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The new courts bill

The Courts and Tribunals (Judiciary and Functions of Staff) Bill¹ was introduced in the House of Lords towards the end of May 2018 and published the following day. Most of its provisions had been included in the previous Prisons and Courts Bill, which had lapsed more than a year earlier. But that bill devoted 38 clauses and 13 schedules to courts and judges. Its successor had just three substantive clauses, followed by a single schedule. As Lord Judge once said of another government announcement, it is a little too late and quite a lot too little.²

On the day the bill was published, Susan Acland-Hood said it was only the first piece in the jigsaw. The HMCTS chief executive promised further legislation “to underpin the online court” as soon as parliamentary time allowed.³

The bill will enable senior judges to use resources more flexibly, allowing part-time High Court judges and recorders to be deployed to courts where they are most needed. More interestingly, the bill will allow court and tribunal staff across all jurisdictions to exercise judicial functions and give legal advice to magistrates sitting in family and criminal proceedings.

The role of legal adviser is not new: for centuries, lay magistrates have been advised by justices’ clerks. Since 2005, these advisers have been HMCTS staff, appointed by the Lord Chancellor. But the bill, if passed, will enable legally-qualified staff to be deployed more widely across the various courts and tribunals according to need. For this reason, jurisdiction-specific titles such as justices’ clerk will be abolished. Legal advisers will not be subject to the direction of anybody but the Lord Chief Justice.

Under the bill, HMCTS staff will be authorised to exercise specified judicial functions under the authority of the Lord Chief Justice or the Senior President of Tribunals. To find out exactly what these functions will be, we shall have to wait for detailed rules to be made by the various rule committees with the agreement of the Lord Chancellor. But the ministry of justice expects authorised staff to carry out some of the more straightforward judicial functions, such as issuing a summons; taking a plea; extending time for service of applications; or considering applications for variations of directions made in private or public law cases. They will have immunity from suit unless they act in bad faith.

Again, exercising judicial powers is something that justices' clerks can do already. At present, though, their powers are limited to those that may be exercised by a single magistrate. In future, authorised staff may have the same powers as a bench of JPs. And they will be deployed for the first time in the Crown Court, where they are needed to take some of the pressure off judges. At present, staff responsible for serious criminal cases can deal only with formal and administrative matters.

HMCTS is expecting to recruit case lawyers who will make decisions based on legal research and an understanding of the legal issues – in just the same way as any other lawyer. It's expected that some judicial functions will be reserved for staff with specified qualifications or experience.

We need to be vigilant whenever judicial powers are exercised by those who are not members of the judiciary. But senior judges have insisted that there will always be a right to challenge decisions taken by court staff. I hope the rules will provide a rehearing rather than an appeal.

Once implemented, the reforms are expected to save a modest £6 million or so a year. As well as providing new posts for lawyers, the reforms should also provide more job satisfaction for judges and court staff.

The bill had its second reading (main debate) in the House of Lords in June 2018.⁴ The justice minister, Lord Keen of Elie QC, described it as “a vital first step in delivering legislation to underpin our ambitious and far-reaching programme to create a modern, world-class courts and justice system that is swift, straightforward and works for everyone”.

At the bill's committee stage the following month, the cross-bench (non-party) peer Lord Pannick QC was rather more realistic. He said it was “a remarkable achievement for the government to bring forward a bill on courts and tribunals that ignores all the serious problems facing our justice system, not simply diversity but the recruitment crisis, the crisis in legal aid, the appalling state of the judicial estate and the vital need for modernisation”.⁵ Even so, the bill got through its committee stage in the Lords without difficulty.

On the face of it, the bill may seem to have very little to do with the online court. But that reform depends on streamlining processes as much as it does on computerising form-filling. If this bill gets through the House of Commons unscathed in the autumn of 2018, it may embolden ministers to reintroduce more of the outstanding legislation.

References

1. Bill page on parliament website: <https://services.parliament.uk/Bills/2017-19/courtsandtribunalsjudiciaryandfunctionsofstaff.html> Other documents on Ministry of Justice website: <https://www.gov.uk/government/publications/courts-and-tribunals-judiciary-and-functions-of-staff-bill>
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3. <https://youtu.be/TnqL755CdiQ?t=1h15m6s>

4. 20 June 2018: <http://bit.ly/2uvfKjK>

5. 10 July 2018: <http://bit.ly/2zvQobu>

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