

## **Equalities Statement – Panel Composition**

### **1. Policy change summary**

- 1.1. This Equality Statement considers the impact of the Government's proposals to amend the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008.
- 1.2. The Government's intentions are set out in the consultation document. These are:
  - 1.2.1.1. To provide that a panel in the First-tier Tribunal (FtT) is to consist of a single member, unless otherwise determined by the Senior President of Tribunals (SPT);
  - 1.2.1.2. To remove the explicit requirement for the SPT to consider the panel composition arrangements that were in place prior to the transfer of the tribunal into the unified system;
  - 1.2.1.3. To provide that future panel composition arrangements of the FtT and Upper Tier should be set by Practice Direction, which would introduce the requirement for ministerial concurrence to spending.
- 1.3. Following the consultation period we will update our equalities considerations with any relevant research submitted in response to the consultation.

### **2. Equality duties**

- 2.1. Section 149 of the Equality Act 2010 requires Ministers and the Department, when exercising their functions, to have due regard to the need to:
  - 2.1.1. Eliminate unlawful discrimination, harassment, victimisation and any other conduct prohibited by the Act;
  - 2.1.2. Advance equality of opportunity between different groups (those who share a relevant protected characteristic and those who do not); and
  - 2.1.3. Foster good relations between different groups (those who share a relevant protected characteristic and those who do not).
- 2.2. Paying due regard needs to be considered against the nine protected characteristics under the Act, namely: race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

### **3. Equality Considerations**

- 3.1. In analysing the equalities impact, we have considered how the policy will affect the non-legal members (NLM) of the judiciary and tribunal users. Diversity data of the judiciary has been provided in the annex, broken down by Chamber (table 1) and type of panel member (table 2). Table 3 shows diversity characteristics of the First-tier Tribunal judiciary against that of the judiciary as a whole and the general population of England and Wales.

- 3.2. **Direct discrimination.** We do not consider that the proposals will result in any direct discrimination relating to any of the protected characteristics set out in paragraph 1.5.
- 3.3. **Indirect discrimination – Tribunal Users.** We do not believe that the proposals will result in any indirect discrimination against tribunal users. The SPT is required to make sure that tribunals are accessible and are handled fairly. The SPT will continue to be responsible for making sure that any future panel arrangements are in line with this requirement and that the appropriate level of expertise is available to handle cases that require it. Additionally, the SPT would continue to have the option of putting safeguards in place, as necessary, to allow additional panel members to sit should users feel that they have been negatively affected by the panel composition arrangements.
- 3.4. **Indirect discrimination - NLMs.** The exact impact that this policy will have on the judiciary will not be known until the SPT has reviewed the current arrangements and decided what, if any, panel composition changes should be introduced. However, our initial view is that the proposals could potentially have a disproportionate impact on NLMs who share certain protected characteristics, as outlined below.
- 3.4.1. **Sex/gender:** 55% of NLMs in the FtT are male, compared with 45% female, and so a reduction in NLM sitting days could affect a higher number of males. However, compared with other areas of the judiciary, there is a higher proportion of females in the FtT (45%) than the wider judiciary (38%). It is therefore possible that a reduction in the number of NLM sitting days will disproportionately affect female NLMs and that this could exaggerate the existing gender imbalance across the wider judiciary.
- 3.4.2. Some of the larger Chambers within the FtT, such as the Social Entitlement Chamber (SEC) and Health Education and Social Care Chamber (HESC) are balanced in terms of gender (49% and 54% male, respectively), but males are heavily over-represented in other Chambers such as the Property Chamber, War Pensions and Armed Forces Compensation Chamber and General Regulatory Chamber (75%, 72% and 71% male, respectively). It may therefore be expected that any reduction in NLM sitting days in HESC or SEC would disproportionately affect female judicial members and a reduction in other Chambers would disproportionately affect male members.
- 3.4.3. **Age:** It is possible that a reduction in NLM sitting days could result in a disproportionate impact on judicial members who are above the age of 60. This is because there is a higher proportion of NLMs who are above the age of 60 (55%) compared with the proportion of Judges who share this characteristic (41%).
- 3.4.4. There are also variations in the age characteristics between the various Chambers of the FtT. For example, some Chambers, such as the General Regulatory Chamber and War Pensions and Armed Forces Compensation Chamber, have no panel members below the age of 40, whereas in the Social Entitlement Chamber 7% are below the age of 40. Likewise, the proportion of over 60s varies from 45% (Immigration and Asylum Chamber) to 67% (War Pensions and Armed Forced Compensation Chamber) across the Chambers. It may therefore be expected that any Chamber-specific reduction in the number

of sitting days could have a disproportionate impact on NLMs who share certain characteristics related to age.

- 3.4.5. **Ethnicity:** The impact that the reform will have on ethnicity in the Property and Tax Chambers is difficult to determine as many people (69% and 50%, respectively) in these Chambers choose not to declare it. Therefore, the available data may not give a true representation of the ethnic diversity of the First-tier Tribunal.
- 3.4.6. However, using the information that is available, it seems that a reduction in the number of NLM sitting days could disproportionately impact members of the judiciary of a BME background. This is because 16% of NLMs in the FtT have declared a BME background, compared with 9% of judges within the FtT and 10% of the wider judiciary. In particular, judicial members of an Asian or Asian British background could be disproportionately affected as they comprise 11% of FtT NLMs compared with 4% of FtT judges and 5% of the wider judiciary.
- 3.4.7. There are also variations between the various FtT Chambers in terms of ethnicity. For example, 5% of judicial members in the War Pensions and Armed Forces Compensation Chamber have a BME background compared with 21% of the judicial members in the Health Education and Social Care Chamber. It may therefore be expected that any Chamber-specific reduction in the number of sitting days could have a disproportionate impact on judicial members who share certain racial characteristics.
- 3.4.8. **Disability:** HMCTS do not publish data on disability and have only routinely collected this information for new recruits since 2013. As such the impact that this policy will have on disabled members is difficult to determine. However within Social Security and Child Support, any attendance allowance, personal independence payment, or disability living allowance cases are currently required to include a disability qualified panel member (DQPM). DQPMs are required to have experience in dealing with the physical or mental needs of disabled persons, either because they work with disabled persons in a professional or voluntary capacity, or because they themselves are disabled. Whilst complete data on the number of disabled members is not available, in the most recent recruitment exercise of DQPMs in the Social Entitlement Chamber, 45% of the 152 recommended candidates reported a disability. It is therefore likely that, should there be a reduction in the number of sitting days of DQPMs, there would be a disproportionate impact on disabled panel members.
- 3.4.9. With the exception of DQPMs, as described above, we have no reason to believe that there will be a disproportionate impact on NLMs who share a protected characteristic relating to disability.
- 3.4.10. **Other protected characteristics:** HMCTS do not publish data relating to religion or beliefs, sexual orientation, gender reassignment, pregnancy or maternity of judicial members. We do not, however, consider that the proposals are likely to directly or indirectly result in any discrimination for judicial members who share a protected characteristic related to these characteristics.
- 3.4.11. Whilst we do not anticipate any impact on persons who share a protected characteristic relating to religion or beliefs, sexual orientation, gender

reassignment, or pregnancy or maternity, we welcome responses through the consultation process.

3.5. **Justification:** Whilst we have identified that this reform could potentially have a disproportionate impact on members of the judiciary who share protected characteristics relating to sex, age, gender, and disability, we are satisfied that this would not be unlawful because it is necessary to achieve the policy objective of ensuring that decisions on panel composition are made within the context of a reformed tribunal system, without the need to have regard to how panels were constituted prior to the unification of the tribunals, allowing a more forward-looking approach. The greater flexibility afforded under the new Composition Order will allow hearings to be dealt with more proportionately and will make sure that specialists are directed to the cases in which their input is most needed. In turn, this will help to streamline and make the tribunal service more efficient whilst continuing to provide a high quality user-focused tribunal service. In addition, user needs are likely to change in the future, particularly due to the advancement of digital technology and its use in the tribunal system. The change to the Composition Order will enable flexibility of panel composition to reflect these changing needs without any requirement to consider historical reasons for these arrangements.

### 3.6. ***Harassment and victimisation***

3.6.1. We do not consider there to be any risk of harassment or victimisation as a result of these proposals.

### 3.7. ***Advancing equality of opportunity***

3.7.1. The impact that these proposals might have on the duty to advance equality of opportunity by those who share a particular protected characteristic has been considered, and we believe that there may be a short-term impact.

3.7.2. Whilst we do not know at this stage the types or number of cases that will require multiple panel members or the way that they may be utilised, it is likely that the demand for specialist panel members or certain types of specialist panel members will decrease. If this happens, it may have an impact on the need for additional recruitment. This could result in a shortage of opportunities for individuals from more diverse backgrounds, in particular younger people, to enter the judiciary. We believe, that this would be offset through natural attrition as 55% of NLMs are above the age of 60, and therefore close to retirement age. The gradual departure of the older, less diverse age group, who are largely white (76% of over 60s) and male (63% of over 60s), will help to create a more balanced judiciary in terms of diversity. This will lead to a closer representation of the age, gender and ethnicity characteristics of the population as a whole. Furthermore, depending on the levels of future deployment of NLMs, natural attrition could potentially create a need for new recruitment.

### 3.8. ***Fostering good relations***

3.8.1. The removal of the need for the SPT to have consideration of historic panel composition arrangements could potentially enable more flexible utilisation of the specialist resource that is provided by NLMs and in turn help to foster good relations within the existing cadre of NLMs. Currently, NLMs are employed only in a specific Chamber, some of which have little diversity of protected

characteristics. However, if, for example, a decision is made to cross-deploy specialists across the FtT, not only would this enable NLMs to utilise their experience and specialisms more broadly, but it will help to create a more diverse pool of experts working together across the FtT.

#### **4. Mitigation**

- 4.1. The government recognises that there may be circumstances where specialist expertise will continue to be needed and the senior judiciary will retain the responsibility for deciding the circumstances under which NLMs should be deployed and what safeguards should be in place to make sure users are not disadvantaged.
- 4.2. As now, when making decisions under this new model the SPT will continue to have regard to the requirements set out in Section 2(3) of the TCE Act which provides that he must consider the need for Tribunals to be accessible;
  - 4.2.1. for proceedings before Tribunals to be fair and to be handled quickly and efficiently;
  - 4.2.2. for members of Tribunals to be experts in the subject matter of, or the law applied in cases in which they decide matters, and;
  - 4.2.3. to develop innovative methods of resolving disputes that are of a type that may be brought before Tribunals.
- 4.3. We invite the SPT to review the requirements across the FtT in consultation with the relevant tribunal judiciary before issuing any new Practice Directions. The SPT has an obligation to ensure that access to justice and the fairness of proceedings is maintained and we do not, therefore, expect these reforms to negatively impact tribunal users.
- 4.4. The proposed requirement that panel composition should be set by Practice Direction would act as an additional safeguard. The Lord Chancellor, who would be required to approve these Practice Directions, has a public sector equality duty as set out in Section 149 of the Equality Act 2010 and will make sure that any panel composition decided by the judiciary take into account impacts on equality and diversity.
- 4.5. The Government recognises that its equalities duty is an ongoing one. We welcome responses to the consultation and any comments relating to equality and diversity inform our equalities assessment. HMCTS will continue to monitor any impacts of any new Practice Direction following implementation.

#### **5. Summary**

- 5.1. Our assessment of the equality impacts is that this proposal will not result in any direct discrimination but could potentially indirectly impact NLMs who share certain protected characteristics, as described in Section 2.4. We are satisfied that the proposal is lawful as it is a necessary and proportionate means of achieving the policy aims set out in the consultation document.

- 5.2. The exact nature of any potential indirect impacts cannot be fully assessed until the decisions have been made as to the type and number of cases in which multiple panel members should be used and the way in which panel members might be deployed in future. As is the case currently, panel composition decisions will remain a judicial function.
- 5.3. The MoJ welcomes responses to the consultation questions and any comments around equality and diversity impacts will inform our ongoing equality assessment. Further, the consultation responses will be shared with the SPT to help in his determination of the appropriate panel arrangements. The MoJ and HMCTS recognise the ongoing equality duty and will continue to assess and monitor the implications of this policy on equality and diversity during and following implementation, and subsequent adjustments will be made as necessary.

## 6. Analysis

Table 1. Equalities split by Tribunal Chamber

		First Tier General Regulatory Chamber	First Tier Health Education and Social Care Chamber	First Tier Immigration and Asylum Chamber	First Tier Property Chamber	First Tier Social Entitlement Chamber	First Tier Tax Chamber	First Tier War Pensions and Armed Forces Compensation Chamber
<b>Total in post</b>		65	1,012	377	326	2,010	140	39
<b>Gender</b>	<b>Male</b>	71%	54%	62%	75%	49%	63%	72%
	<b>Female</b>	29%	46%	38%	25%	51%	37%	28%
<b>Ethnicity</b>	<b>White</b>	80%	75%	79%	29%	85%	44%	90%
	<b>Asian or Asian British</b>	5%	15%	8%	2%	7%	3%	0%
	<b>Black or Black British</b>	3%	1%	4%	1%	1%	1%	0%
	<b>Mixed</b>	0%	1%	2%	0%	1%	0%	0%
	<b>Any other background</b>	2%	4%	4%	0%	2%	1%	5%
	<b>Total BME</b>	9%	21%	19%	2%	11%	6%	5%
	<b>Unknown</b>	11%	4%	2%	69%	4%	50%	5%
<b>Age</b>	<b>Under 40</b>	0%	1%	2%	1%	7%	4%	0%
	<b>40-49</b>	15%	13%	15%	11%	17%	14%	10%
	<b>50-59</b>	26%	33%	38%	35%	30%	25%	23%
	<b>60 and over</b>	58%	53%	45%	53%	47%	57%	67%
<b>Salaried</b>	<b>Fee Paid</b>	98%	97%	76%	97%	95%	94%	95%
	<b>Salaried</b>	2%	3%	24%	3%	5%	6%	5%

**Source:** 2015 UK Tribunals Judicial Diversity Statistics by Jurisdiction - Gender, Ethnicity, Profession, Age and Payment Type, Courts and Tribunals Diversity Tables 2015, <https://www.judiciary.gov.uk/publications/judicial-statistics-2015>

**Table 2. Equalities split by NLM and Judges in First-tier Tribunal**

		FtT NLMs	FtT Judges (incl. Chamber Presidents)
<b>Total in post</b>		2,445	1,524
<b>Gender</b>	<b>Male</b>	55%	54%
	<b>Female</b>	45%	46%
<b>Ethnicity</b>	<b>White</b>	71%	83%
	<b>Asian or Asian British</b>	11%	4%
	<b>Black or Black British</b>	1%	2%
	<b>Mixed</b>	1%	1%
	<b>Any other back-ground</b>	2%	2%
	<b>Total BME3</b>	16%	9%
	<b>Unknown</b>	13%	8%
<b>Age</b>	<b>Under 40</b>	4%	4%
	<b>40-49</b>	12%	19%
	<b>50-59</b>	29%	36%
	<b>60 and over</b>	55%	41%
<b>Salaried</b>	<b>Fee Paid</b>	100%	83%
	<b>Salaried</b>	0%	17%

**Source:** Judicial Diversity Stats Tool, <https://www.judiciary.gov.uk/publications/judicial-statistics-2015>

**Table 3. Equalities split by First-tier tribunal, wider Judiciary and England and Wales population**

		First-tier Tribunal (Judges and NLMs)	All Judges & All NLMs	England and Wales population
<b>Total in post</b>		3,969	8,893	57,408,654
<b>Gender</b>	<b>Male</b>	55%	62%	49%
	<b>Female</b>	45%	38%	51%
<b>Ethnicity</b>	<b>White</b>	76%	78%	84%
	<b>Asian or Asian British</b>	9%	5%	7%
	<b>Black or Black British</b>	1%	1%	3%
	<b>Mixed</b>	1%	1%	2%
	<b>Any other back-ground</b>	2%	1%	1%
	<b>Total BME3</b>	14%	10%	14%
	<b>Unknown</b>	11%	12%	2%
<b>Age</b>	<b>Under 40</b>	4%	3%	50%
	<b>40-49</b>	15%	15%	14%
	<b>50-59</b>	32%	34%	13%
	<b>60 and over</b>	49%	48%	23%
<b>Salaried</b>	<b>Fee Paid</b>	94%	79%	N/A
	<b>Salaried</b>	6%	21%	N/A

**Sources:**

E&W Gender and Age

<http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/rel/pop-estimate/population-estimates-for-uk--england-and-wales--scotland-and-northern-ireland/mid-2014/rft---mid-2014-population-estimates-analysis-tool.zip>

E&W Ethnicity

<https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/ethnicity/articles/ethnicityandnationalidentityinenglandandwales/2012-12-11>

All judges & NLMs - Judicial Diversity Stats Tool,

<https://www.judiciary.gov.uk/publications/judicial-statistics-2015/>

First-tier Tribunal - Table 2.1, 2015 UK Tribunals<sup>1</sup> Judicial Diversity Statistics by Tier - Gender, Ethnicity, Profession, Age and Payment Type, Courts and Tribunals Diversity Tables 2015, <https://www.judiciary.gov.uk/publications/judicial-statistics-2015>