

Prisons and Courts Bill

Court and Tribunal Staff: legal advice and judicial functions

Introduction

1. HM Courts and Tribunals Service (HMCTS) staff can already be authorised to exercise certain aspects of the jurisdiction of a court or tribunal. However, arrangements differ between jurisdictions, which means that judicial oversight is unclear, safeguards (including of independence) are incomplete, and there are gaps in provision.
2. Using specially trained court and tribunal staff to handle uncontroversial, straightforward matters under judicial authorisation and supervision allows our independent judiciary to focus their expertise on complex cases and help to improve the efficiency and effectiveness of the courts and tribunals.
3. To enable the judiciary to make greater and more effective use of authorised court and tribunal staff, we need to ensure that there is a robust approach to authorisation and introduce an underpinning accountability framework. There should be a statutory guarantee of independence for court and tribunal staff in all jurisdictions when undertaking this kind of work, and the current gaps and inconsistencies within and across jurisdictions should be addressed.
4. To ensure that these roles come within the leadership of lawyers, with ultimate responsibility to judges, the Government is also seeking to reform the role of justices' clerks. The statutory restrictions around the justices' clerk role will be relaxed so that these senior lawyers can take a leadership role across all jurisdictions.

What is the current position?

5. Provision already exists for staff to exercise the jurisdiction of virtually all courts and tribunals up to and including the High Court and Upper Tribunal; the most notable exception being the Crown Court. Examples include legal advisers in family and magistrates' courts, lawyers in the Court of Appeal and Authorised Court Officers in the Court of Protection.
6. In the Crown Court the power to authorise staff is restricted to "formal and administrative matters" (Senior Courts Act 1982, s 82). In the civil jurisdiction the power exists for the Civil Procedure Rule Committee to assign functions to court staff. A similar power exists in tribunals. However, the Tribunal Procedure Committee has delegated this power to the Senior President of Tribunals, which he exercises via Practice Statements. In the magistrates' courts and the family jurisdiction, the Lord Chancellor, with the concurrence of the Lord Chief Justice identifies which powers of a single justice can be exercised by a justices' clerk.

What are the proposed changes?

7. The provisions which provide for the exercising of the court jurisdiction will apply to those courts under the s1 Courts Act 2003 duty. This will include the following rules:
 - a. Civil Procedure Rules (applying to the County Court, High Court and Court of Appeal)
 - b. Criminal (applying to magistrates' courts, the Crown Court and Court of Appeal)

- c. Magistrates' Courts Rules
- d. Crown Court Rules
- e. Family Procedure Rules (apply to the Family Court and Court of Appeal)
- f. the Insolvency Rules 1986
- g. Disqualification of Unfit Directors) Proceedings Rules 1987
- h. Companies (Unfair Prejudice Applications) Proceedings Rules 2009
- i. Non-Contentious Probate Rules 1987
- j. Court of Protection Rules

8. The Government proposes to introduce legislation which will mean that:

- Court and tribunal staff will be able to be authorised to exercise the jurisdiction of all courts and tribunals for which HMCTS is responsible.
- Jurisdictional Rule Committees will be responsible for identifying which powers staff can be authorised to exercise, so that every power is subject to appropriate scrutiny by practitioners, judges and court users.
- Safeguards will be introduced for all authorised court and tribunal staff across the jurisdictions to make sure that, amongst other things, they have the necessary independence to undertake judicial functions under the supervision of the judiciary. Other safeguards include protection for authorised persons from legal proceedings, costs in legal proceedings, and indemnification, in respect of anything they do or do not do when exercising, in good faith, the functions of a court or tribunal.
- The Lord Chief Justice and the Senior President of Tribunals will be ultimately responsible for the assignment and direction of these staff.
- The role of justices' clerk will be removed from statute, to enable the creation of a more flexible, cross-jurisdictional leadership role for authorised court and tribunal staff, and cede the power to authorise which functions can be performed by such staff in magistrates' courts and the Family Court from the Lord Chancellor to the relevant procedural rules committee.

9. In future we expect that authorised court and tribunal staff will be assigned a variety of functions and responsibilities, including case management powers and some mediation roles. By and large these functions will be characterised as interlocutory or preparatory in nature and it is not anticipated that there will be many circumstances in which contested matters will be able to be involved in this way. We anticipate that this will mostly be done out of court as 'box work'.

10. A specialist subset of these roles would be case lawyers who are required to make decisions using an understanding of complex legal issues and reliable legal judgement, underpinned by legal research, which would be expected of a professional lawyer. These functions would be specific to particular jurisdictions and some would require staff with legal training and qualifications and/or close supervision by the judiciary. Additionally, some roles would include the provision of legal advice to lay justices.