

Delegated Powers Memorandum

Courts and Tribunals (Judiciary and Functions of Staff) Bill

Prepared by the Ministry of Justice

Introduction

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Courts and Tribunals (Judiciary and Functions of Staff) Bill (“the Bill”). The Bill was introduced in the House of Lords on 23 May 2018. This Memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

Purpose and effect of the Bill

2. The Queen’s speech in June 2017 included a commitment to introduce legislation to modernise the courts system. The Bill provides for important reforms to the courts and judiciary.
3. Clause 1 makes provision enabling more flexible deployment of the judiciary including across jurisdictions, allowing judges to gain experience of different types of cases, which helps with their career progression. It also allows the judiciary more flexibility when it comes to handling case backlogs.
4. Clause 2 amends the title of the Chief Bankruptcy Registrar to Chief Insolvency and Companies Court Judge to bring it in line with the renamed court. It also adds certain titles to the list of judicial titles which the Lord Chancellor has the power to alter under section 64 of the Courts Act 2003 (“CA 2003”).
5. Clause 3 and the Schedule provide for the authorisation of court and tribunal staff across the jurisdictions (with the exception of the Employment Tribunal System) to exercise judicial functions. The relevant procedure rule committees will have the power to determine which functions may or may not be undertaken by authorised staff in their respective jurisdiction. Statutory independence, and the immunities that currently apply to justices’ clerks, will apply to all authorised court or tribunal staff when exercising judicial functions. The post of justices’ clerk will be removed from statute. Clause 3 also

makes provision for powers to make consequential, transitional, transitory and saving provision in relation to the authorised staff provisions.

6. Clause 4 makes the necessary legal provision for the short-title of the Bill, commencement and extent.

Delegated Powers

7. The Bill contains a range of delegated powers. The Bill concerns courts and tribunals. There is a well-established legal framework in relation to delegated powers concerning courts and tribunals which is relevant for powers taken in this Bill.

Rules of court

8. In relation to courts and tribunals, the power to prescribe the practice and procedure is commonly delegated by statute to procedural rules made by the relevant procedure rule committees, which are independent of the Government¹. Such rules are made by statutory instrument, subject to the negative resolution procedure. Given that the functions of court and tribunal staff relate to procedural matters, the key delegated power in the Schedule to the Bill concerning the functions which authorised staff may carry out will fall to be dealt with by the relevant procedural rules and existing procedures will apply. For this reason, the key aspects of the procedure rules are set out below. However, there are still some matters that remain with the Lord Chancellor which will be set out in appropriate detail.
9. Rules of court are often extensive (the Civil Procedure Rules currently comprise 89 Parts) and ill-suited to being contained in primary legislation. Rules of court have not been contained in primary legislation since the first Rules of the Supreme Court which formed a Schedule to the Supreme Court of Judicature Act 1873 (and which were themselves amendable by subsequent rules of court made under delegated powers). Rules of court are also made, subject only to very limited exceptions (essentially the first

¹ The essential scope of the power, in relation to “practice and procedure” is cast in identical terms to the corresponding power to make Civil Procedure Rules (in section 1 of the Civil Procedure Act 1997) (and also, for example, Family Procedure Rules (section 75 of the CA 2003), Criminal Procedure Rules (section 69 of the CA 2003), Court of Protection Rules (section 51 of the Mental Capacity Act 2005), Magistrates’ Court Rules (section 144 of the Magistrates’ Courts Act 1980), Crown Court Rules (section 84 of the Senior Courts Act 1981) and Tribunal Procedure Rules (section 22 of the Tribunals, Courts and Enforcement Act 2007)).

exercise of powers to make rules for closed material procedures) by dedicated rule committees or (as with probate or rules concerning non-criminal matters in the magistrates' court²) the Lord Chief Justice or a judicial officer holder nominated by the Lord Chief Justice, subject to approval by the Lord Chancellor. It would be a novel departure, raising issues in relation to the division of responsibilities between the judiciary and executive arising out of the reform of the office of Lord Chancellor, for rules of court to be contained in primary legislation.

10. As mentioned, the majority of existing powers to make rules of court are subject to the negative resolution procedure. This is widely accepted as appropriate for what are generally regularly made instruments which fine-tune an existing extensive body of rules, and are made by an independent expert committee or senior judicial office holder.

Civil Procedure Rules

11. The Civil Procedure Rules are made under powers in the Civil Procedure Act 1997 (CPA 1997), which are the first modern powers regarding rules of court. Later powers concerning rules of court such as the powers to make Criminal Procedure Rules, Family Procedure Rules and Tribunal Procedure Rules followed this model. The Civil Procedure Rules govern the practice and procedure in the civil division of the Court of Appeal, the High Court, and the county court. Such rules are to be made with a view to ensuring that the system of civil justice is accessible, fair and efficient, and that the rules are both simple and simply expressed (section 1 CPA 1997).
12. The rules are made by the Civil Procedure Rule Committee. The Committee's membership is made up of persons specified in section 2 CPA 1997 and appointed by either the Lord Chief Justice or Lord Chancellor. Before making rules, the Committee must consult such persons as they consider appropriate to do so and meet, unless inexpedient to do so. The Rules must be signed by a majority of the Committee and then submitted to the Lord Chancellor who may allow or disallow them.
13. The Lord Chancellor has the following additional powers under the CPA 1997:
 - to make consequential amendments to enactments by statutory instrument (under section 4 of the CPA 1997) in two ways:

² Section 127 Senior Courts Act 1981 (probate rules); section 144 Magistrates' Courts Act 1980 respectively.

- i. as a result of the Civil Procedure Rules (subject to the negative procedure); and
 - ii. to facilitate the making of those rules (restricted to enactments made before the CPA 1997 and subject to affirmative procedure);
- to give written notice that rules are to be made by the Committee for a specified purpose (section 3A CPA 1997); and
 - by statutory instrument, to amend the constitution of the Committee (subject to the negative procedure, but requiring the concurrence of the Lord Chief Justice and consultation with the Head and Deputy Head of Civil Justice – section 2A CPA 1997).

14. The Civil Procedure Rules are supplemented by Practice Directions made by the Lord Chief Justice (or a judicial office holder nominated by the Lord Chief Justice) (section 5 CPA 1997); and the Rules may, instead of providing for a matter themselves, refer to provision made or to be made in Practice Directions about that matter (paragraph 6 of Schedule 1 CPA 1997). This is an important power which is widely exercised to give efficacy to the rules: Practice Directions themselves are not subject to Parliamentary procedure; but rules providing for a matter to be dealt with in a Practice Direction are subject to negative resolution procedure like any other rules.

Criminal Procedure Rules

15. The Criminal Procedure Rules emanated from the *Review of the Criminal Courts of England and Wales*, carried out by Auld LJ in 2001. The provisions concerning the Rules are in sections 68-74 of the CA 2003 and the first set of Criminal Procedure Rules was introduced in 2005. The Rules apply to proceedings in the magistrates' courts, the Crown Court, the criminal division of the Court of Appeal, and the High Court's jurisdiction under the Extradition Act 2003.

16. Section 69 CA 2003 provides that rules of court are to be made governing the practice and procedure of criminal courts. These rules are to be made by the Criminal Procedure Rule Committee. The power to make rules includes power to make different provision for different cases or different areas, including different provision for a specified court or description of courts, or for specified descriptions of proceedings or a specified jurisdiction. The power to make these rules is to be exercised with a view to securing that the criminal justice system is accessible, fair and efficient, and the rules are both simple and simply expressed.

17. The Committee is to be made up of persons specified and appointed (by either the Lord Chief Justice or Lord Chancellor) in section 70 CA 2003. This includes, amongst others, the Lord Chief Justice, a High Court judge, circuit judge, district judge, lay magistrate, justices' clerk³, Director of Public Prosecutions, practitioners and volunteers with experience of the criminal courts.
18. Before making any rules, the Committee must consult any persons they consider it appropriate to do so, and meet those persons (unless inexpedient to do so). Rules must be signed by a majority of the members of the Committee and submitted for approval to the Lord Chancellor. If the Lord Chancellor disapproves then he must give written reasons to the Committee, but where he approves the rules are made by statutory instrument and subject to the negative resolution procedure (section 72 CA 2003). The Lord Chancellor has a power to give written notice that the Committee makes rules to meet a specified purpose, and where such notice is given the Committee must make such rules within a reasonable time period (section 72A CA 2003). In addition, the Lord Chancellor has the power under section 73 CA 2003 by order to (after consulting the Lord Chief Justice) amend, repeal or revoke any enactment to the extent that he considers necessary or desirable (a) in order to facilitate the making of Criminal Procedure Rules, or (b) in consequence of the power to make rules under section 69 CA 2003 or the procedure to make rules under section 72 CA 2003, or in consequence of the rules themselves.
19. Any such order which amends primary legislation is subject to the affirmative resolution procedure.
20. The Criminal Procedure Rules are supplemented with detailed Practice Directions made by the Lord Chief Justice (section 74 CA 2003).

Family Procedure Rules

21. Family Procedure Rules are also governed by the CA 2003, sections 75-81. The legislative provisions are similar to those in the Civil Procedure Act 1997 in respect of the Civil Procedure Rules. The Family Procedure Rules govern the practice and procedure in the Family Division of the High Court and the Family Court (section 75 CA 2003). The rules are made by the Family Procedure Rule Committee, and are subject to similar requirements to those that apply to the Civil Procedure Rules (section 79 CA 2003). Membership of the Committee is constituted along similar lines to the Civil Procedure Rule Committee (section 77 CA 2003) and requirements concerning the constitution of

³ Paragraph 26 of the Schedule to the Bill removes the justices' clerk role from legislation.

the Committee may be amended by the Lord Chancellor (section 78 CA 2003). Rules are made by statutory instrument subject to the negative resolution procedure. Again, the Lord Chancellor may give written notice to the Family Procedure Rule Committee to make rules to achieve a specified purpose (section 79A CA 2003) and may make consequential amendments as a result of the Family Procedure Rules (section 80 CA 2003). The Family Procedure Rules are supplemented by Practice Directions made by the Lord Chief Justice (section 81 CA 2003).

Tribunal Procedure Rules

22. Tribunal Procedure Rules are governed by the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007, section 22). Tribunal Procedure Rules are made by the Tribunal Procedure Committee in relation to the practice and procedure to be followed in the First-tier Tribunal and Upper Tribunal. The rule-making power is to be exercised so that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done; the tribunal system is accessible and fair; and that proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently⁴.
23. Tribunal Procedure Rules are again subject to similar legislative requirements that apply to civil and family procedure rules (section 22 TCEA 2007). The relevant provisions may be found in parts 1 to 4 of Schedule 5 TCEA 2007. The TCEA 2007 established a unified structure for most tribunals, establishing two new tribunals to which the functions of a number of pre-existing jurisdictions were transferred, in the form of a First-tier Tribunal, which is currently divided into seven chambers (General Regulatory; Social Entitlement; Health, Education and Social Care; Tax; War Pensions and Armed Forces Compensation; Immigration and Asylum; and Property), and an Upper Tribunal, which is currently divided into four chambers (Immigration and Asylum; Tax and Chancery; Lands; and Administrative Appeals). While most chambers have their own bespoke rules made by the Tribunal Procedure Committee, the Committee favours the use of generic rules, keeping the core rules for each chamber as similar as possible.
24. Membership of the Tribunal Procedure Committee is again constituted along similar lines to the Civil Procedure Rule Committee, with broadly similar provisions with regard to appointments to the Committee (paragraphs 20 to 24 of Schedule 5 TCEA 2007). Requirements concerning the constitution of the Committee may be amended by the Lord Chancellor with the concurrence of the Lord Chief Justice, and if necessary the

⁴ Schedule 5 TCEA 2007 sets out the provisions regarding how rules are made and the constitution of the committee.

Lord President of the Court of Session and/or the Lord Chief Justice of Northern Ireland (paragraph 25 of Schedule 5 TCEA 2007). Rules made by the Committee must be allowed by the Lord Chancellor before they come into force, and will be contained in a statutory instrument subject to the negative resolution procedure (see paragraph 28 of Schedule 5 TCEA 2007). Again, the Lord Chancellor may give written notice to the Committee to make rules to achieve a specified purpose (paragraph 29 of Schedule 5) and may make consequential amendments as a result of the tribunal procedure rules (paragraph 30 of Schedule 5). The Tribunal Procedure Rules are supplemented by practice directions made by the Senior President of Tribunals (section 23 TCEA 2007).

Range of powers

25. The Bill contains the following delegated powers:

- Regulations subject to the affirmative procedure
- Regulations subject to the negative procedure
- Rules of court made by the relevant procedural committees subject to the negative procedure

Clause by Clause analysis:

Judiciary

Clause 2(3): Amended section 64 CA 2003 - Power to alter judicial titles

Power conferred on: Lord Chancellor

Power exercisable by: Order made by statutory instrument

Parliamentary Procedure: Negative resolution procedure

Context and purpose

26. Section 64 of the Courts Act 2003 contains a power which enables the Lord Chancellor, with the concurrence of the Lord Chief Justice, to alter certain judicial titles. Section 64(2) sets out the current list of titles. The section includes the power (in section 64(5) and unamended by the Bill) to make any necessary consequential changes to primary and secondary legislation to reflect the change in judicial title. It can only be exercised after consultation with the Heads of Division of the Senior Courts and with the concurrence of the Lord Chief Justice.

27. Clause 2(3) amends the power in section 64 by adding additional judicial titles to the list in section 64(2). That list currently includes the masters and registrars of the Senior Courts appointed under section 89 of, and Parts 2 and 3 of Schedule 2 to, the Senior Courts Act 1981. It does not however include the senior masters and registrars of that court which were created as separate offices by amendment made by the Constitutional Reform Act 2005.

Justification for taking the power

28. The amendment to the power seeks to rectify this omission to enable the titles of these senior judges to be altered in the same way as their more junior counterparts. The amendment to the power is consistent with its original purpose; to enable changes to judicial titles consequent on, for example, organisational changes in the courts and for consistency, ensuring titles of senior judges can be altered at the same time as the related junior judge titles without primary legislation and is therefore appropriate.

Justification for the procedure

29. Although the power does enable amendments to primary legislation, in light of the reasons given in paragraph 28, the narrow nature of any consequential provisions which would be required and the modest nature of the proposed changes, the Government believes that the negative resolution procedure remains appropriate.

Functions of staff

30. The Schedule provides for the authorisation of court and tribunal staff across the jurisdictions (with the exception of the Employment Tribunal system) to exercise judicial functions. '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. Authorisation is by the Lord Chief Justice (or his nominee) or the Senior President of Tribunals (or his delegate). The relevant procedure rule committees will have the power to determine which functions may or may not be undertaken by authorised staff in their respective jurisdiction. The Schedule also provides for statutory independence, and the protections that currently apply to justices' clerks, to apply to authorised court and tribunal staff when exercising legal advice and judicial functions.

Clause 3(1), paragraph 32 of the Schedule – new section 67B(1) CA 2003: Power for rules of court to provide for the exercise of relevant judicial functions within the scope of the rules to be exercised by an authorised person

Power conferred on: *Procedural Rule Committees and Lord Chief Justice*

Power exercisable by: *Rules of Court made by statutory instrument*

Parliamentary Procedure: *Negative resolution procedure*

Context and Purpose

31. In the previous Government's consultation paper 'Transforming our Justice system – a summary of proposals and consultation' it set out its intention to increase the routine judicial work undertaken by 'case officers' (staff employed under section 2(1) of the CA 2003 or section 40(1) of the Tribunal, Courts and Enforcement Act 2007 (TCEA 2007)) to enable judges to concentrate on more complex matters. It is also the intention to enable greater cross-deployment of staff between jurisdictions according to need. One consequence of this is the need to amend legislation which refers to jurisdiction-specific posts, such as the justices' clerk role. Each jurisdiction has provision for the carrying out of some functions by court staff or officers, but provision is not identical. The aim of the reforms is to facilitate greater use of such staff, but it will be for the relevant procedural rules (rules of court or tribunal procedure rules), to set out the functions that can be performed in each jurisdiction, within a consistent cross-jurisdictional framework, and for the Lord Chief Justice (or Senior President of Tribunals) to authorise staff to carry out such functions.

32. The means by which the Government intends to achieve this in courts is set out in the Schedule, paragraph 32 of which inserts a new Part 6A into the CA 2003. The purpose of new section 67B of the CA 2003 is to ensure that any power to make rules of court in relation to a court to which section 1 CA 2003 applies, includes the power for the rules to make provision for the exercise of 'relevant judicial functions'⁵ by court or tribunal staff. The model for this power is paragraph 2 of Schedule 1 to the Civil Procedure Act 1997 (CPA 1997) which as a consequence is repealed (see paragraph 19 of the Schedule to

⁵ 'Relevant judicial functions' are functions of a court to which the general duty of the Lord Chancellor under 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 such a court.

the Bill). Rules of court may also require that a given function may only be exercised by staff with specified qualifications or experience. A person who is a member of court or tribunal staff will not be able to exercise any relevant judicial function unless he or she is authorised to do so by the Lord Chief Justice or his nominee.

33. In some courts (see further below) this new provision mirrors the current powers, but in some it provides a new or different power requiring amendment or repeal of existing powers. Examples of current powers are set out below:

- a) Magistrates' courts - Currently section 28 of the CA 2003 sets out that it is for the Lord Chancellor to make rules authorising which functions of a single justice can be exercised by a justices' clerk or assistant clerk⁶. Such rules are made with the concurrence of the Lord Chief Justice, and after having consulted the Criminal Procedure Committee. This power is repealed (paragraph 26 of the Schedule).
- b) Family Court - Similar provision applies to the Family Court by virtue of section 31O(1) Matrimonial and Family Proceedings Act 1984 (MFPA 1984) and section 76 CA 2003. These powers will be repealed (paragraph 14 of the Schedule).
- c) Crown Court - There is no existing power enabling a member of court staff or officer to undertake judicial functions. Section 82 of the Senior Courts Act 1981 currently limits activities of court officers to 'formal and administrative matters'.
- d) Magistrates' courts (non-criminal matters) – section 144 of the Magistrates' Court Act gives a power to the Lord Chief Justice to make rules regulating the practice and procedure to be followed by justices' clerks. This power is amended to remove references to justices' clerks (paragraph 10 of the Schedule).
- e) County court, High Court, and civil division of the Court of Appeal - The CPA 1997 provides a power for rules to make provision for staff or officers to exercise the jurisdiction of the court. This will be repealed (paragraph 19 of the Schedule).
- f) District Probate Registries – section 127 of the Senior Court Act 1981 currently does not provide such a power.
- g) Court of Protection – section 51 of the Mental Capacity Act 2005 does make provision for court functions to be exercised by court staff and will be repealed (paragraph 38 of the Schedule).

Justification for the power

⁶ See Justices' Clerk Rules S.I. 2005/545

34. The Government believes that as far as possible, it is preferable for rules of court to govern the practice and procedure of the courts within their scope, and that the provision as to the functions that can be performed by court or tribunal staff is rightly a matter for procedural rules. However, rule committees have evolved differently, and the existing legislation reflects a range of powers and approaches in relation to the question of how and which judicial functions may be exercised by staff. This has resulted in varying utilisation of staff in the different jurisdictions. The Government believes that there is a strong case that all relevant rules of court should have the same power in place to allow each jurisdictional rule committee to determine which judicial functions can be exercised by authorised staff in the jurisdiction to which its rules apply. Rules of court are usually made by committees with expertise in the relevant court, or by persons with expertise such as the Lord Chief Justice. As such, they are best placed to determine which functions of the court are appropriate to be exercised by staff and that this is not a matter that should be determined by the Lord Chancellor (as is, for example, it currently is in the magistrates' and the Family Court).

35. On its face, the Government acknowledges that this is a wider power for some jurisdictions (but no wider than the current provision in paragraph 2 of Schedule 1 to the CPA 1997). Currently the Lord Chancellor only has power to authorise that functions of a single justice can be carried out by justices' clerks and assistant clerks in the magistrates' court. In relation to a magistrates' court, the Criminal Procedure Rules will be able to provide for anything that is the function of one or more justices of the peace.

36. But the power also has important safeguards. Firstly, the Committees will be acting here, as they already do in many areas, on the basis of expertise and experience. The Lord Chancellor will retain any necessary input to the rules by virtue of having to agree the rules and having the power to direct the rules (though rarely used). The Lord Chief Justice or his nominee will have to authorise individual members of staff before they can exercise any function prescribed in the rules. Finally, the rules will remain subject to the same level of parliamentary scrutiny.

37. In relation to the Crown Court, the provision of a power to authorise the exercise of judicial functions by authorised staff is new. The Government considers it is long overdue to align the powers for authorised staff in this court with other jurisdictions. It also considers that, for the same reason as applies to the magistrates' courts, the Criminal Procedure Rule Committee's expertise in the procedure and practice of the

criminal courts makes it the right body to exercise the power. The Government considers that the Committee will do so carefully and with the consent of the judiciary.

38. It could be argued that qualifications required for the exercise of certain judicial functions by court or tribunal staff could be dealt with administratively. However, the Government considers that it will give confidence and coherence to these reforms if it is clear that rules of court can specify the qualifications or experience that are considered necessary for the exercise of certain judicial functions. Whilst this would be a new power for some of the rule committees such as the Criminal Procedure Rule Committee, it already exists in the First-tier Tribunal and Upper Tribunal⁷ and so is not without precedent. It is also intrinsically related to the power to authorise functions.

Justification for the procedure

39. The Schedule does not amend the parliamentary procedure for making rules of court which are governed by relevant legislation. The Government does not consider that the addition of a general power for rules of court to determine functions authorised staff may exercise in relation to courts or judges justifies any change.

40. Although the power in relation to the Crown Court, is new, the Government does not consider that it justifies a different procedure to that which normally would apply. The Criminal Procedure Rules will be determined by the independent rule committee and subject to agreement by the Lord Chancellor and negative resolution procedure in Parliament.

41. The rule-making power for the Lord Chancellor in relation to the Family Court is also by negative resolution procedure. It should be noted that the first exercise of this power was subject to the affirmative resolution procedure⁸, but subsequent rules are subject to the negative resolution procedure. Again, the Government considers that given the authorisation of functions is properly an area for the expertise of the Family Procedure

⁷ The Tribunal Procedure Rule Committee has the power to specify functions to be delegated to certain types of staff, which could include those with a specified qualification: Rules may (in particular) – (a) provide for the function to be exercisable by a member of staff only if the member of staff is, or is of a description, specified in exercise of a discretion conferred by Rules; (b) provided for the function to be exercisable by a member of staff only if the member of staff is approved, or is of a description approved, for the purpose by a person specified in the Rules.

⁸ S. 31P(2) Matrimonial and Family Proceedings Act 1984

Rule Committee, there is no justification for a higher level of scrutiny than that which currently applies (to the Lord Chancellor's power, or to the Committee's rule-making powers generally).

Clause 3(1), paragraphs 14 and 26 of the Schedule: New Section 31O(2)(b) Matrimonial and Family Proceedings Act 1984, and section 28(3)(b) CA 2003 – Power to specify qualifications required to exercise legal advisory functions

Power conferred on: Lord Chancellor

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution procedure

Context and purpose

42. Currently, an important function of justices' clerks and assistant clerks is the provision of legal advice to justices of the peace in a magistrates' court and lay judges in the Family Court (see section 28(4) and (5) CA 2003, and section 31O(2) MFPA1984). The Schedule, at paragraphs 14 and 26, ensures this function will continue, but will be performed by court or tribunal staff who are authorised to provide advice by the Lord Chief Justice or his nominee. The Lord Chief Justice or his nominee can only authorise a person if they have qualifications prescribed by the Lord Chancellor (and agreed by the Lord Chief Justice) in regulations. Currently there are two provisions governing the qualifications required by justices' clerks and assistant clerks (section 27(2) CA 2003 regarding justices' clerks, and section 27(6) regarding assistant clerks). Section 27(6) CA 2003 currently gives the Lord Chancellor power to specify the qualifications required before a person can be designated as an assistant clerk⁹.

Justification for the power

43. Taking section 27(6) CA 2003 as a precedent, the Government thinks it is appropriate for qualifications to provide legal advice in the magistrates' court and Family Court to be set out in regulations made by the Lord Chancellor. The Government does not envisage that this regulation-making power will need to be exercised regularly, but the power would be able to reflect any developments in the legal profession as to qualifications required to

⁹ Assistant to Justices' Clerks Regulations S.I. 2006/3405, as amended by S.I. 2007/1448.

practise. The requirement for the agreement of the Lord Chief Justice is also important to ensure that there is senior judicial input into determining the level of qualifications required.

Justification for the procedure

44. The existing power is subject to the negative resolution procedure. The Government believes that the changes to the power, which is a result of the removal of the posts of justices' clerks and assistants to justices' clerks from statute, does not merit increasing the level of parliamentary scrutiny; the agreement of the Lord Chief Justice to the regulations should assure Parliament that the negative resolution is appropriate.

Clause 3(1), paragraphs 14, 26, 32 and 41 of the Schedule: New sections 31O(4) MFPA 1984, 29(1) CA 2003, s67C(1) CA 2003, and 29B(1) Tribunals, Courts and Enforcement Act 2007 - Power to direct an authorised person when exercising judicial and legal advisory functions

Power conferred on: Lord Chief Justice (or his nominee) in relation to judicial and legal advisory functions, and Senior President of Tribunals (or his delegate) in relation to judicial functions.

Power exercisable by: Judicial Direction

Parliamentary procedure: None

Context and Purpose

45. The Schedule provides for statutory independence for all authorised persons providing legal advice in the magistrates' court or Family Court or exercising the functions of a court, judge or tribunal. In particular, the Schedule ensures that the exercise by authorised staff of legal advisory and judicial functions is not subject to the direction of the Lord Chancellor or any other person, except that in the exercise of legal advisory and judicial functions in the courts, authorised staff are subject to the direction of the Lord Chief Justice (or his nominee) and in the exercise of judicial functions of tribunals authorised staff are subject to the direction of the Senior President of Tribunals (or his delegate). The Government believes this will enable appropriate judicial supervision and accountability to the judiciary, in the exercise of legal advisory and judicial functions by authorised staff.

Justification for taking the power

46. In accordance with the Government's intention to increase the leadership role of the judiciary over those court and tribunal staff authorised to exercise judicial functions, the Government considers it appropriate to make the exercise of these functions subject to the direction of the Lord Chief Justice or his nominee, or Senior President of Tribunals or his delegate. The Government does not consider this diminishes independence in decision-making. Rather the power of direction will provide clarity as to how staff should approach certain decisions and factors they should take into account. The Government considers that this will improve the quality of decision-making. Where the Lord Chief Justice nominates, or the Senior President of Tribunals delegates, a member of court or tribunal staff to exercise his direction functions, the nominee (or delegate) is also independent from direction of any person other than the Lord Chief Justice, or Senior President of Tribunals, or a judicial officer nominated by them.

Justification for the procedure

47. The Government considers that the power to direct is a judicial power, and the exercise of it essentially concerns how judicial or legal advisory functions are exercised, which is not a matter requiring parliamentary scrutiny.

Clause 3(1), paragraphs 32 and 41 of the Schedule: New section 67E(4) CA 2003 and new section 29D(4) TCEA 2007 - Power to specify the circumstances in which a court can order the Lord Chancellor to pay costs in proceedings against an authorised person

Power conferred on: Lord Chancellor

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution procedure

Context and purpose

48. One element of the reforms in relation to authorising court and tribunal staff to exercise judicial functions is to strengthen the protection afforded to them when doing so. New sections 67C to 67F CA 2003 and sections 29B to 29E TCEA 2007 make provision to apply the same protections (immunities, costs protection in legal proceedings and

indemnities) that currently apply to justices' clerks and assistants to justices' clerks, to authorised persons exercising judicial functions in all relevant jurisdictions.

49. One consequence of this is the extension of a delegated power given to the Lord Chancellor which currently applies only in the magistrates' courts and Family Court. Section 34(2) of the CA 2003 currently provides protection against costs in proceedings brought against a justices' clerk or an assistant clerk for an action or omission in the execution (or purported execution) of their duties in exercising the functions of a single justice. Section 34(5) provides that the Lord Chancellor may by regulations (after consulting the Lord Chief Justice) prescribe: i) the circumstances in which a court must or must not order that the Lord Chancellor make a payment in respect of the costs of a person in the proceedings; and ii) the how the amount of any such payment is to be determined. The current regulations are the Justice and Justices' Clerks' (Costs) Regulations 2001¹⁰. The costs protection will now be applied to all persons authorised under new section 67B CA 2003 and section 29A TCEA 2007 and the Lord Chancellor's regulation-making power will be extended to actions against authorised persons in all relevant jurisdictions.

Justification for taking the power

50. This power is comparable with the current regulation-making power in relation to costs in actions against justices' clerks and assistant justices' clerks in the magistrates' court and the Family Court. The Government sees merit in providing as closely as it can parity of provision across jurisdictions, and therefore considers it appropriate to apply the regulation-making power to all relevant jurisdictions. The policy intention is to include similar provisions in the current regulations for all relevant jurisdictions.

Justification for the procedure

51. The current regulation-making power is subject to the affirmative resolution procedure. The Government considers that this remains the appropriate level of scrutiny, and this is provided for in amended sections 108(3)(b) CA 2003 (paragraph 36 of the Schedule to the Bill) and 49(5) and (6) of the TCEA 2007 (paragraph 42 of the Schedule to the Bill).

Clause 3(2)-(3): Consequential and transitional provision etc

¹⁰ These rules were made under the Justices of the Peace Act 1997 but continue to have effect notwithstanding the repeal of the legislation under which they were made (see article 6(b) of the CA 2003 (Transitional Provisions, Savings and Consequential Provisions) Order 2005).

Power conferred on: Secretary of State or The Lord Chancellor

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Negative resolution procedure

Context and Purpose

52. This clause enables the Secretary of State or Lord Chancellor by regulations to make consequential, transitional, transitory or saving provision in relation to the Schedule to the Bill.

Justification for the power

53. The Government believes it is necessary to take such a power to avoid any implementation difficulties or legislative inconsistencies which may otherwise arise. The Government has already identified consequential changes to primary legislation and has made provision for them in the Schedule of the Bill. Therefore, this power is limited in scope insofar as it can only be exercised to make amendments to secondary legislation which are consequential on the provisions of the Schedule. Requirements to amend secondary legislation may not become apparent until the provisions are implemented and the Government therefore considers it appropriate to include this power so that full effect can be given to the provisions of the Act.

Justification for the procedure

54. The Government considers that it is appropriate that, as the power being taken relates to amendment of secondary legislation only, the negative resolution procedure should apply.

Clause 3(4): Regulations

55. This clause does not confer a power to make regulations, nor affect the procedure which would apply, but does supplement the regulation making power in Clause 3(2)-(3) so that it may include different provision for different purposes. This supplemental power is included because the implementation of the power will be for the independent rule committees. Since some of the procedure rules cover different courts – for example, the Criminal Procedure Rules cover procedure in criminal matters in the magistrates' court, the Crown Court and Court of Appeal – it may be that different provision is needed for

different purposes; the government wants to ensure that the rule committees are able to implement the proposals in the way they best see fit.

Final provisions

Clause 4(3): Commencement

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: None

56. This clause provides that provision shall be made by way of regulations for the commencement of Section 3 and the Schedule.

57. It is standard that no parliamentary procedure attaches to the regulations. Parliament has approved the provisions and the power enables the Secretary of State to bring them into force at convenient time, and by area if required. The power in Clause 4(4) to include transitory and saving provision is also standard to ensure effective and orderly implementation.

58. This power includes the power to make provision to appoint different days for different areas. This power is needed to ensure that the implementation of the proposals, as determined by the independent rule committees, can be applied incrementally. For example, a rule committee may wish to provide for the exercise of certain judicial functions by authorised staff in a specific area, to test how this works best in practice and show parties how it can work, before rolling out more broadly.

Ministry of Justice

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