

# Equality Statement

## Modernising Judicial Terms and Conditions

### Introduction

This equality statement considers the potential equality impacts arising from proposals in the government's consultation on Modernising Judicial Terms and Conditions: a consultation on proposals to introduce a new tenure for fee paid office holders, to provide for fixed term leadership positions, and to modernise judicial terms and conditions

1. The specific proposals are split between legislative and non-legislative options:

*New proposals that would require primary legislation:*

- **Proposal 1** - Introduce a new single fixed-term grade for fee-paid judges, with a proposed duration of either 6, 8 or 10 years.
- **Proposal 2** - introduce the ability to recruit to leadership positions for a fixed term, with accompanying temporary remuneration.

*Modernisation of terms and conditions for existing office holders. These changes would not require legislation, but are being consulted upon because of their potential impact on current office holders:*

- **Proposal 3A** - introduce an expectation – rather than guarantee – for the number of days fee-paid courts judges sit, in common with tribunal judges.
- **Proposal 3B** - standardise travel allowance to primary courts.
- **Proposal 3C** - introduce a retirement notice period for all office holders, with a proposed duration of either 3, 6 or 12 months.

2. Proposals 3A – C would be implemented under the power of the Lord Chancellor to alter judicial terms and conditions following an appropriate period of notice. Proposals 1 and 2 would be implemented at least two months after Royal Assent of the relevant bill.

### Policy rationale and objectives

3. These proposals taken together would help to achieve the overarching aims of improving judicial career prospects, promoting greater judicial diversity, introducing flexibility of deployment where required and introducing modern business practises which will complement wider reforms to modernise HMCTS.

4. The detail of these proposals are set out firstly in the consultation document and in the Impact Assessment. This Equality Statement will need to read alongside both these documents.

## **Equality Duties**

5. 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 the Department, 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.
6. The “protected characteristics” are race, sex, disability, age, sexual orientation, religion or belief, pregnancy and maternity, and gender reassignment. The characteristic of marriage and civil partnership is relevant only when considering the first limb of the duty.
7. We will update our equality considerations in light of the consultation responses.

## ***Equality considerations***

### ***Direct discrimination***

8. Our assessment is that the proposals to modernise judicial terms and conditions would not be directly discriminatory as they do not treat individuals less favourably because of their protected characteristics.

### ***Indirect discrimination:***

9. We recognise there is potential for indirect discrimination if these proposals are implemented on the basis of age, sex or race and these are discussed in more detail in the ‘Analysis and Potential Impacts’ section below. We believe though that our proposals are a proportionate means of achieving a legitimate aim.
10. Due to the lack of data available regarding certain groups within the judiciary with protected characteristics, we will be carefully considering any consultation responses which refer to potential equality impacts. Following the consultation there will be analysis of the responses received and the proposed policies will be reviewed again taking into consideration the feedback we have received. The feasibility of progressing with any policies that are considered to have a disproportionate equality impact will be reassessed when an updated Equality Statement is completed.

## **Analysis and potential impacts**

11. 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 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.

12. 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. In particular, for the proposals that affect both legally and non-legally qualified office holders; proposals 3B and 3C, we have used as a comparator the wider group of judges and other judicial office holders. For proposals that will only affect offices that require legal qualification we have used the pool of offices that require a legal qualification as our comparator group.

### ***Proposal 1 – new fixed and non-renewable term for fee-paid judges***

#### Potential sex impacts

13. This proposal will affect all future fee-paid judicial appointments. We are unable to predict the future make-up of those who successfully apply for fee-paid appointment so our analysis is based on recent historical appointment data of fee-paid judges between October 2013 and June 2015.
14. During this period there were five first tier tribunal appointment exercises, two upper tier tribunal appointment exercises and one deputy district judge appointment exercise. For these exercises there was a total of 201 successful candidates. Of those who declared their sex, 44.8 per cent (i.e. 87 candidates) were female.
15. The higher percentage of men (55.2 per cent) suggests the proposal will disproportionality affect men, however the government believes this is justifiable given that men are currently over-represented in the overall population of the judiciary (67.7 per cent in April 2015).
16. Improving judicial diversity is one of the key aims of this proposal. Statistics show the percentage of women applying for fee-paid posts (44.8 per cent) is higher than the percentage of women in the current judicial population (32.3 per cent). However, even in the fee-paid judiciary, women are under-represented when compared with the population as a whole (50.8 per cent according to the 2010 census data). If a greater proportion of women apply for posts within the fee-paid judiciary, there could be a corresponding impact on the proportion of applications for salaried posts when their fixed term tenure comes to an end. There is an expectation that all judges appointed to salaried office will have first held a fee paid appointment and in the majority of cases this has been the case.

17. The impact of this proposal is therefore expected to be positive for the judiciary as a whole by increasing the representation of women which supports the broader work that the government, judiciary and the legal professions are doing through the Diversity Forum to encourage greater judicial diversity<sup>1</sup>. In addition, the Lord Chancellor and Lord Chief Justice are under a statutory duty<sup>2</sup> to encourage judicial diversity to help ensure that the judiciary is reflective of the society it serves and this proposal is intended to contribute to that objective.

#### Potential race impacts

18. In the fee-paid appointment exercises between October 2013 and June 2015, 8.8 per cent (17) of successful candidates declared to be from a Black, Asian and Minority Ethnic (BAME) background. This is a higher percentage when compared to the BAME population in the salaried judiciary which is 6 per cent, but still significantly lower than the percentage of BAME groups in England and Wales (14 per cent according to the 2010 Census). This shows that fee-paid judges from a BAME background will be disproportionately impacted by this proposal when compared to the BAME representation in the salaried pool. This is not, however, the case when compared with the population as a whole.

19. The government considers that these impacts are justifiable given one of the key aims of this proposal is to increase judicial diversity in accordance with the statutory duties on the Lord Chancellor outlined above. The government recognises that there is still much work to be done to increase the representation of BAME groups within the judiciary to ensure that it reflects the society it serves.

20. This proposal aims to provide an accelerated means of increasing BAME first time entry into the judiciary. If the new fixed term tenure ensures swifter turnover of the fee-paid cohort and more regular appointments, and candidates from BAME groups are encouraged to apply through various initiatives being undertaken by the Diversity Forum, this could increase representation of those groups in the fee-paid judiciary and have a corresponding impact on the proportion applying for salaried posts at the end of their first fixed term. As mentioned above, fee-paid judges are the main feeder into the salaried judiciary.

#### Potential age impacts

21. The age makeup of the successful candidates in recent fee-paid appointment exercises is very different to that of the salaried judicial pool. Data shows that there was a higher percentage of successful candidates in the younger age bands compared to that of the salaried judiciary. This suggests that this proposal will have a disproportionate impact on younger future fee-paid judges when compared to the salaried pool.

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<sup>1</sup> <https://www.gov.uk/government/publications/judicial-diversity-taskforce-annual-report-2014>

<sup>2</sup> <http://www.legislation.gov.uk/ukpga/2013/22/contents/enacted>

22. Again the government feels this is justifiable given our aim of improving diversity. Nearly half (42%) of all judges are aged over 60 even though younger judges are known to be a more diverse group. Therefore, implementing this proposal will increase turnover in the fee-paid judiciary, continuing to bring in younger, more diverse judges which is likely to have a knock-on effect into the salaried judiciary.

**Proposal 2 - fixed term leadership positions, with accompanying temporary remuneration**

Potential sex impacts

23. This proposal applies to all salaried judicial office holders who may go on to hold a leadership position. The 2015 statistics show there are a total of 5242 judges, of which 32.3per cent (1695) are female.

| <b>Table 1 - Gender breakdown of all judges</b>   |               |             |                    |                 |
|---|---------------|-------------|--------------------|-----------------|
| <b>Appointment Name</b>   | <b>Female</b> | <b>Male</b> | <b>Grand Total</b> | <b>% Female</b> |
| Circuit Judge   | 146           | 494         | 640                | 23%             |
| Deputy District Judge   | 230           | 392         | 622                | 37%             |
| Deputy District Judge Magistrates' Court  | 36            | 79          | 115                | 31%             |
| Deputy Masters, Deputy Registrars, Deputy Costs Judges and Deputy District Judges (PRFD)          | 22            | 33          | 55                 | 40%             |
| Deputy Upper Tribunal Judge   | 8             | 11          | 19                 | 42%             |
| District Judge  | 136           | 305         | 441                | 31%             |
| District Judge Magistrates' Courts  | 43            | 95          | 138                | 31%             |
| Employment Judge  | 146           | 213         | 359                | 41%             |
| Head of Division  |               | 5           | 5                  | 0%              |
| High Court Judge  | 21            | 85          | 106                | 20%             |
| Judge Advocates, Deputy Judge Advocates   | 2             | 10          | 12                 | 17%             |
| Lawyer Chairman (Rent Assessment Panel)   | 1             | 13          | 14                 | 7%              |
| Lord Justice of Appeal  | 8             | 30          | 38                 | 21%             |
| Masters, Registrars, Costs Judges and District Judges (Principal Registry of the Family Division) | 9             | 26          | 35                 | 26%             |
| Presidents, Chamber Presidents, Deputy and Vice Presidents  | 5             | 9           | 14                 | 36%             |
| Recorder  | 164           | 867         | 1031               | 16%             |
| Regional Employment Judge   | 4             | 7           | 11                 | 36%             |
| Regional, Deputy Regional Tribunal Judge  | 5             | 11          | 16                 | 31%             |
| Tribunal Judge  | 688           | 806         | 1494               | 46%             |
| Upper Tribunal Judge  | 21            | 56          | 77                 | 27%             |
| <b>Grand Total</b>  | <b>1695</b>   | <b>3547</b> | <b>5242</b>        | <b>32%</b>      |

24. We do not hold data on the total number of salaried judges who hold leadership positions and the percentage of those that are male and female. Given that women are significantly under-represented in the population of judges (32 per cent) and under-representation increases with seniority (22.8 per cent of Circuit Judges are women compared with 19.8per cent of High Court judges, 18.9 per cent of judges in the Court of

Appeal and the figure is 0 per cent for Heads of Division) it would be reasonable to assume they are significantly under-represented in leadership positions.

25. The proposal to appoint judges to leadership positions on a fixed term will have a disproportionate impact on men given their current over-representation in the population of judges (68 per cent), and potentially older men who have had longer careers in which to reach leadership positions (see potential age impacts below).
26. However, the aims of offering leadership positions on a fixed term is to promote more regular turnover and appointments to those roles and encourage a broader (possible more diverse and younger) range of candidates to apply for those posts as the fixed term offers the opportunity to move onto another role post leadership tenure. It is hoped this proposal will have a positive impact on the representation of women in judicial leadership positions which is significantly needed given their under-representation in the senior judiciary and is consistent with the aims of the Diversity Forum as set out in the Diversity Action Plan.

#### Potential race impacts

27. Within the population of salaried judges, only 7.4 per cent are from a BAME background. This is below the BAME representation in the judiciary as a whole of 10.9 per cent and the general population at 14 per cent.
28. An increase in turnover for leadership positions may have a positive impact on the representation of BAME individuals in leadership positions. Table 2 shows that the representation of BAME judicial office holders decreases the higher an individual progresses within the salaried judiciary. For example, out of those who declared their race 7.7 per cent of District Judges, 3.0 per cent of Circuit Judges and 3.3 per cent of High Court judges are BAME, this reduces to 0 per cent in the Court of Appeal and Heads of Division.

| <b>Table 2 – Race breakdown by Appointment</b> |                  |                               |                               |              |                |              |                    |
|--|------------------|-------------------------------|-------------------------------|--------------|----------------|--------------|--------------------|
| <b>Appointment Name</b>                        | <b>Any Other</b> | <b>Asian or Asian British</b> | <b>Black or Black British</b> | <b>Mixed</b> | <b>Unknown</b> | <b>White</b> | <b>Grand Total</b> |
| Circuit Judge                                  | 6                | 6                             | 1                             | 4            | 70             | 553          | 640                |
| District Judge                                 | 4                | 19                            | 3                             | 6            | 26             | 382          | 440                |
| District Judge Magistrates' Courts             |                  | 4                             |                               | 1            | 25             | 108          | 138                |
| Employment Judge                               | 2                | 2                             | 6                             | 2            | 3              | 129          | 144                |
| Head of Division                               |                  |                               |                               |              | 3              | 2            | 5                  |
| High Court Judge                               | 2                | 1                             |                               |              | 14             | 89           | 106                |
| Judge Advocates, Deputy Judge Advocates        |                  |                               |                               |              |                | 7            | 7                  |
| Lord Justice of Appeal                         |                  |                               |                               |              | 9              | 28           | 37                 |

|   |           |           |           |           |            |             |             |
|---|-----------|-----------|-----------|-----------|------------|-------------|-------------|
| Masters, Registrars, Costs Judges and District Judges (Principal Registry of the Family Division) |           |           |           |           | 10         | 25          | 35          |
| Presidents, Chamber Presidents, Deputy and Vice Presidents  |           |           |           |           | 1          | 13          | 14          |
| Regional Employment Judge   |           |           | 1         |           |            | 10          | 11          |
| Regional, Deputy Regional Tribunal Judge  |           |           |           | 1         | 1          | 10          | 12          |
| Tribunal Judge  | 5         | 8         | 5         | 3         | 8          | 200         | 229         |
| Tribunal Member   |           |           |           |           |            | 12          | 12          |
| Upper Tribunal Judge  | 1         | 1         | 1         | 3         | 4          | 53          | 63          |
| <b>Grand Total</b>  | <b>20</b> | <b>41</b> | <b>17</b> | <b>20</b> | <b>174</b> | <b>1621</b> | <b>1893</b> |

29. The proposal to appoint judges to leadership positions on a fixed term will disproportionately affect salaried judges from white backgrounds given their over-representation in the salaried judiciary and in leadership positions. This can be objectively justified, however, based on the statutory objectives of the Lord Chancellor and Lord Chief Justice, twinned with those of the Diversity Forum to improve judicial diversity, which includes initiatives to increase the representation of BAME groups in the senior judiciary.

#### Potential age impacts

30. The analysis of data shows that nearly half of all judges (42 per cent) are aged over 60, 37 per cent are aged between 50 and 60, and only 21 per cent are aged under 50 years old. This means that any proposal that involves the salaried judiciary will have a greater impact on those over 60 years old simply because there are more of them. Part of the rationale for this proposal, however, is to improve the attractiveness of the judicial career by increasing the rate at which leadership posts become available and encouraging a wider range of candidates, including younger judges, to apply. When these policy aims are taken into account, upon with the objective to improve age proportionality throughout the judiciary, the government considers that any disproportionate impact on older judges is objectively justifiable as it would further the aim of diversifying the judiciary.

#### ***Proposals 3A – introduce an expectation, rather than guarantee, of the number of sitting days for fee-paid judicial office holders***

31. This proposal will apply to all existing courts fee-paid judges, of which 7 per cent declare themselves as BAME, 25 per cent are female, 74 per cent are over the age of 50, 22 per cent are aged between 40 and 50, and 3 per cent are aged under 40.



32. In comparison to the judiciary as a whole, the affected fee-paid judicial office holders are more diverse. While this proposal will have a differential impact on groups with protected characteristics within the fee-paid courts' judiciary, when compared with their salaried counterparts, the government considers that intervention is needed to modernise business practices to ensure the supply of fee-paid judges in the courts matches demand in the light of proposed courts reform. This proposal would bring the terms of current fee-paid judges in the courts into line with already modernised fee-paid judicial terms and conditions and with counterparts in the tribunals.

***Proposal 3B - remove travel allowance to primary courts.***

33. This proposal will apply to all fee-paid judicial office holders (including non-legal members) where there is a higher representation of those with protected characteristics compared to the salaried judicial pool. Women make up 40 per cent of the affected pool compared to 38 per cent of all judicial office holders. Using this comparison it could be argued that women will be disproportionately affected.

34. The same argument can be made when comparing race. In the affected pool 12.3 per cent declare as BAME whereas in the comparator of all judicial office holders of 10.9 per cent declare as BAME. The greater number of BAME fee-paid judges suggests there may be indirect discrimination when compared to the pool of all judicial office holders. However, the impact on women and BAME groups in the affected pool can be objectively justified given the proposals aim to modernise business practices and to treat fee-paid judges in the courts and tribunals in the same way as salaried judges. Salaried judges are not entitled to claim travel expenses for journeys to their normal place of work.

35. The government does not believe there to be any indirect discrimination on the basis of age. The affected fee-paid pool have a lower percentage of older judges; 80 per cent over the age of 50, compared to the comparator pool of all judicial office holders; 82 per cent. However, looking at the affected pool in isolation, there may be a disproportionate impact on older judges (80 per cent over 50) compared to younger judges (20 per cent under 50) given their larger numbers. This can be justified given the need to bring parity between salaried and fee-paid judges.

***Proposal 3C - introduce a retirement notice period for both salaried and fee-paid judges, with a duration of either 3, 6 or 12 months.***

36. Proposal 3C (specifying retirement notice) will, of course, have a disproportionate impact on older fee-paid and salaried judges who are more likely to be considering retirement or be near the compulsory retirement age. This can be objectively justified given the limited impacts this will have on those judges in real terms; it will not impact their intended retirement dates. At most this will mean additional or advance retirement planning for the individuals concerned, but that in itself could be beneficial to them in terms of ensuring there is no delay in pensions being paid upon retirement. This proposal would also be included in the terms and conditions of all existing office

holders, therefore there would be no unequal treatment befalling older judges compared with younger judges.

| <b>Count of Age Band for all judicial office holders.</b>   |                            |                              |                              |                              |                          |                    |
|---|----------------------------|------------------------------|------------------------------|------------------------------|--------------------------|--------------------|
| <b>Appointment Name</b>   | <b>Under 40</b>            | <b>40-50</b>                 | <b>50-60</b>                 | <b>Over 60</b>               | <b>Over 71?</b>          | <b>Grand Total</b> |
| Circuit Judge   |                            | 42                           | 224                          | 374                          |                          | 640                |
| Deputy District Judge   | 45                         | 170                          | 209                          | 198                          |                          | 622                |
| Deputy District Judge Magistrates' Court  | 11                         | 26                           | 38                           | 40                           |                          | 115                |
| Deputy Masters, Deputy Registrars, Deputy Costs Judges and Deputy District Judges (PRFD)          |                            | 2                            | 21                           | 32                           |                          | 55                 |
| Deputy Upper Tribunal Judge   |                            | 3                            | 2                            | 14                           |                          | 19                 |
| District Judge  | 1                          | 88                           | 168                          | 184                          |                          | 441                |
| District Judge Magistrates' Courts  |                            | 18                           | 63                           | 57                           |                          | 138                |
| Employment Judge  | 18                         | 96                           | 146                          | 99                           |                          | 359                |
| Head of Division  |                            |                              |                              | 5                            |                          | 5                  |
| High Court Judge  |                            |                              | 49                           | 57                           |                          | 106                |
| Judge Advocates, Deputy Judge Advocates   |                            | 1                            | 5                            | 6                            |                          | 12                 |
| Lawyer Chairman (Rent Assessment Panel)   | 2                          | 5                            | 4                            | 3                            |                          | 14                 |
| Lord Justice of Appeal  |                            |                              | 8                            | 29                           | 1                        | 38                 |
| Masters, Registrars, Costs Judges and District Judges (Principal Registry of the Family Division) |                            | 3                            | 11                           | 21                           |                          | 35                 |
| Presidents, Chamber Presidents, Deputy and Vice Presidents  |                            |                              | 9                            | 5                            |                          | 14                 |
| Recorder  | 3                          | 211                          | 404                          | 413                          |                          | 1031               |
| Regional Employment Judge   |                            |                              | 5                            | 6                            |                          | 11                 |
| Regional, Deputy Regional Tribunal Judge  |                            |                              | 5                            | 11                           |                          | 16                 |
| Tribunal Judge  | 67                         | 289                          | 536                          | 602                          |                          | 1494               |
| Tribunal Member   | 106                        | 382                          | 1095                         | 2068                         |                          | 3651               |
| Upper Tribunal Judge  | 2                          | 8                            | 23                           | 44                           |                          | 77                 |
| <b>Grand Total</b>  | <b>255<br/>(3per cent)</b> | <b>1344<br/>(15per cent)</b> | <b>3025<br/>(34per cent)</b> | <b>4268<br/>(48per cent)</b> | <b>1<br/>(0per cent)</b> | <b>8893</b>        |

37. In terms of sex and race, the government does not consider there to be any indirect discrimination on women or BAME judicial office holders given their current under-representation in the population of judges; 38 per cent women and 11 per cent BAME. This may mean there will be indirect discrimination to men and white judicial office

holders, however this can be objectively justified given their over-representation, the need to diversify the judiciary and the fact that the proposals will apply to all office holders.

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

38. As mentioned above, there is no data at present on disability within the judiciary and so we cannot assess the potential impact of these proposals on that group. Under our existing obligations we will continue to make reasonable adjustments within the meaning of the Equality Act for members of the judiciary who are known to have disabilities.

***Harassment and victimisation***

39. 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***

40. We have considered how these proposals might impact on the need to advance equality of opportunity. Proposal 1 is designed at increasing the attractiveness of the judicial career by appealing to wider range of applicants from diverse backgrounds and promoting career progression.

41. On the other hand, some people might say introducing a fixed term for fee-paid judges might be counter-productive if the lack of permanency discourages new entrants from applying to the fee-paid judiciary. This could therefore have an effect on the government's duty to advance equality of opportunity. There is no hard evidence to support this, however, so the government does not accept that it is a likely outcome of this proposal. There has, though, been increasing numbers of applicants for fee-paid judicial office across the piece. There are also a number of diversity initiatives in place to improve judicial diversity which will continue regardless of whether new fee-paid judges are appointed on a fixed term. The government will revisit this objective in light of consultation responses received.

42. The government considers that proposals 3A and 3B support advancing equality of opportunity given that they would bring the terms and conditions of fee-paid judges in the courts into line with their counterparts in the tribunals. In the case of 3B, fee-paid judges would also be treated in the same way as their salaried counterparts.

***Fostering good relations***

43. 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.