



Courts and Tribunals (Judiciary and Functions of Staff) Bill

House of Lords

Second Reading Briefing

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.
2. This briefing addresses the Courts and Tribunals (Judiciary and Staff) Bill,¹ ahead of the Second Reading in the House of Lords on 20 June 2018. Here, we outline our initial concerns regarding the changes proposed to the judiciary in Clause 1 and to the judicial functions of court and tribunal staff in Clause 3.
3. JUSTICE is broadly supportive of the changes proposed by the Bill. We are in favour of more flexible deployment of judges – indeed, a judiciary that is sufficiently diverse so as to be fit for purpose in 2018 and beyond. The Bill provides an opportunity to address judicial diversity explicitly.
4. Further, we have long advocated a greater role for case officers that would involve relieving judges from dealing with non-contentious matters. However, defining what role these officers hold needs careful thought. We would therefore suggest that those judicial functions delegated to court officers should be clearly delineated during the legislative process and not simply left to the Rule Committees to determine.²
5. JUSTICE is also concerned about what is absent from the current Bill, following the shelving of last year's Prisons and Courts Bill.³ We note the absence of measures to provide a legislative framework for increased use of online technology in the courts.⁴ We appreciate that the Lord Chancellor has described the Bill as part of an ongoing

All web links accessed 13 June 2018

¹ Courts and Tribunals (Judiciary and Functions of Staff) HL Bill (2017-19) 108.

² See Delegated Powers Memorandum for Courts and Tribunals (Judiciary and Functions of Staff) Bill, para 36. Our concerns are notwithstanding the “experience and expertise” of the Rule Committees.

³ Prisons and Courts HC Bill (2017-19) [145].

⁴ See Lord Chancellor and Lord Chief Justice, *Transforming our Justice System: Joint Statement* (White Paper), p. 6. The proposed introduction of online justice services forms a key plank of the reform programme.

programme of reforms,⁵ and that the Advocate General for Scotland stated in response to Court Modernisation that the Bill represented a “first step” in implementing the wider package of reform.⁶

6. We nonetheless regard this fragmentary approach as unsatisfactory. HMCTS is working at pace on the introduction of online justice services, with the civil money claims service made available to the public in April 2018 and the online divorce application procedure rolled out nationally in May 2018.⁷
7. In our briefing submitted ahead of the Second Reading of the Prisons and Courts Bill 2017,⁸ we made the case for clear principles underlying moves to online justice procedures – principles that would be enshrined in primary legislation:

The time is long overdue for the legal system to embrace technology in the way that other industries have...But we must ensure that it is done carefully and without generating more confusion or distress around the process. There are a number of principles that we consider must be included in primary legislation to ensure that written and online processes are undertaken appropriately, yet these are missing from the Bill. It leaves important detail to be decided by secondary legislation, or procedural rules without setting out the crucial parameters for effective and fair operation. JUSTICE urges Parliament to set out clear principles to guide the future of online court procedures, and modernisation of the courts more generally.

We look forward to seeing legislation brought forward as soon as possible to underpin the digital reform programme.

8. At present, we have no concerns regarding Clause 2 (“Alteration of judicial titles”), which strikes us as predominantly an issue of nomenclature.

⁵ See House of Commons, ‘Written Statement: Courts Update’, 23 May 2018, HCWS715.

⁶ HL *Hansard*, 6 June 2018, col. 1305.

⁷ See David Young, ‘Transforming Civil Justice – latest developments from Civil Money Claims testing’ (*HMCTS blog*, 19 October 2017) <https://insidehmcts.blog.gov.uk/2017/10/19/transforming-civil-justice-latest-developments-from-civil-money-claims-testing/>; Adam Lennon, ‘Online divorce application: national rollout will be just the beginning’ (*HMCTS blog*, 8 May 2018) <https://insidehmcts.blog.gov.uk/2018/05/08/online-divorce-application-national-rollout-will-be-just-the-beginning/>.

⁸ JUSTICE, ‘Prisons and Courts Bill House of Commons Second Reading: Briefing’ (March 2017) available online at <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2017/04/JUSTICE-briefing-Prison-and-Courts-Bill.pdf>, p. 3.

Clause 1 – Deployment of judges

9. Clause 1 of the Bill provides for more flexible deployment of Deputy High Court judges (“DHCJs”), tribunal judges, Recorders and judge-arbitrators. JUSTICE supports the efficient use of judicial resources and the modernisation of the judiciary generally.
10. Modernisation of the judiciary provides an opportunity for the Government to address the pressing need for greater judicial diversity.⁹ Cross-deployment of judges cannot be regarded as a truly modernising step if it merely serves to reshuffle the existing group of predominantly white, male judges. As explored in our Working Party’s *Increasing Judicial Diversity* report,¹⁰ there is an unacceptable lack of women, people from visible ethnic minorities and those from less advantaged socio-economic backgrounds on the bench. In today’s society it is difficult to justify or explain a senior judiciary which so obviously does not reflect the make-up of the nation. The lack of judicial diversity thus remains a vital constitutional issue requiring urgent systemic change.
11. JUSTICE has found that the introduction of an “upward” career path for judges has appreciable benefits for diversity.¹¹ Broadly, it is recommended that lawyers should, at a relatively early stage in their career, be able to take up a salaried entry-level judicial position, with a realistic prospect of eventually joining the Circuit or High Court bench. Although direct entry of experienced practitioners would continue, they would no longer have a virtual monopoly.
12. Our Judicial Diversity Working Party acknowledged that cross-deployment might go towards such a career path: with proper continuous professional development and support, bright judges from all backgrounds might be cross-deployed from their primary appointment (e.g. as a Family District Judge) to a completely different area

⁹ See JUSTICE Working Party Report, *Increasing Judicial Diversity* (JUSTICE, 2017) available at <https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2017/04/JUSTICE-Increasing-judicial-diversity-report-2017-web.pdf>.

¹⁰ *Ibid.*, Introduction.

¹¹ *Ibid.*, Chapter V generally and, in particular, paras 5.2-5.4.

(e.g. the Tax chamber). The Working Party welcomed existing pilot programmes cross-deploying people from the tribunals to the courts, and strongly supported their expansion.¹²

13. We are heartened that the Delegated Powers Memorandum for the Bill suggests that Clause 1 “makes provision enabling more flexible development of the judiciary including across jurisdictions, allowing judges to gain experience of different types of cases, which helps with their career progression”.¹³
14. However, the Bill and the Explanatory Notes are silent on judicial career paths. The policy aim of cross-deployment is articulated as one of “allowing the judiciary to be deployed flexibly to meet the demands of a reformed courts and tribunals service”.¹⁴ This is in itself understandable. However, the opportunity for greater diversity will not be realised unless this too is made an explicit aim – an aim against which the Bill’s success may then be measured.
15. One way in which this might be achieved is to couple broader cross-deployment with the introduction of an inclusive “Talent Management Programme” (TMP).¹⁵ This would involve a concerted, coordinated initiative aimed at encouraging and promoting talented First-tier Tribunal and District judges, so as to improve their chances of progressing up the judicial ladder. The idea would be to encourage and identify, from a very large talent base, people with the intellect and potential to join the senior judiciary in due course and, through sponsorship and training, realise that potential. Cross-deployment would then enable those on the programme to amass the evidence needed for applications to the senior judiciary.
16. With a coordinated approach, and without significant statutory change, it is possible for deployment of judges to be a powerful tool to advance the careers of judges from groups that are underrepresented – notably, women and BAME people.

¹² Ibid., para 5.16.

¹³ Delegated Powers Memorandum for Courts and Tribunals (Judiciary and Functions of Staff) Bill, para 3.

¹⁴ Explanatory Notes for Courts and Tribunals (Judiciary and Functions of Staff) Bill, para 6.

¹⁵ JUSTICE, *Increasing Judicial Diversity*, *supra*. n. 9, paras 5.10; 5.16 and recommendation 23 (p. 79).

17. Finally, we consider that the Government should publish the internal analyses on which its proposals for fixed-term appointments for Recorders and DHCJs were based. JUSTICE would welcome a transparent, robust and evidence-based analysis that focuses on Recorders and Deputies specifically. The Government's consultation paper indicated, for example, that Recorders currently average 21 years in office. The effects on diversity are obvious.¹⁶
18. We welcome Government support of improving diversity amongst the judiciary, and trust that it agrees that the flexible deployment of judges presents an opportunity to do so.

Clause 3 – Organisation and functions of courts and tribunals

19. The purpose of Clause 3 and the Schedule is articulated in the Explanatory Notes accompanying the Bill as follows:

The Bill makes a general provision so that all rules of court governed by the CA 2003 will have the power to provide for the exercise of "relevant judicial functions", the functions of the court, or of any judge of the court. A similar power already exists in tribunals (specifically relating to functions of the FtT and UT). The Bill introduces safeguards for these authorised staff across the jurisdictions (all courts, and the tribunals) to make sure that, amongst other things, they have the necessary independence to undertake judicial functions under the supervision of the judiciary. The Lord Chief Justice and the Senior President of Tribunals will be ultimately responsible for the authorisation and direction of these members of staff.¹⁷

20. Therefore, while the provisions seek to introduce various protections, insulating court officers from professional liability and safeguarding their independence, they also anticipate an expansion of the role; in particular, that all court staff may "exercise judicial functions where procedure rules so provide" (Clause 3(1)(b)).

¹⁶ We note the caveat in Equality Statement: Flexible deployment of the judiciary and judicial titles measures, para 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". Nonetheless, we would caution against an approach that confers opportunities to Recorders ahead of other categories of judges.

¹⁷ Explanatory Notes for Courts and Tribunals (Judiciary and Functions of Staff) Bill, para 10.

Indeed, this is the stated aim in the White Paper, which envisages an increase in the routine judicial work undertaken by ‘case officers’.¹⁸ We appreciate that such an increase is intended to free up judicial time to focus on core judicial functions rather than routine administrative matters.¹⁹

21. This development is broadly in line with JUSTICE’s own recommendations. In our report *Delivering Justice in an Age of Austerity* our Working Party recommended greater use of “legally qualified and suitably trained registrars”.²⁰ Registrars would undertake active case management and dispute resolution functions. The Working Party stressed that these staff would need proper training, but in the long term they would save time and money. Registrars would free up judicial time, so that judges could focus on hearings. Crucially, our Working Party stated that all registrars’ decisions “should be subject to a right of appeal to a judge”.²¹
22. Lord Justice Briggs’s *Final Civil Courts Structure Review*, published following JUSTICE’s *Austerity* report, similarly advocated greater use of what Briggs called “Case Officers”, which were very similar to JUSTICE’s proposals for “Registrars”.²² (Indeed, we accept that “case officers” may well serve as the preferable term). Case officers would assist with *certain* judicial functions, e.g. non-contentious matters, and they would be trained and supervised by judges. Lord Justice Briggs recommended that the decisions of Case Officers could be subject to reconsideration by judges on request by a party.
23. Further, Sir Brian Leveson’s Review of Efficiency in Criminal Proceedings stresses that the role of case officers should be to “enhance the efficiency of the

¹⁸ *Transforming our Justice System: Joint Statement*, p. 6.

¹⁹ See Courts and Tribunals (Judiciary and Functions of Staff) Bill Factsheet: Authorised Court and Tribunal Staff: legal advice and judicial functions (May 2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710515/C_TJFS-factsheet-authorised-staff.pdf para 2.

²⁰ JUSTICE Working Party Report, *Delivering Justice in an Age of Austerity* (JUSTICE, 2015) available at <http://2bqk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/04/JUSTICE-working-party-report-Delivering-Justice-in-an-Age-of-Austerity.pdf> para 2.2.

²¹ *Ibid.*, para 2.36.

²² Lord Justice Briggs [as he then was], *Civil Courts Structure Review: Final Report* (July 2016), chap 7.

administrative aspects of case progression” [emphasis added].²³ We are heartened that the Government has, at least in general terms, taken both reports into account in drafting the new Bill.

24. As with the corresponding provisions in the 2017 Prisons and Courts Bill,²⁴ JUSTICE is concerned about the fact that the remit of – and qualifications required for – the envisaged expanded role are being left to Rule Committees.²⁵

25. For example, the “factsheet” accompanying the current Bill makes the following suggestions as to those functions that might be exercised by court staff:

*[I]n future, we expect that authorised staff will be able to carry out a range of functions and responsibilities, including case management powers and some mediation roles. These will be characterised as **interlocutory or preparatory in nature**, such as issuing a summons; taking pleas; extending time for service of (various) applications; or considering applications for variations of directions made in private or public law cases. **They are unlikely to involve contested matters**. Decisions on which judicial functions authorised staff may exercise will be made by the relevant procedure rule committee.*²⁶ [emphasis added]

26. We are concerned about the potential complexity of some of the functions anticipated for case officers in the extract above. Extending time for service and taking pleas, as examples, may well give rise to contested matters, and will likely have crucial consequences for a litigant’s case. Indeed, Sir Brian stated that the first hearing in a criminal case “requires strong judicial intervention. ...setting the agenda for a case is the work of the judiciary”.²⁷

27. By contrast, our Working Party on appeals in the immigration and asylum system has considered how this function is realised in that jurisdiction. In particular, the

²³ Rt. Hon Sir Brian Leveson, President of the Queen’s Bench Division, *Review of Efficiency in Criminal Proceedings* (2015) para 117.

²⁴ Prisons and Courts Bill Clause 50; schedule 11. See JUSTICE, ‘Prisons and Courts Bill House of Commons Second Reading: Briefing’ (March 2017), paras 25-29. See also Bar Council, Prisons and Courts Bill House of Commons Second Reading (20 March 2017), para 6.4.

²⁵ See Delegated Powers memo, p. 1.

²⁶ See Courts and Tribunals (Judiciary and Functions of Staff) Bill Factsheet: Authorised Court and Tribunal Staff: legal advice and judicial functions (May 2018), *supra*. n. 19, para 9.

²⁷ Leveson, para 102.

Working Party has noted the essential role played by tribunal case workers in identifying whether there has been compliance with directions as to submission of documents to the tribunal and acting as a sift by identifying poorly-prepared cases.²⁸ Identifying vulnerable appellants, and assisting litigants in person are further supportive roles that we consider case officers could provide.

28. This illustrates the importance of providing red lines as to what is an appropriate function for a case officer. In our view, the delimiting of case officers' functions to non-contentious issues is vital, given the starting point that "the adversarial process practised in this country [is] that Judges are arbiters or umpires".²⁹ Further, Lord Briggs's report outlines "the general concern that Case Officers (even if legally qualified and trained) will not without the benefit of judicial experience be able to deliver the same quality of service in the performance of functions currently carried out by judges".³⁰ Lord Briggs further identifies "a real concern about how to identify a clear dividing line between straightforward case management decisions, suitable to be made by Case Officers, and case management of the more complex type, properly regarded as a judicial art".³¹
29. We appreciate that defining what is and what is not a contentious issue is a delicate exercise. Nonetheless, we consider that it is possible to draw red lines. JUSTICE's *Delivering Justice in an Age of Austerity* report gave examples of where a case officer/registrar would be required to seek judicial intervention: "cases raising complex legal and factual issues, cases requiring oral evidence, potential test cases, or cases requiring interpretation of legislation or policy".³² At the very least, the Rule Committees would benefit from an indication from the Minister as to what would not be appropriate for a case officer to perform, in any jurisdiction.

²⁸ JUSTICE Working Party Report, *Immigration and Asylum Appeals: A Fresh Look* (forthcoming). The report will be launched 2 July 2018; we can provide further details at that stage.

²⁹ Leveson, para 280.

³⁰ Briggs, *Civil Courts Structure Review: Final Report*, para 7.5.

³¹ *Ibid.*, para 7.6.

³² JUSTICE Working Party Report, *Delivering Justice in an Age of Austerity* (JUSTICE, 2015), *supra* n. 20, para 2.23.

30. With regard to qualifications for authorised court staff, the current Bill similarly gives insufficient detail as to what might be required. We see no reason why qualifications cannot be specified within the Bill. The current s. 27 of Courts Act 2003, where: “a person may be designated as a justices' clerk only if he — (a) has a 5 year magistrates' court qualification” serves as a model for how qualification requirements might be enshrined in primary legislation. However, this is set to be replaced by the proposed new s.28(3)(b) of Courts Act 2003, proposed in the Schedule at paragraph 14, which specifies that those qualifications required of court officers will be prescribed in regulations (subject only to negative resolution procedure) made by the Lord Chancellor with the agreement of the Lord Chief Justice. Though we make no comment on the appropriateness of the qualification requirement itself in the existing legislation, the shift from primary legislation into regulations, without any indication of the required expertise in primary legislation, is unhelpful.
31. Lord Briggs's report gives a helpful indication of the level of qualification that may be desirable: “In my view the relevant legal qualification should be that of a law degree or equivalent. By 'equivalent' I mean something like (but not limited to) the qualification of solicitor or barrister. I would also recommend a requirement for some practical experience in the law, and ideally in litigation...”³³ However, we recognise that currently court officers perform a broad spectrum of roles, some which in our view require legal qualification and others administrative skills.
32. Tasking Rule Committees with defining the scope of judicial functions that authorised court staff may exercise, and the qualifications required for them to do so, means that such decisions will be made without Parliamentary scrutiny. Given that these decisions will have to be made at some point, JUSTICE believes that the appropriate route would be for Parliament to provide, at the very least, a framework for what this variety of roles should at a minimum contain.
33. We are aware that the MoJ intends to provide policy guidance on this issue at Committee Stage, and we look forward to seeing it.

³³ Briggs, *Civil Courts Structure Review: Final Report* (July 2016), para 7.27.

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