian

advocate to represent Asian clients. In such situations all of the following would be unlawful under the 2010 Act:-

- (a) For a solicitor to give instructions to a female advocate because of her sex, thereby treating a comparable male advocate less favourably;
- (b) For a solicitor to give instructions to an advocate because he is Asian, thereby treating a comparable non-Asian advocate less favourably (for the purposes of the 2010 Act, 'race' includes colour, nationality and ethnic or national origins);
- (c) For a female advocate to accept instructions, knowing that she is being instructed for reasons related to her gender, and where a comparable male advocate will be denied an opportunity to gain experience or otherwise suffer a detriment; and
- (d) For a clerk to comply with a client's request to allocate work to an Asian advocate, or suggest someone on the basis that they are Asian.

4.1 It would be equally unlawful in relation to any of the above for the instructions to be given to a male or non-Asian advocate to the detriment of a female or Asian colleague (or in relation to any of the other protected characteristics).

4.2 The employers of the clerks (that is Faculty Services Ltd) can be liable under s.109(1) of the 2010 Act for any acts of unlawful discrimination by clerks. Aiding, instructing, causing or inducing an act of unlawful discrimination may also be unlawful under ss. 111-112 of the 2010 Act.

4.3 As already noted, such requests would be a breach of the solicitors' Standards of Conduct. They might be justified by the claim that it is what the client wants. It may be, however, that a solicitor making such a request does not really have instructions to discriminate, nor does the solicitor wish to discriminate. It may be that the solicitor has a client who is very worried and anxious and has asked for a female advocate when what they really want is a sensitive, understanding counsel. A sensitive understanding counsel may, of course, be male or female.

- 4.4 Likewise, a solicitor might request a list of available male advocates for a piece of work. Following questioning from the clerk, it becomes apparent that what the solicitor wants is an aggressive cross-examiner. The real skill having been identified, the clerk is able to recommend counsel on a fair basis, i.e. aggressive cross-examiners of whatever sex.

Tackling discriminatory instructions

- 5.0 The Faculty expects discriminatory instructions to be dealt with as follows.
- 5.1 Where the client or solicitor has stated to the chosen advocate or it is apparent that the choice of advocate is discriminatory or where this has been stated or is apparent to the clerk, steps should be taken to ensure that the discrimination is dealt with. The stages of dealing with the issues will normally be:-
- (a) Ask the solicitor why the choice has been made;
 - (b) Identify the root cause of the problem – for example it may be that the client believes there are ‘genuine’ reasons for the particular choice of advocate and it will have to be considered whether the choice is nevertheless discriminatory;
 - (c) Share the problem (another person in the stable or in the clerks room may well be able to help to diffuse the position and identify the real problem);
 - (d) Keep a proper note;
 - (e) Be polite but firm, clear and fair.
- 5.2 Where the solicitor/client insists on a discriminatory allocation of work then instructions should be refused.
- 5.3 Simultaneously, where the clerk is made aware that a discriminatory allocation is proposed, the stable Director and the stable’s Equality Officer should be informed so that an informed decision on acceptance or refusal of the work can be made. Consideration should be given to whether or not it is appropriate to report the instructing solicitor to his or her regulatory body. In those circumstances, the Dean of Faculty must be consulted and any decision to report the instructing solicitor will be taken by the Dean.

- 5.4 Any instances of actual or potential discriminatory instructions must be included in the report by the stable to the Dean of Faculty.

Allocation of work

- 5.5 In many cases, work is sent directly to a named counsel. However, there are circumstances in which clerks are asked for advice and/or availability of counsel. For example:
- (a) Where the instructing solicitor wishes a list of counsel available for a particular hearing or a particular piece of work;
 - (b) When the instructing solicitor has little experience of instructing counsel and wishes guidance;
 - (c) Named counsel does not accept the instruction sent;¹
 - (d) Named counsel returns previously accepted instructions; or
 - (e) Instructions are withdrawn from named counsel.
- 5.6 Occasionally, solicitors will send a letter of instruction addressed to 'Blank, advocate', with a request that the instructions are allocated to an appropriate counsel of the stables' choice.

Monitoring

- 5.7 The instructions mentioned in paragraphs 5.5 and 5.6 are referred to as 'unallocated work'. The Faculty will monitor the allocation of such work, in order to satisfy itself that work is not being allocated on a discriminatory basis. Details of how the Faculty expects monitoring to be carried out will be provided to stables and clerks. It is anticipated that the system will include a requirement for stables/clerks to record:-
- (a) which counsel have been included in lists offered to instructing solicitors, why other counsel have not been included, and which counsel (if any) was selected; and
 - (b) which counsel were considered for 'unallocated work', why other counsel were not considered, and which counsel (if any) was allocated the work.

¹ In terms of the Guide to the Professional Conduct of Advocates, in principle an advocate is not entitled to pass on instructions to another advocate, without the prior concurrence of the instructing solicitors (para. 8.7)

- 5.8 Each stable will provide a report on the allocation of 'unallocated' work to the Dean of Faculty every 6 months. The Dean of Faculty will consider what steps, if any, require to be taken by individual stables where the report(s) indicate possible discrimination in the allocation of work.
- 5.9 In addition to monitoring the allocation of work, as already noted, stables will require to report to the Dean of Faculty any instances of actual or potential discriminatory instructions. This should be included in the 6-monthly report mentioned above.
- 5.10 The Faculty will also monitor other data which may indicate that discriminatory practices in the instruction of counsel exists. This may include monitoring:
- (a) the income levels of practising advocates;
 - (b) the number of instructions issued to advocates;
 - (c) the composition of the Bar.
- 5.11 This monitoring will aim to identify any inequalities in work allocation and any discriminatory or disadvantageous trends in clients' practices when instructing counsel. Where the Faculty identifies that discriminatory practices do exist, the Faculty will take such steps as are reasonably practicable and appropriate to address those practices.
- 6.0 If you require additional assistance, or have any queries on this policy, contact should be made in the first instance with the Convener of the Equality and Diversity Committee.
- 7.0 The Faculty gratefully acknowledges the help which we derived from the Bar Council of England & Wales' materials on equality and diversity, on which we have drawn in preparing this document.