

Prisons and Courts Bill

Equality Statement: Authorised Court and Tribunal Staff

Policy change summary

1. HMCTS staff can be already be authorised to exercise certain aspects of the jurisdiction of a court or tribunal. More extensive and flexible use of such authorised staff across all courts and tribunals is an important factor in the delivery of our reforms to the justice system. Relevant primary legislation already exists in every jurisdiction to deliver a limited function for authorised HMCTS staff, except in the Crown Court. New legislation is required to realise the extent of our ambition for these staff. Additionally, we intend to seek the removal of the statutory role of justices' clerk and the creation of a non-statutory legal leadership role to provide support and direction for authorised court and tribunal staff across all jurisdictions.

Equality duties

2. Section 149 of the Equality Act 2010 ("the Act") requires Ministers and the Department, when exercising their functions, to have 'due regard' to the need to:
 - eliminate unlawful discrimination, harassment, victimisation and any other conduct prohibited by the 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).
3. In carrying out this duty Ministers and the department must pay "due regard" to the nine "protected characteristics" set out in the Act, namely: race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

Equality considerations

4. Consideration has been given to the impact of the proposed changes in the context of the Government's equality duties. The Government's view is that judges' time would be better spent on complex, deliberative matters, allowing the more straightforward tasks, and cases, to be progressed by appropriately authorised court and tribunal staff. The Government believes that where appropriate, specially trained court staff would be able to deal with some uncontroversial, straightforward matters under judicial authorisation as effectively as the judges currently do. This would help to resolve disputes more quickly.

Impact on court users rights

5. Suitably authorised HMCTS staff are already established in many jurisdictions and the legislation sought will provide a cohesive, robust framework within which such staff will operate. Authorised court and tribunal staff will be making case management decisions that are currently undertaken by the judiciary. The right of court users to have a criminal charge or civil right determined by an independent and impartial tribunal is well established in the common law and the same requirements exist in Article 6 ECHR. Protecting the rights of all court

users is therefore a key aspect of this reform. Against this context judges will, therefore, remain the only people able to decide the outcomes of cases. Authorised court and tribunal staff will relieve judges of more routine case management and progression tasks.

6. Ensuring that court users have confidence in this cadre of HMCTS staff, and that all decisions made by them are fair and reasonable, is critical to the success of this policy. Authorised court and tribunal staff will be appropriately trained and will have a range of qualifications and experience depending on the type of functions they have been assigned. They will receive specific training on the key judicial skills and ethics, including the need for impartiality and integrity. All authorised court and tribunal staff will have to complete the Civil Service learning courses listed below;
 - (a) Equality and diversity essentials
 - (b) Disability awareness, and;
 - (c) Unconscious bias
7. The judiciary are responsible for assigning authorised staff and will only assign such staff once they meet the required competency threshold. Some of the authorised HMCTS staff roles will require a legal qualification, such as providing legal advice to magistrates.
8. In addition, authorised court and tribunal staff will be independent from direction by the government whilst executing the tasks they have been authorised to perform. They will, however, be subject to direction by, and accountable to, the Lord Chief Justice or Senior President of Tribunals. Depending on the jurisdiction, court users may be advised that their application has been considered by an authorised member of court or tribunal staff and any subsequent rights. All case management decisions made by authorised persons can be reviewed at a subsequent hearing or appealed to a higher court. Within some jurisdictions an additional right of reconsideration currently exists whereby a decision made by HMCTS staff can be considered afresh by a member of the judiciary without a formal appeal occurring.

Impact on HMCTS staff

9. All authorised court and tribunal staff will be recruited via established Civil Service mechanisms, and will be expected to abide by the Civil Service code. They will be 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 functions to assist staff if they believe they are being discriminated against.
10. All authorised court and tribunal staff roles will be filled by members of HMCTS staff appointed under s2 Courts Act 2003 or s40 Tribunals, Courts and Enforcement Act 2007, and through fair and open competition. The assignment and removal of their authorised powers will ultimately be a matter for the judiciary, who will be advised by HMCTS staff who have responsibility for the day-to-day operation of the activity of these authorised members of HMCTS staff. Assignment of powers will be based on competence.

Impact on Judiciary

11. We expect that the proposal will have a beneficial impact on the judiciary by removing some of the lower-level work that they currently have to undertake. Authorised court and tribunal staff will free up judges and magistrates' time to focus on more complex matters. Although we think this will benefit judges we do not know if there will be any direct equality impacts or the extent of the impact, if any.
12. Judicial Diversity Statistics 2016¹ show that in courts 72% of judges in England and Wales are male, 55% of judges in all tribunals administered by HMCTS and Welsh Tribunals not administered by HMCTS² are male and 47% of magistrates' in England and Wales are male. This compares with 50% in the equivalent England and Wales population³.
13. In relation to age, Judicial Diversity Statistics 2016⁴ show that in courts 97% of judges in England and Wales are 40 and over and 48% are 60 and over. In tribunals 97% are 40 or over and 56% are 60 or over. For magistrates, 97% of England and Wales magistrates are 40 or over and 57% are 60 or over⁵. The equivalent England and Wales population statistics⁶ show that 56% are 40 to 69 and 16% are 60 to 69.
14. In terms of ethnicity, of those who declared ethnicity, 91% of England and Wales magistrates are white⁷. For judges, of those in courts who declared, 94% are white⁸. Of those judges in tribunals who declared, 86% are white⁹. The equivalent England and Wales population statistics¹⁰ show that 86% are white¹¹.

Direct discrimination

15. Our assessment is that the proposed reforms for authorised court and tribunal staff would not be directly discriminatory within the meaning of the Act. In establishing an approach to the responsibilities of authorised HMCTS staff we have had to be aware of the rights of all court users.
16. We believe that the reforms will have a benefit to all court users by helping to reduce delays and ensure a case is progressed via the most appropriate channel of the courts. We are reviewing the role of justices' clerks as part of these reforms to ensure we continue to make the best use of their skills. This is being done in close consultation with the judiciary and justices' clerks themselves.
17. We do not believe that there will be any direct discrimination in relation to HMCTS staff as a result of the safeguards set out in paras 4.6 and 4.7.
18. We do not believe that there will be any direct discrimination in relation to judges and magistrates' as a result of the safeguards set out in paras 4.6 and 4.7.

¹ <https://www.judiciary.gov.uk/publications/judicial-statistics-2016/>

² This is all tribunals in England and Wales and the Employment Tribunals in Scotland.

³ Labour Force Survey Quarterly, April-June 2016. Ages 18 to 69.

⁴ <https://www.judiciary.gov.uk/publications/judicial-statistics-2016/>

⁵ Statutory retirement age for magistrates' and judges is 70 years of age.

⁶ Labour Force Survey Quarterly, April-June 2016. Proportions are those aged 40 to 69 and 60 to 69 as a proportion of those aged 18 to 69.

⁷ Declaration rate was 99%.

⁸ Declaration rate was 84%.

⁹ Declaration rate was 88%.

¹⁰ Labour Force Survey Quarterly, April-June 2016. Ages 18 to 69.

¹¹ Declaration rate was over 99%.

Indirect discrimination

19. We do not believe that the proposed reforms for authorised court and tribunal staff will result in any indirect discrimination against users of the justice system. The approach is designed to make the process easier and swifter for all court users by removing unnecessary judicial involvement where it is not required.
20. We do not believe that there will be any indirect discrimination in relation to HMCTS staff as a result of the safeguards set out in paras 4.6 and 4.7.
21. We do not believe that there will be any indirect discrimination in relation to judges and magistrates' as a result of the safeguards set out in paras 4.6 and 4.7.

Discrimination arising from disability and duty to make reasonable adjustments

22. We do not believe that the proposed reforms for authorised court and tribunal staff will result in any discrimination arising from disability and duty to make reasonable adjustments.

Harassment and victimisation

23. We do not consider there to be a risk of harassment or victimisation as a result of these changes.

Advancing equality of opportunity

24. Consideration has been given to how the proposal impacts on the duty to advance equality of opportunity. We believe that these changes will help to ensure equality of opportunity is advanced for those with protected characteristics. The approach is designed to make the process easier and swifter for all court users by removing unnecessary judicial involvement where it is not required and by helping to reduce delays and ensure cases are progressed via the most appropriate channel of the courts. All authorised court and tribunal staff will be recruited via fair and open competition through established Civil Service mechanisms and therefore we expect this cadre of staff to be representative of the general population. We expect that the proposal will have a beneficial impact on the judiciary by removing some of the lower-level work that they currently have to undertake.

Fostering good relations

25. Consideration has been given to how these changes impact on the duty to advance the fostering of good relations between people who have a protected characteristic and those who do not. Authorised court and tribunal staff will need to understand requirements of those with protected characteristics who may engage with the courts; the development and design of the new service and ongoing support will be user focused to ensure this.

Mitigation

26. Our assessment of equality impacts is that the implementation of these changes will not result in any direct or indirect discrimination against courts and tribunal users, HMCTS staff, judges or magistrates with protected characteristics.

Summary

27. Having given due regard to the public sector equality duty under section 149 of the Equality Act 2010 we have concluded that the policy is not detrimental in any respect to those with protected characteristics. The design of the authorised court and tribunal staff role has had to safeguard the rights of all court users and, as a consequence, we are confident that we have met our equality duties as no court user should be disadvantaged as a result of this policy. We believe that the safeguards we will put in place, allied to the judicial supervision and requirement for appropriate legal qualifications where necessary, will achieve this outcome. We also believe that appropriate safeguards are in place to protect HMCTS staff, judges and magistrates regardless of protected characteristics.
28. Finally, as the equality duty is an ongoing duty, we will continue to monitor and review these proposals for any potential impacts on persons with protected characteristics and make sure that access to justice is maintained.

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