



Courts and Tribunals (Judiciary and Functions of Staff) Bill

House of Lords

Committee Stage

Briefing and Suggested Amendments

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Summary

- **Clause 1 of the Bill provides an opportunity for the Government to address the pressing need for greater judicial diversity.**
- **The scope of judicial functions delegated to court staff in Clause 3, and the qualifications required for the exercise of such functions, should be clearly delineated during the legislative process and not simply left to the Rule Committees to determine.**

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 Committee Stage in the House of Lords on 10 July 2018.
3. In advance of the Bill's Second Reading on 20 June, we provided a briefing that outlined our concerns regarding the changes proposed to the judiciary in Clause 1 and to the judicial functions of court and tribunal staff in Clause 3.² This update includes tabled amendments relevant to those concerns.
4. As set out in our initial briefing, 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.
5. 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

All web links accessed 13 June 2018

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

² JUSTICE, 'Courts and Tribunals (Judiciary and Functions of Staff) Bill: Second Reading Briefing' (June 2018) available online at <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/JUSTICE-Courts-and-Tribunals-Briefing-HL-Second-Reading.pdf>.

judicial functions delegated to court officers should be clearly delineated during the legislative process and not simply left to the Rule Committees to determine.³

6. A number of amendments tabled address these two concerns directly, which we detail below. We invite members of the House to support them.

Clause 1 – Deployment of judges

Amendment 1 (Baroness Chakrabarti and Lord Beecham)

After Clause 1, insert the following new Clause—

“Report on availability of judicial training to support deployment

- (1) Within twelve months of the coming into force of section 1, the Lord Chancellor must publish a report on the availability of the judicial training necessary to enable judges to be deployed more flexibly.
- (2) The report under subsection (1) must be laid before each House of Parliament.”

Amendment 2 (Lord Marks of Henley-on-Thames and Lord Beith)

After Clause 1, insert the following new Clause—

“Report on the impact of the provisions under section 1 on the diversity of the judiciary

- (1) The Secretary of State must carry out an assessment of the impact of the provisions under section 1 of this Act on the diversity of the judiciary.
- (2) This assessment must make reference to whether increasing flexibility in the deployment of judges has had an impact on the diversity of the judiciary.
- (3) The Secretary of State must lay a report of the assessment before both Houses of Parliament within one year of this Act passing.”

7. 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.

8. Modernisation of the judiciary provides an opportunity for the Government to address

³ 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.

the pressing need for greater judicial diversity.⁴ 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. Lord Marks' amendment would ensure that the links between cross-deployment and judicial diversity are better understood, and that diversifying the judiciary is given the parliamentary attention it warrants.

9. As explored in our Working Party's *Increasing Judicial Diversity* report,⁵ 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.
10. JUSTICE has found that the introduction of an "upward" career path for judges has appreciable benefits for diversity.⁶ 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.
11. 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 (e.g. the Tax Chamber of the First Tier Tribunal). The Working Party welcomed existing pilot programmes cross-deploying people from the tribunals to the courts, and strongly supported their expansion.⁷

⁴ See JUSTICE Working Party Report, *Increasing Judicial Diversity* (JUSTICE, 2017) available at <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2017/04/JUSTICE-Increasing-judicial-diversity-report-2017-web.pdf>.

⁵ *Ibid.*, Introduction.

⁶ *Ibid.*, Chapter V generally and, in particular, paras 5.2-5.4.

⁷ *Ibid.*, para 5.16.

12. 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”.⁸
13. 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”.⁹ 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. Lord Marks’ amendment would serve to fulfil this objective.
14. Baroness Chakrabarti’s amendment, proposing regular reporting on the availability of judicial training, would further support a culture of judicial career paths and we urge members of the House to support it.

Clause 3 and the Schedule – Organisation and functions of courts and tribunals

Amendment 3 (Baroness Chakrabarti and Lord Beecham)

Page 3, line 24, leave out subsection (3) and insert—

“() A statutory instrument containing regulations under this section may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.”

Amendment 4 (Baroness Chakrabarti and Lord Beecham)

After Clause 3, insert the following new Clause—

“Review of the delegation of legal advice and judicial functions to authorised staff

⁸ Delegated Powers Memorandum for Courts and Tribunals (Judiciary and Functions of Staff) Bill, para 3.

⁹ Explanatory Notes for Courts and Tribunals (Judiciary and Functions of Staff) Bill, para 6.

(1) Within the period of three years from the coming into force of this Act, the Lord Chancellor must arrange for a review to be undertaken on the impact of the implementation of the provisions contained within section 3 and the Schedule to this Act.

(2) A report setting out the findings of the review must be laid before both Houses of Parliament.”

Amendments 5-7 (Baroness Chakrabarti and Lord Beecham)

The Schedule –

Page 6, line 36, at end insert—

“() is a qualified solicitor, barrister or chartered legal executive with more than three years’ experience post- qualification, and”

Page 8, line 31, at end insert—

“() is a qualified solicitor, barrister or chartered legal executive with more than three years’ experience post- qualification, and”

Page 10, line 28, at end insert

“and if they are a qualified solicitor, barrister or chartered legal executive with more than three years’ experience post-qualification.”

Amendment 8 (Baroness Chakrabarti and Lord Beecham)

The Schedule –

Page 10, line 33, at end insert—

“() No authorisation under subsection (2) shall include the power to—

- (a) make an order of the court which is opposed by one or more party,
- (b) make any order of the court in a civil claim with a value of more than £25,000,
- (c) make any order of the court with a penal notice or power of arrest,
- (d) make any order of the court in a matter in which one or more parties lack capacity as defined in section 2(1) of the Mental Capacity Act 2005,
- (e) make any order of the court in a matter in which one or more witnesses are a vulnerable witness as defined in section 16(1) of the Youth Justice and Criminal Evidence Act 1999,
- (f) make any order of the court under section 37 of the Senior Courts Act 1981 for an injunction, including any freezing order,
- (g) make any order of the court, referred to as a “search order”, under section 7 of the Civil Procedure Act 1997,
- (h) make any order of the court as to costs,
- (i) make any order of the court concerning expert evidence,
- (j) take a plea from a defendant in criminal proceedings, or
- (k) make any other determination which is dispositive of the cause.”

Amendment 9 (Baroness Chakrabarti, Lord Beecham and Lord Marks)

Page 11, line 8, at end insert—

“67BA Right to judicial reconsideration of decision made by an authorised person

A party to any decision made by an authorised person in the execution of the person’s duty as an authorised person exercising a relevant judicial function, by virtue of section 67B(1), may apply in writing, within 14 days of the service of the order, to have the decision reconsidered by a judge of the relevant court within 14 days from the date of application.”

Amendment 10 (Baroness Chakrabarti and Lord Beecham)

The Schedule –

Page 18, line 9, at end insert—

- “() No authorisation under this paragraph shall include the power to make—
- (a) any order of the tribunal which is opposed by one or more party,
 - (b) any order of the tribunal in a civil claim with a value of more than £25,000,
 - (c) any order of the tribunal with a penal notice or power of arrest,
 - (d) any order of the tribunal in a matter in which one or more parties lack capacity as defined in section 2(1) of the Mental Capacity Act 2005,
 - (e) any order of the tribunal in a matter in which one or more witnesses are vulnerable witnesses as defined in section 16(1) of the Youth Justice and Criminal Evidence Act 1999,
 - (f) any order of the tribunal for an injunction,
 - (g) any order of the tribunal as to costs,
 - (h) any order of the tribunal concerning expert evidence, or
 - (i) any other determination which is dispositive of the cause.”

Amendment 11 (Baroness Chakrabarti and Lord Beecham)

The Schedule –

Page 18, line 26, at end insert—

“() A party to any decision made by an authorised person in the execution of the person’s duty as an authorised person exercising functions of a tribunal, by virtue of paragraph 3 of Schedule 5, may apply in writing, within 14 days of the service of the order, to have the decision reconsidered by a judge of the relevant tribunal within 14 days from the date of the application.”

15. 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.¹⁰

16. 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)). Indeed, this is the stated aim in the White Paper, which envisages an increase in the routine judicial work undertaken by ‘case officers’.¹¹ We appreciate that such an increase is intended to free up judicial time to focus on core judicial functions rather than routine administrative matters.¹²
17. 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”.¹³
18. However, as with the corresponding provisions in the 2017 Prisons and Courts Bill,¹⁴

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

¹¹ *Transforming our Justice System: Joint Statement*, p. 6.

¹² 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.

¹³ JUSTICE Working Party Report, *Delivering Justice in an Age of Austerity* (JUSTICE, 2015) available at <http://2bqk8cdew6192tsu41lay8t.wengine.netdna-cdn.com/wp-content/uploads/2015/04/JUSTICE-working-party-report-Delivering-Justice-in-an-Age-of-Austerity.pdf> para 2.2.

¹⁴ 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.

JUSTICE is concerned about the fact that the remit of – and qualifications required for – the envisaged expanded role are being left to Rule Committees.¹⁵

19. 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.*¹⁶ [emphasis added]

20. 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 Leveson 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”.¹⁷

21. 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”.¹⁸ Further, Lord Briggs’s Final 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”.¹⁹

¹⁵ See Delegated Powers memo, p. 1.

¹⁶ 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.

¹⁷ Rt. Hon Sir Brian Leveson, President of the Queen’s Bench Division, *Review of Efficiency in Criminal Proceedings* (2015), para 102.

¹⁸ Leveson, para 280.

¹⁹ Lord Justice Briggs [as he then was], *Civil Courts Structure Review: Final Report* (July 2016), para 7.5.

22. We therefore welcome Baroness Chakrabarti's amendments 8 and 10, which delimit the judicial functions that court staff will be able to exercise under the new Clause 3. Crucially, amendment 8 ensures that only a judge may take a plea in criminal proceedings, and both amendments ensure that it will be judges who make those determinations "which [are] dispositive of the cause".
23. We appreciate that defining what is and what is not a contentious issue is a delicate exercise. Recognising this, we also welcome Baroness Chakrabati's amendments 9 and 11, which provide for the "right to judicial reconsideration of a decision made by an authorised person". Such a mechanism will ensure proper judicial oversight of those determinations that appear at first glance to be non-contentious but materialise to be otherwise. JUSTICE regards the 14-day time limit outlined in the amendment to be appropriate and in line with equivalent procedural rules.
24. With regard to qualifications for authorised court staff, the current Bill gives insufficient detail as to what might be required. We see no reason why qualifications cannot be specified within the Bill. Lord Briggs's report gave 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..."²⁰
25. In light of Lord Briggs's guidance, and the need for further clarity in the Bill, we support Baroness Chakrabarti's amendments 5-7, ensuring that those court staff authorised to perform judicial functions (as well as those giving legal advice to judges and magistrates) have appropriate legal qualifications. However, we recognise that currently court officers perform a broad spectrum of roles, some of which in our view require legal qualification and others may be described as more administrative tasks.
26. 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

²⁰ Briggs, *Civil Courts Structure Review: Final Report* (July 2016), para 7.27.

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.

27. Baroness Chakrabarti's amendments 3 and 4 go a long way to ensuring that Parliament has proper ongoing scrutiny of these arrangements, irrespective of whether Parliament or Rule Committees delineate the scope and qualification of the role, and we urge members to support these.

JUSTICE

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