

Equalities Statement: Flexible deployment of the judiciary

Policy Change Summary

1. This equality statement considers the potential equality impacts arising from measures in the Prison and Courts Reform Bill intended to amend existing legislation to allow more flexible judicial deployment in three specific areas:
 - I. making Recorders deployable to the Upper Tribunal (UT);
 - II. allowing Deputy High Court Judges appointed on a temporary basis to sit in a wider range of courts and tribunals than currently; and
 - III. enabling the appointment of a greater range of High Court judges to conduct judicial arbitrations under section 93 of the Arbitration Act 1996 .

Recorders in the UT

2. The UT is the superior body to the First-tier Tribunal and has a number of functions including hearing both appeals from the First-tier Tribunal as well as most applications for judicial review of immigration decisions. The Tribunals, Courts & Enforcement Act 2007 sets out the judges who are judges of the UT and therefore may hear cases there. This includes Circuit Judges, District Judges and High Court Judges, but does not include Recorders.
3. Allowing Recorders to sit in the UT would enable the judiciary to be deployed more flexibly in order to meet business need by broadening the pool that the UT can draw from. In the short term, this could be used support more efficient disposal of cases. There are a number of Recorders who, as the fee-paid comparator of Circuit Judges, have sufficient experience to sit in the UT and would be willing to do so.

Temporary Appointment of Deputy High Court Judges

4. The Lord Chief Justice for England and Wales already has a statutory power to appoint a person meeting the eligibility criteria as a Deputy High Court Judge (DHCJ) on a temporary and exceptional basis (section 94AA of the Constitutional Reform Act 2005). This is without the need for a Judicial Appointments Commission process if there is an urgent business need and that no other reasonable steps could be taken to deal with the workload. This allows DHCJs to be appointed to facilitate business in the High Court or Crown Court.
5. The proposed amendment would widen this so that the person appointed could sit in any court or tribunal to which a permanent DHCJ could be deployed, including less senior courts than the High Court.

Arbitration

6. The Arbitration Act 1996 provides for two types of judge to sit as judge-arbitrators: judges of the Commercial Court as well as judges conducting official referees' business (now dealt with by the Technology & Construction Court). This allows cases falling within the jurisdiction of these courts to be resolved via arbitration, which can be a more desirable option than litigation in commercial disputes.
7. The proposed measure would extend the range of judges who can sit as judge-arbitrators to include any eligible High Court judge, and would also allow the Lord Chief Justice to delegate his functions in agreeing that judges can accept an appointment to sit

as judge-arbitrators. This would allow more High Court judges to resolve cases via arbitration by a High Court judge with the powers of judge-arbitrator where the parties wish to do so, for example in the Chancery Division of the High Court, which has seen a growth in demand for arbitration in recent years.

Policy rationale and objectives

8. The judiciary already have wide powers to deploy judges between courts and tribunal jurisdictions, so these measures are intended to amend existing legislation in specific areas to enable deployment. Taken together, they will help support the wider aims of the reform agenda, allowing the judiciary to be deployed flexibly to meet the demands of a reformed courts and tribunals service.
9. Though these measures support that wider agenda, they target specific areas and are not expected to have a broad impact beyond those areas. For example, the power to appoint Deputy High Court Judges on a temporary basis is intended to be used only in limited circumstances where a business need cannot be addressed in another way.

Equality Duties

10. Section 149 of the Equality Act 2010 (“the Act”) sets out the Public Sector Equality Duty (PSED). This is a legal duty that requires Ministers and Departments, when exercising their functions, to have ‘due regard’ to its three limbs:
 - I. The need to eliminate discrimination, harassment, victimisation on the basis of a “protected characteristic” and other conduct that is unlawful under the Act;
 - II. The need to advance equality of opportunity between those who share a “protected characteristic” and those who do not; and
 - III. The need to foster good relations between those who share a “protected characteristic” and those who do not.
11. The “protected characteristics” are race, sex, disability, age, sexual orientation, religion or belief, pregnancy and maternity, and gender reassignment. The characteristics of marriage and civil partnership are relevant only when considering the first limb of the duty.

Equality considerations

Direct discrimination

12. Our assessment is that these proposals would not be directly discriminatory as they do not treat individuals less favourably because of their protected characteristics.

Indirect discrimination

13. We have considered whether there is potential for indirect discrimination on the basis of age, sex or race if these proposals are implemented and these are discussed in more detail in the ‘Analysis and Potential Impacts’ section below. The proposals will be applied in the same way to all those impacted and, on the basis of the available data, we do not consider that there will be any particular disadvantage suffered by anyone with a protected characteristic. We also consider that our proposals are a proportionate means

of achieving the legitimate aim of allowing more flexible judicial deployment. We therefore consider it unlikely that the proposals will result in any indirect discrimination.

Analysis and potential impacts

14. In order to ensure we comply with our duties under the Act we have first considered, in so far as we are able, the extent to which our proposals may have a differential impact on those with protected characteristics compared with those that do not share those characteristics. However, the data we currently have is limited and due to the lack of reliable data we are unable to identify the potential for the proposals to have impacts in relation to disability, sexual orientation, gender reassignment, religion and belief, pregnancy and maternity, and marriage/civil partnership. We have therefore omitted these protected characteristics from our analysis. We are working with Judicial Office and the Judicial Appointments Commission to improve the collection and disclosure of disability and social mobility data.
15. We are able to consider the potential impacts of our policies on those with the following protected characteristics: sex, age and race, given this is the data currently collected on the judiciary in England and Wales. For each option we have considered whether there would be a differential impact on these groups, using the judiciary as a whole as a comparator¹. We have then looked at what this impact means in relation to the 3 limbs of the duty.

Making Recorders deployable into the UT

16. A Recorder is already on the list of judicial office holders that can be deployed to assist with the business of the First-tier Tribunal. This measure will enable Recorders to be added to the list of judicial office holders that can be deployed to give assistance in the UT. Given that the measure will not result in any new appointments, it will not affect the overall make-up of the judiciary.
17. As with other judge groups, women and people with a Black, Asian and Minority Ethnic (BAME) background are under-represented among Recorders². However, this measure is unlikely to have a significant impact on the overall constitution of the UT because of the low numbers of Recorders expected to be deployed into the UT.
18. As a group, Recorders tend to be younger than judicial office holders as a whole – for example, around 19% of Recorders are under 50, compared with 15.8% of judicial office holders. The UT is below this, at around 11%. However, we do not hold data on which judges would have the specific experience to sit in the UT, and it may be that this is weighted towards older and more experienced judges given that the UT is the superior body to the First-tier Tribunal. But Recorders are unlikely to sit in numbers that would have a significant impact on the overall make-up of the UT.
19. This measure will not change the characteristics of the judiciary as a whole. It would involve existing judges sitting in another fashion, rather than recruiting new judges.

¹ <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/diversity/judicial-diversity-statistics-2016/>

² Recorders - around 21% female; around 6% BAME (national average 14% according to 2010 census). UT – around 34% female; around 12% BAME.

Temporary Appointment of Deputy High Court Judges

20. It is unlikely that this measure would have significant impacts on age, race or sex. The power for the Lord Chief Justice to appoint a Deputy High Court Judge on a temporary basis without a JAC process is intended to be used in limited circumstances where there is an urgent business need which cannot be addressed through normal processes in the time allowed, and therefore would be used in numbers and for time periods short enough to have only a minimal impact. While we are not able to predict specific volumes, by their nature these instances are likely to be rare – since its creation in 2013, the power has been used on only one occasion.
21. It is important to make sure that this measure is not used to bypass fair and open competition for roles; appropriate safeguards are in place to do this, such as limiting the appointment to specific business and requiring the Lord Chief Justice to consult with the Lord Chancellor before making the appointment.

Appointment of Judge-arbitrators

22. As above, it is unlikely that this measure would have significant age, race or sex impacts. As the measure widens the range of High Court judges who can sit as judge-arbitrators, it would involve existing judges sitting in another fashion, rather than recruiting new judges.

Discrimination arising from disability and the duty to make reasonable adjustments

23. Judicial Office does not currently collect data on disability, meaning the only available data comes from those appointed in more recent years via the Judicial Appointments Commission, so it is difficult to assess the potential impact of these proposals on that group. However we do not consider it likely that these measures would have significant impacts on disability, given the low numbers affected by these changes. Under our existing obligations we will continue to make reasonable adjustments within the meaning of the Act for members of the judiciary who are known to have disabilities.

Harassment and victimisation

24. We do not consider there to be a risk of harassment or victimisation as a result of these proposals given the changes are the same for all affected judicial office holders.

Advancing equality of opportunity

25. Implementing these measures would largely follow existing processes e.g. for deploying judges to the UT or appointing a judge as a judge-arbitrator under section 93 of the Arbitration Act 1996. We are exploring the need for putting safeguards in place to make sure that these measures do not bypass the principles of fair and open competition for judicial roles, for example by using expression of interest exercises to advertise opportunities. In making Recorders deployable to the Upper Tribunal we are mindful of ensuring that the needs of less experienced Recorders are considered to ensure equality of opportunity.

Fostering good relations

26. We have considered this objective and do not consider there to be scope within these proposals to foster good relations between those with protected characteristics and those who do not.

This publication was archived in June 2017.