

## **Courts and Tribunals (Judiciary and Functions of Staff) Bill**

### **Equalities Statement: Authorised staff: legal advice and judicial functions**

#### **Policy change summary**

1. HM Courts and Tribunals (HMCTS) staff can already be authorised to carry out certain functions of a court, tribunal or judge. Greater use of such authorised staff across all courts and tribunals is an important element of the Government's reforms to the justice system, and can only be fully realised with appropriate safeguards for staff and the right cross-jurisdictional leadership structure in place.
2. Legislation is required to introduce the same legal underpinning and framework for authorisation and accountability of staff across all jurisdictions, and to reform the role of justices' clerk. The Government intends to create a new cross-jurisdictional, non-statutory role to manage the new authorised staff structure, which will allow those in justices' clerks roles at the moment to take on a greater judicial leadership role across all jurisdictions as Heads of Legal Operations.

#### **Equality duties**

3. 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:
  - i. eliminate unlawful discrimination, harassment, victimisation and any other conduct unlawful under the 2010 Act;
  - ii. advance equality of opportunity between different groups (those who share a relevant protected characteristic and those who do not); and
  - iii. foster good relations between different groups (those who share a relevant protected characteristic and those who do not).
4. Paying 'due regard' needs to be considered against the relevant 'protected characteristics' of race, sex, disability, sexual orientation, religion and belief, age, gender reassignment, and pregnancy and maternity. In addition, the characteristic of marriage and civil partnership is relevant to (i).

#### **Policy impacts**

##### *Court and Tribunal Users*

5. HMCTS staff can already be authorised to carry out certain judicial functions and already do so in most jurisdictions. This legislation seeks to introduce a cohesive framework for authorisation, independence and accountability of staff across all court and tribunal jurisdictions, together with the safeguards they need to exercise such functions most effectively. Under the proposed changes, suitably qualified and experienced HMCTS staff can be authorised to make decisions on straightforward matters that are currently undertaken by the judiciary<sup>1</sup>. We anticipate that this will mean cases can be progressed more efficiently, which is to the benefit of all court and tribunal users.
6. Ensuring that court and tribunal users have confidence in these staff, and that decisions made by them are fair and reasonable, is critical to the success of this policy. Defendants or respondents may be advised that a decision on their case has been made by a member of authorised staff and notified of any consequent rights, and a

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<sup>1</sup> There is no intention for this statement to prejudice subsequent decisions made by the Rule Committees on what judicial functions authorised staff will, in practice, be permitted to exercise in the courts and tribunals.

right to a review or reconsideration of a decision made by an authorised member of staff may be introduced. The Government's view is that decisions on practices and procedures such as these should be determined by the relevant jurisdictional rule committee. We do not consider that this policy will be detrimental to the interests of tribunal and court users including victims, respondents and witnesses in the court process.

7. Protecting the rights of all court users and ensuring fair access to justice is a key aspect of HMCTS Reform Programme, and the right of court users to have a criminal charge or civil right determined by an independent and impartial tribunal, as established in common law and in Article 6 of the European Convention on Human Rights (ECHR), will be maintained. Against this context, judges will remain the only people able to decide the outcomes of cases.

#### *HMCTS staff*

8. Under the proposed changes, it will be possible for some staff to be authorised by the Lord Chief Justice (or his nominee) or Senior President of Tribunals (or his delegate) to exercise judicial functions, providing that they meet the qualification requirements as determined by the relevant independent rule committee. We expect that some authorised staff positions will be undertaken by existing staff – providing greater opportunities for career progression within HMCTS – but that external recruitment will also be necessary. Staff will be recruited through fair and open competition under established civil service mechanisms, and appointed under section 2 of the Courts Act 2003.
9. Whether recruitment is internal or external, appointment to these positions will require the relevant qualifications and experience as determined by the relevant jurisdictional procedure rule committee. Fair and equal treatment will be given to both internal and external staff applying for these roles. We anticipate that staff may need particular qualifications, including legal qualifications, and experience depending on the type of functions they are assigned, but this will be for the independent procedure rule committees to determine.
10. HMCTS previously met with the unions to discuss the Reform Programme. The unions were supportive of the idea of developing staff in authorised officer roles, as long as they were sufficiently trained. Training and development opportunities for authorised court staff are envisioned as part of this policy.
11. All HMCTS staff are required to complete Civil Service training on equality and diversity; disability awareness; and unconscious bias as part of their employment, and those who are authorised to exercise judicial functions in courts and tribunals will receive specific training on key judicial skills and ethics, including the need for impartiality and integrity. All staff are expected to abide by the Civil Service Code, which sets out the standards of behaviour expected of civil servants.
12. Authorised staff will be independent from direction by the government whilst exercising relevant judicial functions. They will, however, be subject to direction by, and accountable to, the Lord Chief Justice (or his nominee) or the Senior President of Tribunals (or his delegate).

#### *Judiciary*

13. We expect that these proposed changes will have a beneficial impact on the judiciary by relieving them of some of the most routine work that they currently undertake in court and tribunal cases. The judiciary will be responsible for authorising and assigning authorised staff. We are aware of the possibility that the existence of unconscious bias

may impact the opportunities offered to staff and will ensure that all staff have the opportunity to access development and training.

## **Equality considerations**

14. Direct discrimination occurs when a policy would result in people being treated less favourably because of a protected characteristic. Our assessment is that this policy is not directly discriminatory within the meaning of the 2010 Act, as the changes from this policy would be applied in the same way to all court staff.
15. Indirect discrimination occurs when a policy applies equally to all individuals but would put those sharing a protected characteristic at a particular disadvantage compared to those who do not. Having considered the likely impacts on the basis of the limited available data, we do not consider that the proposals are likely to result in a particular disadvantage for court and tribunal users, HMCTS staff or the judiciary.

### *Crime - Defendants, Victims and Witnesses*

16. We acknowledge that there are higher proportions of defendants with the protected characteristics of age, race and sex, than in the general population. The latest Race and the Criminal Justice System (CJS) in 2016<sup>2</sup> report shows that black and minority ethnic groups (BAME) are over-represented among defendants at most stages throughout the CJS and data on women and the CJS in 2015<sup>3</sup> shows that men are substantially over-represented among defendants in criminal proceedings.
17. Based on the protected characteristics available in the 2017 Crime Survey for England and Wales (CSEW)<sup>4</sup>, over the last year there were more victims of personal crime in the following groups compared with others sharing the same protected characteristic: people aged 16-24; people from any other mixed/multiple ethnic and any other Black/African/Caribbean backgrounds and people who are single.
18. This means that these groups are more likely to be affected by any new policy or change in policy in the criminal courts, including the one proposed here. We do not, however, consider that these groups would be put at a particular disadvantage by this policy. The policy will apply in the same way to all authorised staff, whose involvement in the management of criminal cases will be provided for equally through Criminal Procedure Rules and any practice directions (albeit under judicial supervision and with assignment of functions and roles at the court-level). As such, the impact of these proposed measures on court staff is expected to be equal for all court users.
19. There is limited data available on the court users in terms of other protected characteristics (namely sexual orientation, religion and belief, gender reassignment, and pregnancy and maternity, and marriage and civil partnership). Whilst the CSEW provides data on these characteristics for victims, in general, we cannot extract information on these characteristics from victims who have provided evidence in court or defendants who have come through the court. However, we do not consider that these proposals will result in anyone with a protected characteristic being put at a particular disadvantage when compared to someone without the protected characteristic.

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<sup>2</sup>[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/669094/statistics\\_on\\_race\\_and\\_the\\_criminal\\_justice\\_system\\_2016\\_v2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/669094/statistics_on_race_and_the_criminal_justice_system_2016_v2.pdf)

<sup>3</sup>[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/572043/women-and-the-criminal-justice-system-statistics-2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/572043/women-and-the-criminal-justice-system-statistics-2015.pdf)

<sup>4</sup><https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/crimeinenglandandwalesannualtrendanddemographicstables>

20. We therefore consider the proposals to be a proportionate approach to achieving the legitimate aims of improving the case management and progression in the criminal courts and freeing up judges to focus on the most complex matters.

#### *Family – Applicants, Respondents, Subjects*

21. We acknowledge that there are higher proportions of applicants, respondents and subjects with the protected characteristics of age, race, religion and sex, than in the general population. Cafcass data from 2010/11, taken from the MoJ Family Justice Review<sup>5</sup>, shows that women are over-represented as respondents and applicants in public law cases, and as respondents in private law cases. Men however, are overrepresented as applicants in private law cases. This data was produced as a result of a special commission for the review that has not been repeated and cleared for publication since, it is therefore limited but illustrates some of the protected characteristics shared by family court users.
22. The data also shows that in public law cases, children aged 5 or under (subjects) are over-represented and children aged 11 or under (subjects) are over-represented in private law cases. Those 18-49 are over-represented as both private law applicants and respondents, those 30-49 are over-represented as applicants in public law cases, and those 18-39 over-represented as respondents. Applicants and respondents with no religion are over-represented in public and private law cases compared to the general population. Those who belong to Black, Mixed and Chinese/Other ethnic groups are over-represented as subjects in public law cases.
23. This means that these groups are more likely to be affected by any new policy or change in policy in the family courts, such as the one proposed here. However, we do not consider that these proposals will result in anyone with a protected characteristic being put at a particular disadvantage when compared to someone without the protected characteristic. It will apply in the same way to all authorised staff whose involvement in the management of family cases will be provided for equally through the Family Procedure Rules and any practice directions (albeit under judicial supervision and with assignment of functions and roles at the court-level). As such, the impact of these proposed measures on court staff is expected to be equal for all court users.
24. It is not clear from the data whether court users with the protected characteristics of disability are over- or under-represented as users of the family court. Furthermore, information is not available on family court users and the following protected characteristics: sexual orientation, gender reassignment, pregnancy and maternity, and marriage and civil partnership, as well as on some aspects of race. However, we do not consider that these proposals will result in anyone with a protected characteristic being put at a particular disadvantage when compared to someone without the protected characteristic.
25. We therefore consider these proposals to be a proportionate approach to achieving the legitimate aims of improving the case management and progression in the family courts and freeing up judges to focus on the most complex matters.

#### *Civil Court and Tribunals Users*

26. Data is not available on the profiles of users of civil courts and tribunals, so the proportion of users possessing protected characteristics is unknown. However, we do not consider that these proposals will have any detrimental impact on those who share

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<sup>5</sup> <https://www.gov.uk/government/publications/family-justice-review-government-response>

these protected characteristics. Authorised staff operating in civil courts and tribunals will work within the same robust cohesive framework as authorised staff operating in other jurisdictions.

27. Furthermore, the policy will apply the same way to all authorised staff, whose involvement in the management of civil and tribunals cases will be provided for equally through procedure rules and any practice directions (albeit under judicial supervision and with assignment of functions and roles at the court-level). As such, the impact of these proposed measures on court staff is expected to be equal for all court users.
28. Although we do not hold data about the protected characteristics of civil court and tribunal users, we do not consider that these proposals will result in anyone with a protected characteristic being put at a particular disadvantage when compared to someone without the protected characteristic.
29. We therefore consider these proposals to be a proportionate approach to achieving the legitimate aims of improving the case management and progression in the civil courts and tribunals, and freeing up judges to focus on the most complex matters.

#### *HMCTS staff*

30. Data on HMCTS workforce diversity in March 2017<sup>6</sup> shows that 71.5% of employees below Senior Civil Servant (SCS) level are female and 28.5% male, and that 65% of employees are white, with 14% from BAME groups, and 21% undeclared.
31. This breakdown shows the proportionate effect that this policy may have on different groups in the HMCTS workforce, however we do not consider that there is any reason that any group should be put at a particular disadvantage, as the assignment (and any removal) of a member of staff's authorisation to exercise judicial functions will be based on competence. This will include an assessment of their qualifications and experience against any requirements that the relevant procedure rule committee may set.
32. This policy should increase the opportunities for HMCTS staff to undertake casework in the courts and tribunals. All HMCTS staff who meet the requirements set by the relevant rule committee on qualifications and experience will have the same opportunities to become authorised to exercise judicial functions. Authorisation will ultimately be a matter for the judiciary. In this, they will be able to seek the advice of HMCTS staff, who will have responsibility for the day-to-day activity of authorised staff.
33. We expect that some authorised staff positions will be undertaken by existing staff – providing greater opportunities for career progression within HMCTS - but that recruitment may also be necessary. Staff will be recruited through fair and open competition under established civil service mechanisms, and appointed under section 2 of the Courts Act 2003. Whether recruitment is internal or external, appointment to these positions will require the relevant qualifications and experience as determined by the procedure rule committees. We anticipate that staff may need particular qualifications, including legal qualifications, and experience depending on the type of functions they are assigned, but this will be for the rule committees to determine.
34. All HMCTS staff, including those authorised to exercise judicial functions, are protected under existing workplace discrimination and reasonable adjustment policies. HMCTS has a duty to ensure that all staff are recruited and treated fairly and to put in place support for reasonable adjustments for staff and to assist staff if they believe they are being discriminated against. HMCTS complies with this duty.

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<sup>6</sup>[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/630426/HMCTS\\_Annual\\_Report\\_and\\_Accounts\\_201617\\_Web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/630426/HMCTS_Annual_Report_and_Accounts_201617_Web.pdf)

## *Judiciary*

35. This policy should enable and encourage greater use of appropriately trained and experienced authorised staff in more routine case management decisions, which will free up judges' and magistrates' time to focus on more complex matters.
36. Although we believe this will benefit judges and magistrates, we do not know if there will be any direct equality impacts or the extent of the impact, if any. We do expect any impact to be equal for all, however, as the parameters of the functions that authorised staff may undertake will be determined by the procedure rule committees at the national level whilst discretion is given at the local (court) level around supervision and the assignment of roles and responsibilities for authorised staff.
37. Judges will supervise authorised staff but we expect the involvement of authorised staff in cases to be of overall benefit to judges, which will relieve judges to focus on the most complex matters before them. The supervisory role is intended to provide judges with assurance and input into the duties and responsibilities of authorised staff working in their courts.
38. As of 1 April 2017, the Judicial Diversity statistics<sup>7</sup> showed that 28% of court judges, 54% of magistrates and 45% of tribunal judges were female. The statistics also highlighted that 7% of court judges, 11% of magistrates, 11% of tribunal judges and 16% of non-legal tribunal members were or declared themselves as being from a Black, Asian or Minority Ethnic (BAME) background. This shows that the judiciary is not yet as representative of the general population as it could be. However, the Diversity Forum, attended by representatives of the Ministry of Justice, Judicial Appointments Commission, the judiciary and the legal profession, are exploring ways of increasing diversity in the judiciary.
39. We anticipate that these proposals on authorised staff could result in positive changes that see more of the case preparation and interlocutory work in cases being undertaken by a more diverse and representative group. This could increase diversity in some aspects of decision-making.

### *Discrimination arising from disability and duty to make reasonable adjustments*

40. In so far as this policy extends to disabled court users, we believe that the policy is proportionate, having regard to its aim. It remains important to make reasonable adjustments for disabled court users and members of the judiciary to ensure appropriate support is given. As members of HMCTS staff, authorised staff will undergo training to ensure they are aware of the duty to make reasonable adjustments for disabled court and tribunal users, and general training on disability awareness.
41. With regard to HMCTS staff, any internal or external, appointment of staff into authorised staff roles will be conducted in line with the Civil Service Commission's recruitment principles of fair and open competition with a duty to make reasonable adjustments, and the guaranteed interview scheme for any candidate with a disability who meets the minimum selection criteria for a role.

### *The need to advance equality of opportunity between those sharing a protected characteristic and those not*

42. This part of the duty relates to the need to remove or minimise disadvantages suffered by people due to their protected characteristic, and take steps to meet the needs of

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<sup>7</sup> <https://www.judiciary.gov.uk/wp-content/uploads/2017/07/judicial-diversity-statistics-2017-1.pdf>

people who share a protected characteristic, where those needs are different from the needs of those who do not share that protected characteristic.

43. We anticipate that the use of authorised staff will mean cases can be progressed more efficiently, which is likely to be of benefit to all court and tribunal users, judges and staff.

*The need to foster good relations between those sharing a protected characteristic and those not*

44. Consideration has been given to this objective that indicates it is unlikely to be of particular relevance to this proposal.

### **Ongoing duty**

45. The equality duty is an ongoing duty and we will continue to monitor and review these proposals for any potential equalities impacts on persons with protected characteristics to help ensure that access to justice is maintained. The procedure rule committees will also be aware of the situation and have the capacity to amend the qualifications and functions should the need arise.