

Courts and Tribunals (Judiciary and Functions of Staff) Bill

Policy Statement

Power for rules of court to determine which judicial functions may be exercised by authorised staff and to set out the qualifications or experience required

Relevant Provisions

1. Clause 3 and the Schedule to the Bill, which introduce new sections 67A to F of the Courts Act 2003 (CA 2003).
2. In particular, new section 67B(1) CA 2003 introduces a power for rules of court to provide for the exercise of “relevant judicial functions” by Her Majesty’s Courts and Tribunals Service (HMCTS) staff. Staff exercising such functions are referred to in the legislation and in this statement as “authorised persons” or “authorised staff”, as the legislation requires that a member of court or tribunal staff may only exercise judicial functions if authorised to do so by the Lord Chief Justice (or his nominee).

Policy Intent

3. The policy intention is to improve efficiency within the courts service by diverting judges’ time from routine tasks to allow them to focus their time and expertise on more complex matters before them. The Courts and Tribunals (Judiciary and Functions of Staff) Bill seeks to achieve this by providing for court and tribunal staff, who are suitably qualified and experienced, to be authorised to exercise judicial functions.

Delegation of Power

4. The Bill provides the power for the exercise of “relevant judicial functions”¹ by authorised staff to rules of court. A similar power already exists for some court jurisdictions². This Bill provides for a consistent power across the court jurisdictions, amending or repealing existing powers as necessary. The legislation also provides that requirements on qualifications or experience for authorised staff may be specified in the rules.
5. Within the tribunals system, paragraph 3 of Schedule 5 to the Tribunals, Courts and Enforcement Act 2007 currently enables Tribunal Procedure Rules to provide for functions of the First-tier Tribunal or Upper Tribunal to be exercised by staff and also provide for the qualifications and experience of such staff. This power will remain for the Tribunal Procedure Rules and be extended to other jurisdictions as appropriate.
6. This delegation of power is, in effect, a delegation to the independent procedure rule committees, which make the jurisdictional rules of court, to determine:
 - which judicial functions authorised staff may or may not exercise (each Committee will determine this for the jurisdiction for which they are responsible);
 - which qualifications and what experience these staff will need to have to exercise certain functions; and
 - any other provision to enable these measures that the Committees may wish to make.
7. A member of court or tribunal staff who meets the criteria set out in the relevant procedure rules as to qualifications or experience will not automatically be able to exercise any functions that may be set out in the rules. The legislation requires that staff must be

¹ ‘Relevant judicial functions’ in the courts are (a) functions of a court to which the general duty of the Lord Chancellor under section 1 of the CA 2003 applies and (b) a judicial function of a person holding an office that entitles the person to exercise functions of such a court.

² See, for example, paragraph 2 of Schedule 1 to the Civil Procedure Act 1997 (power for Civil Procedure Rules) and section 76(2) of the Courts Act 2003 (power for Family Procedure Rules) and s.49 Crime and Disorder Act 1998.

authorised to exercise those functions by the Lord Chief Justice (see new section 67B(2) CA 2003) (or his nominee).

Procedure Rule Committees

8. The Criminal Procedure Rule Committee, Family Procedure Rule Committee and Civil Procedure Rule Committee make rules pertaining to their jurisdiction, independently from one another. Each is comprised of members who are representatives for their respective jurisdictions. Each Committee is independent of government.
9. Each procedure rule committee has a statutory requirement to consult any persons it considers appropriate. Rules must be signed by a majority of the members of the Committee and submitted to the Lord Chancellor to allow or disallow the Rules. If the Lord Chancellor disallows the Rules then he must give written reasons to the Committee for doing so. Where he allows the amendments, the Rules are made by statutory instrument and subject to the negative resolution procedure in Parliament.

How will this work in practice?

10. The procedure rule committees will prescribe in rules the functions that authorised staff may, or may not, exercise and the qualifications and experience they will need. The Committees will decide whether any consultation will be required for rules setting out which functions authorised staff may, or may not, exercise and the appropriate pace of change. The rules could set out an inclusionary (listing out permitted functions) or exclusionary (listing exceptions to a range of functions) approach. Whichever approach is adopted, we anticipate that the Committees will set the **parameters and limits** on what functions staff may or may not exercise before other factors such as qualifications and authorisation become applicable.
11. For example, in the criminal jurisdiction, the Criminal Procedure Rule Committee could determine that authorised members of HMCTS staff may make minor variations to bail conditions, and so it would make Rules to that effect. However, it could also put such limits or parameters around the exercise of this function as it feels necessary, such as excluding circumstances where changes would raise safety or security issues, or requiring that only staff who are legally qualified may exercise this function.
12. With those parameters in place, staff who meet the **qualifications and experience criteria** in the rules will need to be authorised by the Lord Chief Justice (or his nominee) before they can exercise any of the functions set out in the relevant rules.
13. In practice, authorisation of individual members of staff will not be a 'one-off' event, rather we expect that over time, staff may work through an **authorisation process**, to become authorised in different sets of functions or areas, as necessary to carry out a particular role³ and alongside any required training.
14. We expect that the procedure rule committees will take the outcomes of the 'Judicial Ways of Working' consultation into consideration when developing rules around functions and associated qualification requirements for authorised staff. We also expect that the rule committees will regularly review the exercise of functions by authorised staff.

Training

15. Training will be assessed on appointment and may vary between individuals depending on their existing experience, knowledge and skills. The combination of experience and qualifications will be highly relevant. We do not expect legal qualifications to necessarily

³ HMCTS will create particular roles for authorised court staff, which will entail the exercise of certain functions. Both the roles, and grouping of functions (as the relevant committee determines may be exercised by an authorised person) therein, will vary in accordance with the qualifications and experience of the staff in those roles.

be required for all the different types of judicial functions that authorised staff will carry out. In the First-tier and Upper Tribunals, for example, there are three tiers of staff who are authorised to exercise different judicial functions. The most basic functions (for example, issuing standard directions at the commencement of a case) can be carried out by authorised staff members in some chambers. Slightly more complex functions are undertaken by caseworkers, and the most complex of the delegated functions are generally reserved to registrars, who are legally qualified. This may be replicated in other jurisdictions, so that different levels of staff will qualify to exercise different types of functions. However, this will be for the procedure rule committees to determine in relation to the functions they set out in the rules.

16. The authorisation process is being designed with the judiciary, alongside principles for the judicial supervision of authorised staff.
17. We expect that there will be some simple functions that a trusted member of staff could be authorised to carry out quite quickly, in each of the jurisdictions. For more complex functions judges, depending on the jurisdiction, will determine when they feel a member of staff is ready to be authorised.
18. Thereafter, authorised staff will remain under the **supervision** of the judiciary. The judiciary will make the decision as to whether an individual should be authorised to undertake specific responsibilities. There will be periodic reviews to oversee the quality of the work undertaken, depending on the level of staff and the nature of the tasks performed. Supervision will not mean that the judiciary will check every piece of work when they authorise staff to perform specific functions. The judiciary must be confident with the quality of decision-making. The legislation provides that an authorisation granted to a member of staff may be subject to conditions and may be varied or revoked by the Lord Chief Justice (or his nominee) (see new section 67B(4) CA 2003) at any time.
19. The Lord Chief Justice can nominate a judicial office holder or member of HMCTS staff to carry out his authorisation function. Such a person is referred to here as a 'nominee'. We anticipate that a number of judges, and in time, senior HMCTS lawyers, will be nominated to do this on behalf of the Lord Chief Justice. Importantly, the Bill provides statutory independence for HMCTS staff when carrying out the authorisation function.⁴ The person who has the power to authorise a member of staff will not necessarily be the same person that the member of staff works alongside to establish confidence in their decision-making; however authorisations will only take place with assurance of competence and evidence of qualifications.
20. Importantly, these provisions do not mean that authorised court and tribunal staff must and will always undertake the functions that they are qualified and authorised to exercise. There will be situations and cases in which a judge may wish to reserve all decisions – including the most straightforward and routine - and nothing in these provisions prevents them from doing so or compels them to make use of authorised staff who may be at their disposal.

Are there any judicial functions that authorised court staff exercise currently?

21. The power in the Bill for rules of court to set out the functions which authorised staff may exercise, will build on and expand the responsibilities currently able to be exercised by

⁴ A member of HMCTS staff nominated to carry out the authorisation and direction functions of the Lord Chief Justice is not subject to the direction of any other person other than the Lord Chief Justice or a judicial office holder nominated by the Lord Chief Justice, when exercising the functions. See new s.310(7) Matrimonial and Family Proceedings Act 1984 and new ss. 28(6), 29(4), 67B (6) and 67C (4) Courts Act 2003.

court staff. There are different authorised staff roles in each jurisdiction. Examples of the type of work currently conducted by court staff are set out below.

22. In the **civil jurisdiction**, legal advisers of the County Court (who are barristers or solicitors) have the authority, at present, to perform the functions that are set out in practice direction 2E⁵. Their responsibilities include:

- Rectifying a procedural error.
- Extending time for service of the claim form.
- Adding or substituting a party to the proceedings.
- Setting aside default judgments.
- Staying proceedings or extending the period of a stay.
- Ordering interim payments.
- Issuing judgments or orders in terms agreed.

These are all routine case management functions and are often confined only to cases where all parties consent. Legal advisers do not make decisions that represent a final determination, and a party may request a reconsideration of any decision of a legal adviser within 14 days of being served a notice of that decision.

23. In the **magistrates' courts** and the **family court**, judicial functions can be undertaken by the justices' clerk or assistant justices' clerk. A justice's clerk must have a five-year magistrate's court qualification, or be a barrister or solicitor who has served no less than five years as an assistant justices' clerk. The qualifications required by assistant justices' clerks are (in broad terms) that they have qualified as barristers or solicitors or passed the necessary exams for either of those professions.

24. The range of functions performed by justices' clerks and assistant justices' clerks is wide ranging and is set out in the Justices Clerks' Rules 2005⁶ and Justices' Clerks and Assistants Rules 2014⁷. Their duties within the **magistrates' courts** and the **family court** include, but are not limited to:

- The issue of any summons, including a witness summons
- The issue of a warrant of arrest
- The request of a pre-sentence report following a guilty plea
- The remitting of an offender to another court for sentence
- The issue of a warrant of distress
- The allowing of further time for payment of a sum enforceable by a magistrates' court
- The making of a transfer of fine order under section 89 of the Magistrates' Courts Act 1980
- Giving, varying or revoking directions in the Family Court, in accordance with the Justices' Clerks and Assistant Rules 2014
- Making orders in the Family Court, in accordance with the Justices' Clerks and Assistants Rules 2014
- Requesting welfare reports under section 7 of the Children Act 1989
- Joining parties to proceedings

⁵ <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part02/practice-direction-2e-jurisdiction-of-the-county-court-that-may-be-exercised-by-a-legal-adviser>

⁶ https://www.legislation.gov.uk/uksi/2005/545/pdfs/uksi_20050545_en.pdf

⁷ <https://www.legislation.gov.uk/ukdsi/2014/9780111108888>

What functions might authorised court staff be able to exercise in the future?

25. This information is intended to provide an illustration and does not reflect or attempt to pre-empt what the independent jurisdictional rule committees may ultimately determine. It sets out the kinds of tasks that the Government envisages authorised staff could, in the future, be permitted to exercise, in each jurisdiction. They are principally case management and case progression functions.
26. In the **criminal jurisdiction**, these may include:
- Adjournment requests (where straightforward, for example moving a hearing from 12:00 to 14:00 to accommodate a video link, as opposed to vacation of trial or where parties disagree);
 - Extensions of time to serve (where straightforward and there is no change to timetabling from directions made and no impact on trial date);
 - Requests to be excused from hearing;
 - Witness summons applications (where criteria of non-attendance and material evidence are met).
27. Other areas might include: requests for documents from a case (for example simple transcript requests from relevant parties); requests to list (for example requests for mention hearings where resolution has not been met through administrative means or where parties are repeatedly not serving documents so the court lists the case for further directions); and special measures applications.
28. In the **civil and family jurisdictions**, a range of functions are already routinely undertaken by court staff. This is not a new power in these **jurisdictions** and so there is already precedent on how this power can be used.
29. It is possible that over time rule committees might extend the functions that could be undertaken by authorised staff. This would only happen if the rule committees were confident that the process is working well in practice and were content to authorise new and different functions. It would also depend on judicial confidence in authorised staff, and would always be subject to a judge's prerogative in any individual case to reserve decision-making.

Expected approach on commencement

30. The procedure rule committees may introduce rules that give effect to these new measures from the earliest possible opportunity, building on existing areas in which staff already exercise some judicial functions. In most of the jurisdictions (the exception being the Crown Court) staff can already exercise judicial functions. However, it is anticipated that in light of the provision of safeguards provided in this Bill (independence, immunity and indemnity), and consistency in independence, the relevant rule committees may decide that further functions are appropriate to be assigned to authorised staff. However, this will remain a matter for the rule committees to determine.
31. In the **magistrates' courts** and the **family court**, the Criminal Procedure Rule Committee and Family Procedure Rule Committee may choose to directly transpose the judicial functions that justices' clerks are authorised to exercise⁸ (and which justices' clerks can allocate to assistant justices' clerks to carry out⁹), into Criminal Procedure Rules and

⁸ The power for this is in s28(1) of the Courts Act 2003 and section 31O(1) of the Matrimonial and Family Proceedings Act 1984. The functions of magistrates that may be exercised by justices' clerks or assistant justices' clerks are set out in the Justices' Clerks Rules 2005. The functions of the Family Court or of a judge of the court that may be exercised by justices' clerks or assistant justices' clerks are set out in the Justices' Clerks and Assistants Rules 2014.

⁹ The power for this is in s28(2) of the Courts Act 2003 and section 31O(1) of the Matrimonial and Family Proceedings Act 1984.

Family Procedure Rules respectively. The Criminal Procedure Rule Committee and the Family Procedure Rule Committee may also include in the rules the qualifications and/or experience required of staff exercising those functions. We expect that these are likely to be similar to the current qualification requirements for assistant justices' clerks.

32. In the **Crown Court**, where powers for staff to exercise judicial functions are entirely new, a more incremental approach to introducing functions for authorised court staff is expected. The Government hopes that the scope of duties and level of responsibilities entrusted to authorised staff would grow over time but recognises that this will depend on judicial confidence.
33. In the **civil jurisdiction**, the functions designated to authorised staff are currently more limited than in some other jurisdictions. In the immediate term we would expect that the existing practice direction setting out the functions that County Court legal advisers may perform would continue in force. While any changes to this would be the responsibility of the Civil Procedure Rule Committee, we might expect that over time as confidence builds in the use of authorised staff their use might be extended to more situations and jurisdictions.
34. In May 2018, the Civil Procedure Rule Committee identified the Online Civil Money Claims (OCMC) project as an area where authorised officers can be used in the civil jurisdiction. An OCMC working group, headed by Mr Justice Birss is looking at the possible roles authorised officers could have in OCMC.

Ministry of Justice

July 2018