

# COURTS AND TRIBUNALS (JUDICIARY AND FUNCTIONS OF STAFF) BILL [LORDS]

## EXPLANATORY NOTES

### What these notes do

These Explanatory Notes relate to the Courts and Tribunals (Judiciary and Functions of Staff) Bill [Lords] as brought from the House of Lords on 13 November 2018 (Bill 286).

- These Explanatory Notes have been prepared by the Ministry of Justice in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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## Overview of the Bill

1. The Queen’s speech announced that legislation would be brought forward to modernise the courts system. This Bill introduces the first set of court reform measures relating to the deployment of the judiciary and enabling staff to exercise certain judicial functions.
2. The Bill:
  - a. Makes provision for more flexibility in the use of judicial resource in five particular areas (see paragraph 7 of these Notes).
  - b. Amends the title of the “Chief Bankruptcy Registrar” to “Chief Insolvency and Companies Court Judge” to bring it line with other judges in that court.
  - c. Extends the Lord Chancellor’s power under the Courts Act 2003 (the “CA 2003”) to amend certain titles or other comparable offices.
  - d. Provides for the authorisation of court and tribunal staff across the criminal, civil and family courts and tribunals to exercise judicial functions and to give legal advice to judges of the family court and justices of the peace.
  - e. Enables rules of court to determine which functions authorised staff may or may not exercise in their respective jurisdiction, subject to limitations on certain core judicial functions which authorised staff will not be able to carry out.
  - f. Applies statutory independence, and the immunities that currently apply to justices’ clerks, to all authorised court or tribunal staff when exercising judicial functions.
  - g. Removes the post of justices’ clerk from statute.

## Policy background

3. Most of the measures contained in this Bill were first introduced in the Prisons and Courts Bill<sup>1</sup> on 23 February 2017, which fell with the dissolution of Parliament. Additional measures have been included in this version of the Bill to further provide for flexible judicial deployment and related judicial matters.
4. The joint statement issued in September 2016 by the Lord Chancellor, Lord Chief Justice of England and Wales, and Senior President of Tribunals outlined the context of reforms to courts and tribunals within which the Bill addresses specific measures that require legislation.<sup>2</sup> This statement said: “*the vision is to modernise and upgrade our justice system so that it works even better for everyone, from judges and legal professionals, to witnesses, litigants and the vulnerable victims of crime*”<sup>3</sup>.
5. The Bill contains measures that give effect to policies outlined in a Government consultation regarding courts and tribunals reform.<sup>4</sup>

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<sup>1</sup> Prisons and Courts Bill: <https://services.parliament.uk/bills/2016-17/prisonsandcourts.html>

<sup>2</sup> *Transforming our Justice System*, Joint Statement: <https://www.gov.uk/government/publications/transforming-our-justice-system-joint-statement>

<sup>3</sup> *Transforming our Justice System*, Joint Statement, p.3

<sup>4</sup> *Transforming our Courts and Tribunals*, Cm9391: <https://www.gov.uk/government/consultations/transforming-our-courts-and-tribunals>;

## Judicial measures

6. The judicial measures in the Bill enable the flexible use of the judiciary to respond to the changing demands of a reformed courts and tribunals system. These will help the senior judiciary to ensure the right judges are deployed to the right cases, taking account of changes in caseloads of different jurisdictions, which will also have benefits for all users of the courts and tribunals.
7. They cover five particular areas: enabling temporarily appointed Deputy High Court Judges to sit in any court or tribunal to which a Deputy High Court Judge could usually be deployed; removing the restriction on a judge being the President of more than one Chamber of the First-tier Tribunal (“FtT”) or Upper Tribunal (“UT”); enabling Recorders to sit as judges in the UT and senior employment judges to sit as judges in the FtT and UT; extending the range of High Court judges who can sit as judge-arbitrators; and allowing the President of the Employment Tribunals in England and Wales and Scotland to sit in the Employment Appeal Tribunal. At a minimum, judges will have met the statutory eligibility criteria for their primary appointment and any additional office to which they may be deployed.
8. In addition, the judicial measures also contain provision to change judicial titles, to allow titles to reflect changes in the organisation of courts and tribunals including name changes. The title of “Registrar in Bankruptcy of the High Court” was recently changed to “Insolvency and Companies Court Judge” to reflect the change in name of the court in which they sit. The name of the senior judge of that court could not be changed by secondary legislation and the Bill therefore effects this change. It also ensures that the title of that office, and other similar offices, can be changed by secondary legislation in future.

## Authorised court and tribunal staff: legal advice and judicial functions

9. HM Courts and Tribunals Service (HMCTS) staff can already be authorised to carry out certain functions of a court, tribunal or judge. Currently staff carry out these duties in most jurisdictions, with the Crown Court a notable exception. The functions which staff can carry out are prescribed in a variety of ways, usually either by the Lord Chancellor (as in magistrates’ courts and the Family Court) or by procedure rules (as in the Civil Procedure Rules or Tribunal Procedure Rules) in the relevant jurisdiction. In the FtT and UT, the procedure rules provide that functions can be exercised only if the person is approved by the Senior President of Tribunals. In practice, this approval is given in Practice Statements issued by the Senior President of Tribunals. In the civil jurisdiction, functions can be assigned to court staff through Civil Procedure Rules, made under the Civil Procedure Act 1997. In magistrates’ courts and the Family Court, the Lord Chancellor, with the concurrence of the Lord Chief Justice (see section 28 of the CA 2003), identifies which powers of a single justice can be exercised by a justices’ clerk or assistant clerk.
10. 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”,<sup>5</sup> the functions of the court, or of

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<sup>5</sup> ‘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 Courts Act 2003 (“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.

any judge of the court. A similar power already exists in tribunals (specifically relating to functions of the FtT and UT). The Bill excludes some core judicial functions from this general power, meaning that rules of court will not be able to provide for authorised staff to be able to exercise any of those ‘excluded functions’.

11. 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.
12. Justices’ clerks are the most senior lawyers employed by HMCTS, however their role is limited (by Part 2 of the CA 2003) to the work of magistrates. They oversee the provision of legal advice to magistrates and staff exercising the functions of a single justice or the Family Court. In order to broaden the role of these lawyers to provide leadership across all jurisdictions, the Government is removing this role, but not function, from statute.

## Legal background

13. The legislation relating to the judiciary and authorised staff is set out in a number of statutes and secondary legislation. The following paragraphs explain the current legislative background.

## Judicial measures

14. A number of provisions relate to judicial deployment:
  - a. Deputy High Court Judges are appointed under section 9(4) of the Senior Courts Act 1981 following the recommendation of the Judicial Appointments Commission. Section 94AA of the Constitutional Reform Act 2005 sets out the circumstances under which, without such a recommendation, the Lord Chief Justice may appoint a person to sit as a Deputy High Court judge on a temporary basis where there is an immediate business need for a person to sit in the Crown Court or High Court.
  - b. Sections 4 to 6A of the Tribunal, Courts and Enforcement Act 2007 (the “TCEA 2007”) provide who is to be a judge or other member of the FtT and UT. The list of judicial office holders who are also judges of both tribunals is contained in section 6 of that Act.
  - c. Section 22 of the Employment Tribunals Act 1996 makes provision for membership of the Employment Appeal Tribunal. Subsections (1) and (2A) set out a list of those judicial office holders who can be nominated by the Lord Chief Justice, after consulting the Lord Chancellor, to be a judge of that tribunal.
  - d. Section 93 of the Arbitration Act 1996 provides for judges of the Commercial Court and judges conducting official referee’s business (now dealt with by the Technology and Construction Court) to accept appointment, with the permission of the Lord Chief Justice of England and Wales, as judge-arbitrators.
  - e. Section 64 of the CA 2003 contains a power for the Lord Chancellor, with the concurrence of the Lord Chief Justice, to alter the name of specified judicial offices. That list included the office of the Registrar in Bankruptcy of the High Court which was recently changed by the Alteration of Judicial Titles (Registrar in Bankruptcy of the High Court) Order 2018 to “Judge of the Insolvency and Companies Court”. The

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list of offices which can be amended does not include the offices of senior masters and registrars in the Senior Courts set out in section 89(3C) of the Senior Courts Act 1981, including the Senior Registrar in Bankruptcy of the High Court.

## Authorised court and tribunal staff: legal advice and judicial functions

15. Section 2(1) of the CA 2003 and section 40(1) of the TCEA 2007 govern the appointment of HMCTS staff (for courts and tribunals respectively).
16. Currently, HMCTS staff can be authorised to carry out judicial functions in different ways in different jurisdictions, largely through rules of court or tribunal procedure rules made under primary legislation.
17. Sections 27-29 and 31-35 of the CA 2003 concern the appointment and status of, and protections in relation to, justices' clerks and assistant clerks, as well as their functions in the magistrates' court (section 144 of the Magistrates Courts Act 1980 makes provision in relation to non-criminal matters). Justices' clerks' functions in the Family Court are dealt with in section 31O of the Matrimonial and Family Proceedings Act 1984. Paragraph 2 of Schedule 1 to the Civil Procedure Act 1997 gives a power for Civil Procedure Rules to make provision for staff to exercise the jurisdiction of civil courts (county court, High Court and Court of Appeal). Section 51(2) of the Mental Capacity Act 2005 gives a power for Court of Protection Rules to make provision for staff to exercise the jurisdiction of the Court of Protection. Paragraph 3 of Schedule 5 to the TCEA 2007 gives a power for Tribunal Procedure Rules to delegate functions to tribunal staff.

## Territorial extent and application

18. Clause 4(6) and (7) sets out the territorial extent of the Bill, that is the jurisdictions of which the Bill forms part of the law. The extent of a Bill can be different from its application. Application is about where a Bill produces a practical effect. Subject to certain exceptions, the provisions of the Bill extend and apply to England and Wales only. Therefore:
  - a. Clause 1(1) to (4) extend and apply to the United Kingdom.
  - b. Clause 1(5) extends and applies to England and Wales, and Scotland.
  - c. Clause 1(6) and (7) extend and apply to England and Wales only.
  - d. Clause 2(1) and (3) extend and apply to England and Wales only.
  - e. Clause 2(2) extends to the United Kingdom but applies to England and Wales only.
  - f. Clause 3 introduces the Schedule, Part 1 of which extends and applies to England and Wales and Part 2 of which extends and applies to the United Kingdom.
  - g. Clause 4 makes the necessary legal provision for the short-title of the bill, commencement and extent, and extends to the United Kingdom.

### Minor and consequential effects

19. Clause 3 and the Schedule provide for court and tribunal staff to be authorised to exercise judicial functions. Court and tribunal staff exercising such functions will be in the same position as any judge and therefore current provision which deems things done by court staff to be treated as being done by the court is unnecessary. Paragraphs 1 and 3 of the Schedule remove such deeming provisions from section 51 of the Criminal Justice Act 1972 and section 8(4)(a) of the Bail Act 1976

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which extend and apply to England and Wales and Scotland. The Schedule also removes the role of justices' clerk. Paragraphs 17 and 18 of the Schedule remove references to clerks in paragraph 11(7)(b) of Schedule 3 to the Criminal Justice Act 1991 and paragraph 5(4)(a) of Schedule 13 to the Criminal Procedure (Scotland) Act 1995, both of which extend and apply to England and Wales and Scotland.

### Legislative Consent Motions

20. There is a convention that Westminster will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly without the consent of the legislature concerned. In the view of the UK Government, none of the provisions in the Bill engage the legislative consent process in the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly and therefore no legislative consent motion is being sought in relation to any provision of the Bill.
21. If there are amendments relating to matters within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly, the consent of the relevant devolved legislature(s) will be sought for those amendments.
22. See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom. Annex A also summarises the position regarding legislative consent motions and matters relating to Standing Orders Nos. 83J to 83X of the Standing Orders of the House of Commons relating to Public Business.

## Commentary on provisions of Bill

### Clause 1: Deployment of judges

23. Sections 87(1A) of the Constitutional Reform Act 2005 provides that a person is eligible to sit as a Deputy High Court Judge only if selected for the pool for such requests following a selection exercise conducted by the Judicial Appointments Commission ("JAC"). However, section 94AA of the Constitutional Reform Act 2005 creates a limited exception to this. It provides the Lord Chief Justice, after consultation with the Lord Chancellor, with a power to appoint a person as a temporary deputy judge of the High Court in urgent cases where there are no other reasonable steps which can be taken, without a JAC process. Previously the legislation allowed this person to be deployed only to the High Court or Crown Court; clause 1(1) expands this to permit the person to be deployed to any court or tribunal in which a deputy judge of the High Court appointed under section 9(4) of the Senior Courts Act 1981 is able to sit, for example in the family court, the county court or the FtT or UT.
24. Section 6 of the TCEA 2007 sets out a list of judges who are judges of both the FtT and UT. Clause 1(2) adds Recorders to this list, which will enable Recorders to hear cases in the UT, in addition to the FtT where they can already sit. It also adds the Presidents of the Employment Tribunals (England and Wales, and Scotland), the Vice President of Employment Tribunals (Scotland) and Regional Employment Judges to the list, enabling them to hear cases in the FtT and the UT. The appointment of leadership employment judges to the FtT and UT has a secondary impact of enabling the Senior President of Tribunals to delegate some of his judicial functions to the leadership employment judges, as he can already delegate certain judicial functions to members of a panel of employment judges or employment appeal judges.
25. Clause 1(4) removes the current restriction on a person presiding over more than one chamber of the FtT or of the UT. Allowing for a Chamber President to be appointed to more than one Chamber in the same Tribunal will meet the aim of flexibly using the existing (and future) complement of Chamber Presidents, without having to recruit and appoint a new Chamber

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President immediately there is a vacancy.

26. Clause 1(5) adds the President of Employment Tribunals (England and Wales) and the President of the Employment Tribunals (Scotland) to the list of judges who may be nominated to be a judge to the Employment Appeal Tribunal. This mirrors similar provisions in the TCEA 2007 which provide for FtT Chamber Presidents to be members of the UT.
27. Section 93 of the Arbitration Act 1996 sets out the judges who may accept appointment as a judge-arbitrator in England and Wales. This is currently limited to judges of the Commercial Court or judges conducting official referees' business (now judges sitting in the Technology & Construction Court). Clause 1(6) and (7) expand this to allow any High Court judge or other judge eligible to sit in the High Court to be eligible to accept appointment as a judge-arbitrator.

### Clause 2: Alteration of judicial titles

28. Clause 2(1) and (2) change the title of the office of "Chief Bankruptcy Registrar" to "Chief Insolvency and Companies Court Judge". This reflects a change in name of the other judges of this court and of the court itself. Clause 2(3) enables the judicial titles of other senior masters and district judges of the Senior Courts to be changed in future by secondary legislation should it be necessary to do so.

### Clause 3: Authorised court and tribunal staff: legal advice and judicial functions

29. Clause 3(1) gives effect to the Schedule.
30. Clause 3(2)-(4) give the Secretary of State or Lord Chancellor a narrow power to, by regulations, make consequential, transitional, transitory or saving provision in relation to the authorised staff provisions in the Schedule. Such regulations will be subject to the negative Parliamentary procedure.
31. The effect of this provision is to ensure effective and orderly implementation of the provisions of the Schedule and to avoid any legislative inconsistencies in secondary legislation. The power will primarily be used to remove references to "justices' clerk" in secondary legislation, which is necessary because the Bill abolishes the justices' clerk role.
32. The power in Clause 3(2)-(4) will not be used to amend primary legislation. The consequential amendments to primary legislation have already been identified and provision for them is made in the Schedule to the Bill.

### Clause 4: Short title, commencement and extent

33. Clause 4(1) confirms the short title of the Bill.
34. Clause 4(2)-(5) set out the commencement provisions for the Bill. Clause 4 (short title, commencement and extent) will come into force on the day on which the Bill is passed. Clause 1 (deployment of judges) and Clause 2 (alteration of judicial titles) will come into force at the end of the period of two months beginning with the day on which the Bill is passed. Clause 3 and the Schedule (functions of staff) will come into force on such day as the Secretary of State may by regulations appoint. Subsection (4) allows for regulations to appoint different days for different purposes or areas and to make transitional, transitory or savings provision.
35. Clause 4(6)-(7) also set out the extent of the Bill (see paragraphs 18-22 and Annex A of these Explanatory Notes for further information).

### Schedule: Authorised court and tribunal staff: legal advice and judicial functions

36. The Schedule applies to the civil, family, criminal and tribunal jurisdictions and comprises measures on court and tribunal staff authorised to provide legal advice to magistrates and judges of the family court, and measures on court and tribunal staff authorised to exercise judicial

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functions. **Part 1** deals with courts and **Part 2** deals with tribunals. The key provisions of the Schedule are set out below. The Schedule also makes minor and consequential amendments to primary legislation to facilitate the above.

### **Matrimonial and Family Proceedings Act 1984 (“MFPA 1984”)**

37. Paragraph 13 amends section 31C(2) of the MFPA 1984 (which makes provision for precedent in relation to certain decisions of the family court) to replace references to justices’ clerks or assistant clerks with persons authorised under section 67B(2) of the Courts Act 2003 (“CA 2003”). This means that HMCTS staff authorised under section 67B(2) must follow decisions made by a judge listed in section 31C(1)(a) to (i) in the same way that a justices’ clerk or assistant clerk previously had to.
38. Paragraph 14 substitutes a new section 31O into the MFPA 1984, which now provides for the giving of legal advice to judges of the family court by persons authorised by the Lord Chief Justice or his nominee. The functions described in new section 31O(1) largely replicate those in the current section 31O(2) that relate to justices’ clerks. The power in the current section 31O(1) for the Lord Chancellor to authorise justices’ clerks to carry out functions of the family court or a judge of the court, is now covered by a power for rules of court under new section 67B(1) of the CA 2003.
39. New section 31O(2) provides that authorised persons giving legal advice must be members of court and tribunal staff and have such qualifications as are prescribed in regulations (subject to the negative resolution procedure) made by the Lord Chancellor with the agreement of the Lord Chief Justice.
40. New section 31O(4) and (5) of the MFPA 1984 ensure the independence of persons authorised to give legal advice under section 31O(1) by providing that they are subject only to the direction of the Lord Chief Justice and are not subject to the direction of the Lord Chancellor or any other person.
41. The Lord Chief Justice may nominate one or more judicial office holders or members of court or tribunal staff to carry out his authorisation and direction functions (section 31O(6)). Section 31O(7) gives those nominees who are members of court or tribunal staff independence when exercising these authorisation or direction functions, though they remain subject to the direction of the Lord Chief Justice or a judicial officer holder nominated by the Lord Chief Justice.

### **Crime and Disorder Act 1998 (“CDA 1998”)**

42. Paragraph 21 omits subsections 49(2) to (5) of the CDA 1998, which makes provision for rules to provide for certain powers of a magistrates’ court that may be exercised by a single justice of the peace to be exercised by a justices’ clerk. Such power will instead be provided under new section 67B of the CA 2003.
43. Paragraph 22 makes changes consequential to the removal of the justices’ clerk role, amending section 50(4) to replace references to justices’ clerks with persons authorised under new section 67B(2) of the CA 2003 to exercise the powers of a single justice. This means that (as is currently the position for a justices’ clerk) a person authorised under section 67B(2) CA 2003 cannot remand an accused person in custody or, without the consent of the prosecutor and the accused, remand the accused on bail on conditions other than those (if any) previously imposed.

### **Courts Act 2003 (“CA 2003”)**

#### ***Sections 28 and 29: Legal Advice***

44. Paragraph 26 substitutes new sections 28 and 29 for previous sections 27 to 29 of the CA 2003. Current section 27 sets out how a justices’ clerk may be appointed and designated, the qualifying criteria necessary to be appointed as such, and provisions dealing with the appointment to a local justice area. The new sections follow a similar approach to new section 31O MFPA 1984 (above) by

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setting out provisions relating to the authorisation and independence of those staff who will provide legal advice.

45. New section 28 of the CA 2003 replaces the current provision for legal advice given to justices of the peace to be provided by justices' clerks so that the function of giving legal advice is instead exercised by a person authorised by the Lord Chief Justice (or his nominee). Authorised persons giving legal advice must be members of court and tribunal staff and have such qualifications as are prescribed in regulations (subject to the negative resolution procedure) made by the Lord Chancellor with the agreement of the Lord Chief Justice (section 28(3)).
46. The Lord Chief Justice may nominate one or more judicial office holders or members of court or tribunal staff to carry out his authorisation functions (section 28(5)). Independence is ensured for nominees who are members of court or tribunal staff by providing that when carrying out this authorisation function they are subject only to the direction of the Lord Chief Justice or a judicial officer holder nominated by the Lord Chief Justice (section 28(6)).
47. New section 29(1) to (4) provides for a person authorised to exercise functions under new section 28(1) to be subject only to the direction of the Lord Chief Justice or his nominee. Subsection (2) specifies that, apart from such directions, authorised persons are not subject to the direction of the Lord Chancellor or any other person. Under subsection (3), the Lord Chief Justice may nominate one or more judicial office holders or members of court or tribunal staff to carry out his direction functions. As with the authorisation function, independence is ensured for those nominees who are members of court or tribunal staff by providing that when carrying out this direction function they are subject only to the direction of the Lord Chief Justice or a judicial officer holder nominated by the Lord Chief Justice (subsection (4)).

#### ***New Part 6A CA 2003: Exercise of judicial functions by authorised persons***

48. Paragraph 32 inserts new Part 6A (Exercise of judicial functions by authorised persons). It creates the power for court and tribunal staff to be authorised by the Lord Chief Justice to exercise "relevant judicial functions", which it also defines, and provides for rules of court to make the necessary provision for the exercise of those functions by staff so authorised. It also provides for the independence of such staff and safeguards for them, such as protection from legal proceedings, costs in legal proceedings, and indemnification when exercising judicial functions.
49. There is equivalent provision in relation to authorisation, independence and safeguards for authorised staff exercising judicial functions in the tribunals in Part 2 of the Schedule, which inserts new sections 29A to 29E of the TCEA 2007.

#### ***67A Meaning of "judicial office holder" and "relevant judicial function"***

50. New section 67A defines 'relevant judicial functions' as meaning the functions of a court to which the general duty of the Lord Chancellor in section 1 of the CA 2003 applies and a judicial function of a person holding an office that entitles the person to exercise functions of one of the courts to which that duty applies. The courts to which the duty under section 1 applies include the Family Court, Court of Protection, High Court, magistrates' courts and the Crown Court.
51. This new section makes clear that 'relevant judicial functions' does not include certain functions, which are listed in the section. This means that rules of court will not be able to provide for authorised staff to be able to exercise any of these 'excluded functions'. These are set out in section 67A as follows:
  - a. any function involving authorising a person's committal to prison;
  - b. any function involving authorising a person's arrest (unless it concerns the issue of a warrant for arrest in order to secure that the person attends court proceedings and the warrant is uncontested);

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- c. making an order for repossession of a building which is occupied as a dwelling (unless the order is uncontested);
- d. granting an injunction under section 37 of the Senior Courts Act 1981; and
- e. making an order under section 7 of the Civil Procedure Act 1997 (order for preserving evidence etc).

52. Whether authorised staff may or may not exercise other functions, beyond those prohibited in this list, will be for those making rules to decide when they make rules of court under new section 67B(1), as set out below.

#### ***67B Authorisation to exercise relevant judicial functions***

53. New section 67B makes provision to enable authorised persons to exercise “relevant judicial functions”, as defined under the new section 67A. Subsection (1) provides that powers to make rules of court include the power to provide for relevant judicial functions to be exercised by court or tribunal staff who meet requirements as to qualification or experience, and the power to specify those requirements for qualifications or experience.

54. New section 67B(2) requires a person to be authorised by the Lord Chief Justice before they can exercise relevant judicial functions as provided for in rules of court.

55. New section 67B(5) provides for the Lord Chief Justice to be able to nominate one or more judicial office holders or members of court or tribunal staff to exercise his or her functions of authorisation under this section.

56. New section 67B(6) ensures independence for those nominees who are members of court or tribunal staff by providing that when carrying out this authorisation function they are subject only to the direction of the Lord Chief Justice or a judicial officer holder nominated by the Lord Chief Justice.

#### ***67C Exercise of relevant judicial functions: reconsideration of decisions***

57. New section 67C requires those who make rules of court, when making rules to allow certain judicial functions to be carried out by authorised staff in their jurisdiction, to consider whether the rules should include a specific right of reconsideration by a judicial office holder of decisions made by an authorised officer in the exercise of each of those judicial functions and:

- a. where they consider that there should be such a right, include it in the rules they make; or
- b. where they do not consider that there should be a right of reconsideration, inform the Lord Chancellor of their decision and explain the basis for that position.

58. The Lord Chancellor could then either ask those making the rules to reconsider their decision or, if he agreed with the decision, lay the rules in Parliament. In doing so, the Lord Chancellor may choose to set out the rationale for not including a specific right to reconsideration in the rules in the Explanatory Memorandum that accompanies the statutory instrument containing the rules. This will ensure transparency in the decision-making process.

#### ***67D Directions and independence: authorised persons***

59. New section 67D provides that a person authorised under new section 67B is not subject to the direction of any person other than the Lord Chief Justice or his nominee (subsection (2)). The Lord Chief Justice may nominate one or more judicial officer holders or members of court or tribunal staff to carry out this direction function (subsection (3)). Independence is ensured for nominees who are members of court or tribunal staff by providing that when carrying out this direction function they are subject only to the direction of the Lord Chief Justice or a judicial officer holder nominated by the Lord Chief Justice (subsection (4)).

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### ***67E Protection of authorised persons***

60. New sections 67E to 67G of the CA 2003 give the same protections from legal proceedings, costs in legal proceedings, and indemnities that currently apply to justices' clerks and assistant clerks (under current sections 31 to 35 of the CA 2003) to persons authorised under new section 67B. These provisions will now apply to all authorised persons exercising relevant judicial functions as provided for by rules of court. They will also apply to those exercising the functions of a tribunal – this is provided for under Part 2 of the Schedule.
61. New section 67E(1)(a) and (b) provide that no legal action can be brought against an authorised person in respect of anything done or not done in execution of their duties as an authorised person or relating to their jurisdiction.
62. New section 67E(2)(a) and (b) provide that legal action can be brought against the authorised person in respect of anything done or not done in purported execution of their duties as an authorised person or relating to a matter not within their jurisdiction if it is proven that they acted in bad faith.
63. New section 67E(3)(a) and (b) provide that if legal action is brought against an authorised person under circumstances where the individual is protected under section 67E(1) or (2) then the court may strike out the proceedings and may order costs against the person bringing the action.

### ***67F Costs in legal proceedings: authorised persons***

64. New section 67F(4)(a) and (b) provide that the Lord Chancellor may, after consulting with the Lord Chief Justice, make regulations to decide when a court must and must not order the Lord Chancellor to pay costs under section 67F(3) and to decide how the amount is to be determined. Paragraph 36 of the Schedule amends section 108(3)(b) of the CA 2003 so to make those regulations subject to the affirmative procedure.
65. New section 67F(5) provides that the Lord Chief Justice may nominate a judicial office holder to exercise his functions under this section.

### ***67G Indemnification of authorised persons***

66. New section 67G(1) and (2) set out which costs the authorised person is protected against including the costs of disputing a claim, damages awarded against and ordered to be paid by the person, costs of settling a claim and any costs reasonably incurred in connection with proceedings.
67. New section 67G(3) to (7) provide that the Lord Chancellor must indemnify the authorised person if the person acted reasonably and in good faith. The Lord Chancellor shall decide whether, and to what extent the person shall be indemnified and can determine, before certain costs are incurred or a settlement made, whether those certain costs will be paid (subject to such limitations as the Lord Chancellor thinks proper, and providing it does not affect the outcome of the proceedings).

### ***Further amendments to the Courts Act 2003***

68. Paragraph 33(2) amends section 70 of the CA 2003 (Criminal Procedure Rule Committee) so that a person authorised to provide legal advice under new section 28(1) of the CA 2003 is required to be a member of the committee (replacing the reference to a justices' clerk).
69. Paragraph 33(3) inserts new section 70(4A) into the CA 2003 to provide that an authorised person appointed to the Criminal Procedure Rule Committee is not subject to the direction of the Lord Chancellor or any other person when exercising a function as a member of the Committee.
70. Paragraph 35 makes identical amendments to section 77 of the CA 2003 in respect of a person authorised to provide legal advice under section 31O(1) of the MFPA 1984 in relation to membership of the Family Procedure Rule Committee.
71. Part 2 of the Schedule deals with the exercise by court and tribunal staff of functions of the FtT

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and UT. It provides for court and tribunal staff to be authorised by the Senior President of Tribunals to exercise functions of the tribunal and makes similar provision for the independence, protection and liabilities of such staff as are made in relation to courts in new sections 67D to 67G of the CA 2003.

### **Tribunals, Courts and Enforcement Act 2007 (“TCEA 2007”)**

72. Paragraph 40 inserts wording into subsection 8(2) of the TCEA 2007 to provide that the Senior President of Tribunals may not, under section 8(1), delegate his functions under new sections 29B and 29D of new Chapter 2A, or Paragraph 3 of Schedule 5, to the TCEA 2007. This means that the Senior President of Tribunal’s general power of delegation cannot be used.
73. Paragraph 41 inserts new sections 29A to 29E into the TCEA 2007 with the effect of giving equivalent protection to officers and staff authorised by the Senior President of Tribunals to exercise the functions of a tribunal as the protection given to authorised persons exercising the functions of a court or judge of the court under new section 67B of the CA 2003.

#### ***Section 29A Meaning of “authorised person” and “judicial office holder”***

74. New section 29A defines an authorised person as a person authorised by the Senior President of Tribunals under Paragraph 3 of Schedule 5 to exercise the functions of the FtT and UT and a judicial office holder as having the meaning given by section 109(4) of the Constitutional Reform Act 2005.

#### ***Section 29B: Directions and independence: authorised persons***

75. New section 29B(1) and (2) provides that the Senior President of Tribunals, or his delegate, may give directions to an authorised person but that apart from these directions an authorised person is not subject to the directions of the Lord Chancellor or any other person when exercising the functions of a tribunal.
76. New section 29B(3) and (4) provides that the Senior President of Tribunals may delegate this direction function to one or more judicial officer holders or members of court or tribunal staff. Independence is ensured for delegates who are members of court or tribunal staff by providing that when carrying out these functions they are subject only to the direction of the Senior President of Tribunals or a judicial office holder nominated by the Senior President of Tribunals when exercising these functions.

#### ***Section 29C Protection of authorised persons***

77. New section 29C(1) to (4) sets out the situations in which actions can or cannot be brought against authorised persons and how the court should deal with an action brought inappropriately.

#### ***Section 29D: Costs or expenses in legal proceedings: authorised persons***

78. New section 29D deals with cases in which costs in relation to proceedings against an authorised person can and cannot be made and against who those costs can be made. It inserts a new power for the Lord Chancellor to make regulations (after consulting the Senior President of Tribunals or his delegate (who must be a judicial office holder)) specifying when a court may order the Lord Chancellor to pay costs in respect of proceedings against an authorised person, and how the amount should be determined. As a consequence, paragraph 42 amends section 49 TCEA 2007 to provide that the affirmative resolution procedure applies.

#### ***Section 29E: Indemnification of authorised persons***

79. New section 29E sets out which costs the authorised person is protected against and describe the conditions under which the Lord Chancellor must indemnify authorised persons.

#### ***Further amendments to the TCEA 2007***

80. Paragraph 44(2) amends paragraph 3 of Schedule 5 (Tribunal Procedure Rules) so that it adds persons appointed under section 2(1) of the CA 2003 in addition to those appointed under section

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40(1) of the TCEA 2007, as those persons who can be authorised to exercise the functions of the tribunal.

81. Paragraph 44(3) further amends paragraph 3 of Schedule 5 (Tribunal Procedure Rules) so that it now provides for a person to exercise functions by virtue of procedure rules only if authorised by the Senior President of Tribunals or his delegate. The Senior President of Tribunals may delegate this authorisation function to one or more judicial office holders or members of court or tribunal staff. Independence is ensured for delegates who are members of court or tribunal staff by providing that when carrying out this function they are subject only to the direction of the Senior President of Tribunals or a judicial office holder nominated by the Senior President of Tribunals.
82. Paragraph 44(8) makes clear that any reference to a ‘function’ that an authorised member of staff may carry out does not include:
  - a. any function involving authorising a person’s committal to prison;
  - b. any function involving authorising a person’s arrest;
  - c. any function of granting an injunction.
83. This means that authorised staff will not be able to exercise any of these ‘excluded functions’ in the tribunals. Whether authorised staff may or may not exercise other functions, beyond those prohibited in this list, will be determined by rules made by the Tribunal Procedure Committee. The rules currently provide for staff to exercise judicial functions only with the approval of the Senior President of Tribunals.
84. Paragraph 45 makes similar provision for a right of judicial reconsideration to that made for rules of court under new section 67C of the CA 2003. It requires the Tribunal Procedure Committee, when making procedure rules to allow certain functions to be carried out by authorised staff, to consider whether the rules should include a right to judicial reconsideration of the decisions made by an authorised officer in the exercise of those functions.
85. New section 28A(4) of Schedule 5 to the TCEA 2007 additionally requires that, where the Tribunal Procedure Committee makes such rules but does not consider that the rules should include a right of reconsideration, it must inform the Lord Chancellor of its decision together with its reasons. The Lord Chancellor could then either ask the Tribunal Procedure Committee to reconsider its decision or, if he agreed with the decision, lay the rules in Parliament

## Commencement

86. Clause 1 (deployment of judges) and Clause 2 (alteration of judicial titles) come into force at the end of the period of two months beginning with the day on which the Bill is passed. Clause 3 and the Schedule (functions of staff) come into force by means of regulations made by the Secretary of State. Clause 4 (short title, commencement and extent) comes into force on the day on which the Bill is passed.

## Financial implications of the Bill

87. The Bill’s measures concerning court and tribunal staff are estimated to enable a net annual benefit of approximately £6m, once implemented, from 2023-24. The figures set out in the impact assessments accompanying the Bill are estimates, based on certain assumptions about implementation that are subject to change. This financial assessment will be updated and refined in the light of new information available.

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## Parliamentary approval for financial costs or for charges imposed

88. The measures concerning court and tribunal staff will lead to expenditure by the Lord Chancellor of approximately £7.9 million per annum, but this will lead to savings of approximately £13.7 million per annum. A money resolution will be required to cover the expenditure.

## Compatibility with the European Convention on Human Rights

89. The Secretary of State, The Rt Hon David Gauke MP, has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

"In my view, the provisions of the Courts and Tribunals (Judiciary and Functions of Staff) Bill are compatible with the Convention rights".

90. The Government has published a separate ECHR memorandum with its assessment of compatibility of the Bill's provisions with the Convention rights: this memorandum is available on the Government website<sup>6</sup>.

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<sup>6</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/710509/CTJFS-bill-ECHR-memo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710509/CTJFS-bill-ECHR-memo.pdf)

## Annex A - Territorial extent and application in the United Kingdom

The information provided in this Annex is the view of the UK Government. Subject to certain exceptions, the Bill forms part of the law of England and Wales and applies to England and Wales only. For further detail, please see the commentary in paragraphs 18-22 of these Notes.

Clause 1(1) to (4) (judicial deployment) form part of the law of, and apply to, the United Kingdom.

Clause 1(5) (judicial deployment) forms part of the law of, and applies to, England and Wales, and Scotland.

Clause 1(6) and (7) (judicial deployment) form part of the law of, and apply to, England and Wales only.

Clause 2(1) and (3) (alteration of judicial titles) form part of the law of, and apply to, England and Wales only.

Clause 2(2) (alteration of judicial titles) forms part of the law of the United Kingdom, but applies to England and Wales only.

Clause 3 (functions of staff) introduces the Schedule; Part 1 (Courts) forms part of the law of and applies to, England and Wales only and Part 2 (Tribunals) forms part of the law of, and applies to, the United Kingdom.

Clause 4 (short-title, commencement and extent) forms part of the law of, and applies to, the United Kingdom.

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Engages Legislative Consent Motion?
Clause 1	Yes	Yes	In part	In part	N/A	N/A	N/A	No
Clause 2	Yes	Yes	No	No	No	Yes	Yes	No
Clause 3	Yes	Yes	In part	In part	N/A	N/A	N/A	No
Clause 4	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Schedule	Yes	Yes	In part	In part	N/A	N/A	N/A	No

### Subject matter and legislative competence of devolved legislatures

In so far as the Bill deals with the alteration of judicial titles within the single legal jurisdiction in England and Wales (criminal, civil and family jurisdictions) this is reserved to the UK Government under the Government of Wales Act 2006 (Schedule 7A). However, it is not reserved to the UK

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Government under the Scotland Act 1998 (Schedule 5), nor is it a reserved or excepted matter under the Northern Ireland Act 1998 (Schedules 2 and 3).

# **COURTS AND TRIBUNALS (JUDICIARY AND FUNCTIONS OF STAFF) BILL [HL]**

## **EXPLANATORY NOTES**

These Explanatory Notes relate to the Courts and Tribunals (Judiciary and Functions of Staff) Bill [HL] as brought from the House of Lords on 13 November 2018 (Bill 286).

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