

**Courts and Tribunals (Judiciary and Functions of Staff) Bill**  
**Equality Statement: Flexible deployment of the judiciary and judicial titles measures**

**Introduction**

This equality statement considers the potential equality impacts arising from measures in the Courts and Tribunals (Judiciary and Functions of Staff) Bill intended to amend existing legislation to enable more flexible deployment of the judiciary, including across jurisdictions by:

- allowing Deputy High Court Judges appointed on a temporary basis to sit in a wider range of courts and tribunals than currently;
- making Recorders deployable to the Upper Tribunal (UT); and senior Employment Tribunal judges deployable to the First-tier Tribunal (FtT) and UT;
- allowing a Chamber President of the UT, or the FtT, to also be appointed as Chamber President of another Chamber of the same Tribunal;
- enabling Employment Tribunal presidents to be authorised to sit in the Employment Appeal Tribunal; and
- enabling the appointment of a greater range of High Court judges to conduct judicial arbitrations under section 93 of the Arbitration Act 1996.

It also considers measures relating to changing judicial titles:

- Changing the title of Chief Bankruptcy Registrar to that of Chief Insolvency and Companies Court Judge; and
- giving the Lord Chancellor power in future to amend the titles of Senior Master of the Queen's Bench Division, Chief Chancery Master, Chief Taxing Master, Senior District Judge of the Family Division, Chief Insolvency and Companies Court Judge.

The Ministry of Justice recognises that the judiciary is less diverse of certain protected characteristics than the wider population and has additional policies and practices aimed at increasing the diversity of the judiciary. These will help to ensure that people with protected characteristics are better represented in the future judiciary. Whilst the measures below are intended to improve the flexible deployment of the judiciary, it is to be noted there are additional measures being carried out by the MoJ in relation to diversity. Schemes are in place across the wider judiciary to encourage greater diversity and equality of opportunities. There are more than a hundred Diversity and Community Relations judges across England and Wales who volunteer for community engagement to encourage judicial careers from groups that are typically underrepresented in the judiciary. There are support and mentoring schemes in place to provide help for under-represented groups, including candidates who are female, or from a BAME background, or who come from a low socio-economic background, to apply to the judiciary.

Judicial deployment is the responsibility of the senior judiciary. Increased flexible deployment provisions will enable greater use of judicial resource, in order to better meet the business requirements across courts and tribunals. In addition to meeting the business needs, greater flexibility will enable individuals to gain valuable experience in sitting in other jurisdictions. Where it is appropriate in accordance with the circumstances of each case, deployment decisions will be taken following fair and transparent expressions of interest exercises across the eligible pool of judges.

We have considered the implications for Welsh language in the development of the Bill and published a summary of our proposals on the Government's website.

### *Temporary Appointment of Deputy High Court Judges*

1. 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) to facilitate business in the High Court or Crown Court. 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. The proposed amendment would widen this power 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.

### *Recorders in the UT*

2. The UT is the superior body to the FtT and has a number of functions including hearing both appeals from the FtT 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 to support more efficient disposal of cases.

### *Senior Employment Tribunal Judges as judges of the First-tier Tribunal and Upper Tribunal*

4. The Tribunals, Courts and Enforcement Act 2007 sets out which judges can sit in the First-tier and Upper Tribunals. Currently, members of a panel of judges who sit in the employment tribunals are also listed as judges of the First-tier Tribunal and/or Upper Tribunal. However, this currently precludes certain leadership judges of the employment tribunals.
5. This proposal, therefore, adds the President of the Employment Tribunal (England & Wales), the President of the Employment Tribunal (Scotland), the Vice-President of the Employment Tribunal (Scotland), and Regional Employment Judges, to the list of judges who are also judges of the First-tier Tribunal and Upper Tribunal.

### *Allowing a Chamber President to also be appointed as Chamber President of another Chamber of the same Tribunal*

6. Currently, it is not permissible for a judge to preside over more than one chamber of the FTT and may not, at any particular time, preside over more than one chamber of the UT (but may at the same time preside over one chamber of the FTT and over one chamber of the UT). Amending the Tribunals, Courts and Enforcement Act 2007 would allow for this.

### *Employment Tribunal Presidents authorised to sit in the Employment Appeal Tribunal*

7. Provisions in the Tribunals, Courts and Enforcement Act 2007 allow for FtT Chamber Presidents to be members of the UT which provides additional capacity for experienced judges to hear appeals. The President of the Employment Tribunal (England and Wales) and the President of the Employment Tribunal (Scotland) are also able to sit in the Upper Tribunal.

8. However, currently there is no similar provision for the President of Employment Tribunal (England and Wales) and the President of the Employment Tribunal (Scotland) to be appointed to the Employment Appeal Tribunal. This provision will amend section 22(2A) of the Employment Tribunals Act 1996 to provide for this.

#### *Arbitration*

9. 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.
10. The proposed measure would extend the range of judges who can sit as judge-arbitrators to include any High Court judge and other serving and retired judges entitled to sit in the High Court under section 9(1) of the Senior Courts Act 1981, 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 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.

#### *Change of title of Chief Bankruptcy Registrar to that of 'Chief Insolvency and Companies Court Judge'*

11. Following the Alteration of Judicial Titles (Registrar in Bankruptcy of the High Court) Order 2018 (2018 No. 130) which came into force on 26/02/18, the title of Bankruptcy Registrars was amended to Insolvency and Companies Court Judge.
12. However, the Chief Bankruptcy Registrars title could not be amended via this statutory Instrument as it requires primary legislation to amend. Under this option amendments Senior Courts Act 1981, and Constitutional Reform Act 2005, would allow for this.

#### *Amendment of the Lord Chancellor's power to amend certain judicial titles*

13. There are certain other judicial roles that require primary legislation to amend their title, which is inconsistent with other judicial roles and can lead to delays and inflexibility. These roles are in sub-section 3C of section 89 of the Senior Courts Act 1981 and are the offices that are not already catered for in section 64 of the Courts Act 2003
14. Those roles are the Senior Master of the Queen's Bench Division, Chief Chancery Master, Chief Taxing Master, Senior District Judge of the Family Division and Chief Insolvency and Companies Court Judge. This anomaly could be corrected by amending section 64 (2) of the Courts Act 2003 accordingly.

#### **Policy rationale and objectives**

15. The judiciary already have wide powers to deploy judges between courts and tribunal jurisdictions, so the judicial deployment 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.
16. 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.

17. The provisions relating to the amendment of judicial titles are intended to reflect organisational change in the courts and allow greater flexibility in dealing with any future changes.

### **Equality Duties**

18. 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:

- a) The need to eliminate discrimination, harassment, victimisation on the basis of a “protected characteristic” and other conduct that is unlawful under the Act;
- b) The need to advance equality of opportunity between those who share a “protected characteristic” and those who do not; and
- c) The need to foster good relations between those who share a “protected characteristic” and those who do not.

19. 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**

20. 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**

21. We have considered whether there is potential for indirect discrimination 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 for age, sex or race, we do not consider that there will be any particular disadvantage suffered by anyone with a protected characteristic when compared to someone without the protected characteristic. We also consider that our proposals are a proportionate means of achieving the legitimate aim of increasing the efficiency of the courts and tribunals by introducing greater flexibility to deploy the right judge to the right case. We therefore consider it unlikely that the proposals will result in any indirect discrimination.

### **Analysis and potential impacts**

22. 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, 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 due to lack of robust data for judges these characteristics. 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 mobility data from 2019 onwards.

23. 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 comparator<sup>1</sup>. We have then looked at what this impact means in relation to the three limbs of the duty.

#### *Temporary Deputy High Court Judges to sit in wider range of courts*

24. This measure is to allow temporarily-appointed judges to sit in the full range of courts that Deputy High Court Judges can. This measure will not change the characteristics of the judiciary as a whole. It will allow existing judges to sit in additional jurisdictions to meet business needs rather than recruiting new judges as well as deal with emergency situations, such as total workload, or specialist work type.
25. 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 already exists and is used in limited circumstances where there is an urgent business need which cannot be addressed through normal processes in the time allowed, and therefore is used in numbers and for time periods short enough to have only a minimal impact.

#### *Making Recorders deployable into the UT*

26. This measure will enable Recorders to be added to the list of judicial office-holders who can be deployed to give assistance in the UT. This measure will not change the characteristics of the judiciary as a whole. It will involve existing judges sitting in additional jurisdictions to meet business need rather than recruiting new judges.
27. The Ministry of Justice does 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 FtT. But Recorders are unlikely to sit in numbers that would have a significant impact on the overall make-up of the UT.
28. The Ministry has policies and practices aimed at increasing the Diversity of the Judiciary which will help ensure people with protected characteristics are better represented in the future judiciary.

#### *Senior Employment Tribunal Judges to be judges of the First-tier Tribunal and Upper Tribunal (together, the “unified tribunals”)*

29. These measures will widen the jurisdictions in which senior employment judges can sit by providing for relevant employment judges to also be judges of the unified tribunals. This measure will not change the characteristics of the judiciary as a whole as it will allow existing judges to sit in additional jurisdictions to meet business need rather than recruiting new judges. It only potentially applies to 14 individuals, so will have a negligible impact on the overall diversity of judges who can sit in the FtT and UT

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<sup>1</sup> <https://www.judiciary.gov.uk/publications/judicial-statistics-2017/>

*Allowing a Chamber President to also be appointed as Chamber President of another Chamber of the same Tribunal*

30. This measure allows for a Tribunal Chamber President to be appointed as president in another Tribunal as long as it is at the same Tribunal. Although it could result in fewer Chamber Presidents being appointed, due to the small number of offices (19) it is unlikely that this measure will have a significant impact on diversity.

*Presidents of the Employment Tribunals to be authorised to sit in the Employment Appeal Tribunal*

31. This measure enables the appointment of the President of the Employment Tribunal (England and Wales) and the President of the Employment Tribunal (Scotland) to the Employment Appeal Tribunal, to ensure that the appellate tribunal can benefit from their experience and expertise. This measure will not change the characteristics of the employment judiciary as a whole as it allows existing judges to sit in additional jurisdictions to meet business need. The diversity impact on the Employment Appeal Tribunal would be negligible due to the limited number of judges to which this policy would apply.

*Appointment of Judge-arbitrators*

32. This measure widens the range of High Court judges who can sit as judge-arbitrators. This measure will not change the characteristics of the judiciary as a whole. It allows existing judges to sit as arbitrators to meet business need.

*Change of title of Chief Bankruptcy Registrar to that of Chief Insolvency and Companies Court Judge*

33. This measure changes the title of one judicial leadership role. The power to change the title of judge already exists for other judicial roles, and the titles of Bankruptcy Registrars has already been changed via secondary legislation to Insolvency and Companies Court Judges. There are no equalities impact from this change.

*Amendment of the Lord Chancellor's power to amend certain judicial titles*

34. This measure allows the change of name of a small number of judicial roles via Ministerial Order, rather than by primary, legislation. The power to change the title of judges by order already exists for almost all other judges and this measure would simply correct the anomaly of these roles requiring primary legislation for the name change. There are no equalities impacts from this change.

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

35. We do not have robust data on the proportion of judges with a disability, although the Judicial Appointments Commission publishes official statistics relating to disabilities for judicial recruitment. It is difficult to assess the potential impact of these proposals on that group. However, under our existing obligations we will continue to make reasonable adjustments within the meaning of the Act for members of the judiciary who report disabilities.

### **Harassment and victimisation**

36. 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. In addition, all judges need to comply with the current "Guide to Judicial Conduct"

### **Advancing equality of opportunity**

37. Judicial deployment is the responsibility of the senior judiciary. 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. Where it is appropriate in accordance with the circumstances of each case, deployment decisions will be taken following a fair and transparent expressions of interest exercise across the eligible pool of judges.

### **Fostering good relations**

38. 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.