



**Bar Council response to the Criminal Procedure Rule Committee
consultation:
“A proposal to make new rules to provide for the exercise of judicial
functions by authorised court officers”**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Criminal Procedure Rule Committee consultation, *A proposal to make new rules to provide for the exercise of judicial functions by authorised court officers*¹ circulated in April 2019.

2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rules of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. We note that Section 3 of the *Courts and Tribunals (Judiciary and Functions of Staff) Act 2018* (hereafter “The 2018 Act”) delegates wholesale the determination of what judicial functions authorised court and tribunal staff may exercise, so far as the criminal justice system is concerned, to the Criminal Procedure Rule Committee (“the Committee”). The importance of the exercise being undertaken, therefore, is not to be

¹ <https://www.justice.gov.uk/courts/procedure-rules/criminal/invitation-comment-proposed-court-officer-rules-april-2019.pdf>

understated. The Committee's task is an important and sensitive one in an area which hitherto would have been subject to the full rigours of legislative scrutiny, whether as part of primary or secondary legislation, rather than, as here, mere procedural scrutiny. The Bar Council, therefore, urges caution in doing anything more than codification of the status quo so far as existing judicial functions are exercised by legally (or non-legally) qualified court officers.

5. There are very good reasons for seeking greater efficiencies in, essentially, administrative functions of the criminal justice system. There are benefits in making decision-making in these areas more straightforward and efficient. We recognise that transferring the decision-making in these areas to court officers may relieve the burden on otherwise very hard-pressed judges and that this can be achieved with only limited damage to the fair or proper administration of the justice system.

6. We do have concerns, however, that this could be undertaken in such a way as to lead to less clarity and accountability in the exercise of judicial functions if the present proposals were implemented as they stand.

7. By way of example:

7.1. We are very concerned about proposals to expressly prohibit the exercise of certain judicial functions by court officers, rather than, in each case, setting out expressly what judicial functions may be exercised by non-judicial administrators.

7.2. We are wholly against proposals that non-legally qualified personnel may, in any circumstances, exercise judicial functions. While we accept that there has been a de facto drift in certain, very limited, respects to the exercise of judicial powers by non-legally qualified personnel, such as in the Criminal Appeals Office, we do not think that this ought to be permitted or extended. Judicial functions require the exercise of judicial judgment and should not be delegated to lay staff members who lack any legal training.

7.3. Our concern also includes the very limited provision for reconsideration/appeal, much of which we consider to be unrealistic in both the proposed permitted timescales and unworkable in practice. We accept, of course, that if provision for reconsideration were more generous then the costs savings that are behind the current proposals may not be achieved. However this supports, in our view, the proposition that judicial functions ought generally to be exercised by judges, rather than unqualified administrators.

8. In circumstances where, given the decline in access to state-supported legal advice and representation, and a concomitant rise in litigants in person in the criminal courts, we consider that the proposals to delegate down the exercise of many case management powers to court staff, will reduce access to justice for those who need it the most. To a litigant in person the proposed Rules will be opaque in operation and there will certainly be a lack in clarity as to what rights she has to participate in the decision-making process, whom the decision maker will be, and what appeal route she may have. We are concerned that only a well-funded private defendant would be well able to track their way through the proposed procedural scheme.

9. We respond to the specific questions raised in the consultation below.

Question 1 - Rule 2.4(2) defines legal qualifications for court staff by reference to those that must be possessed by people authorised under section 28 of the Courts Act 2003 to give legal advice to justices of the peace. Is that provision appropriate and adequate?

10. Since the transfer of powers to court and tribunal staff may well be extensive we consider it essential to require that every authorised court officer carrying out these additional functions is legally qualified (as understood at paragraph 71 of the consultation paper) and consider that the provision as stated in paragraph 71 of the consultation paper ought to be imposed, preferably as part of the rules, rather than hived off to some further document.

Question 2 - Rule 2.4(3) imposes general prohibitions against the exercise by court staff of the judicial functions listed in that rule. Is that list appropriate and adequate? Is it helpful to gather together general prohibitions in this way?

11. This is one of the areas where the Bar Council does take issue with the proposed approach of the Committee. We do not doubt that the list contained in draft rule 2.4(3) correctly includes some of the functions which ought not to be exercised by a member of court staff who is not a judge. However, we consider that there are important aspects of criminal procedure including, it appears, all case management, which are not prohibited and, therefore, the assumption being established in the Rules is that these may all, in due course, be exercised by court staff. We understand that generally, though not in all cases, the judicial functions which are to be exercised by court staff are expressly identified in the subsequent Rules. However, we think the right approach is for the Rules to positively state what judicial functions may be carried out by non-judicial staff.

12. Importantly, we consider that the suggested approach of simply identifying what judicial functions are prohibited, rather than positively identifying the functions that may be exercised by court staff, may not be within legislative scope. Section 3 (1)

of the 2018 Act permits authorised court and tribunal staff “to exercise judicial functions where procedure rules so provide.” We do not consider that this can lawfully be done, as proposed in this Rule and others (such as ‘Version A’ under proposed Rule 2.8), by omission. The proper interpretation of this provision of the 2018 Act is to require the Rules positively to state which judicial functions are to be so exercised. In other words the proposed Rules as drafted may be ultra vires and, therefore, subject to legal challenge as well as, we consider, being unhelpful in terms of the proper operation of the Rule of Law.

13. It would be far more helpful and appropriate, throughout the Rules (and not just in parts), to list the judicial functions that may be exercised by court staff. In other words, starting from a general prohibition and then setting out expressly what judicial functions are to be exercised by court staff. Each of the functions proposed to be exercised by court staff would then be the subject of careful and detailed consideration and scrutiny before being included in the list of permitted functions. Such an approach would have the benefit of clarity and accessibility for all court users and the public, Courts Service staff, as well as practitioners and Judges.

14. It would also allow, in due course, addition or removal from the list of permitted judicial functions by way of amendment to the Rules which would, again, only take place following a deliberative process of consideration and consultation.

15. This approach would avoid the risk of the gradual erosion of judicial control over criminal proceedings through internal policy change within the Courts Service, substantially without transparency and, certainly not the transparency that goes with legislation.

16. It would also avoid the risk of differential approaches to whether aspects of case management are to be heard by a judge or simply be determined, without a hearing, by a member of court staff.

17. We appreciate that it may be initially time-consuming for the Committee to consolidate existing judicial functions operated by court staff in certain courts, in particular, Justices’ Clerks in the Magistrates Courts. However, that will be, we consider, time well spent.

Question 3 - Rule 2.4(4) imposes general conditions on the exercise by court staff of judicial functions under rules 2.5 to 2.9. Are those conditions appropriate and adequate? Given that such conditions would apply anyway, under the general law, is it helpful nonetheless to include them in the rule?

18. We agree that it is appropriate for general conditions on the exercise of judicial functions by court staff to be imposed. We do not consider that the Rule 2.4 (4) as drafted is useful or clear:

18.1. The conditions are not stated, but instead refer generally and vaguely to conditions that are otherwise imposed. There is no benefit to practitioners or the public in including the drafted formula. Indeed, it could be regarded as obscuring, rather than clarifying what the conditions are. We consider it would be better for the conditions to be expressly stated. This may be a useful opportunity to consolidate the conditions that are to apply.

18.2. The use of the undefined word “legislation” stating that it includes the Rules is probably incorrect. The common understanding of legislation is the passing of laws by a parliament. The Rules are not legislation.

18.3. Further, sub-Rule 2.4 (4) (b) (i) is otiose in any event. The Rules will be read as a whole and in accordance with the law.

19. Our preference is for the conditions to be stated in a consolidated single Rule. However, if that is not possible, then the rule could more simply state something along the lines of “The exercise by an authorised court officer of a relevant judicial function for which rule 2.5, 2.6, 2.7, 2.8 or 2.9 provides is subject to conditions provided in law including these Rules.”

Question 4 - Are the functions made exercisable by court staff under rule 2.5 (functions of the Court of Appeal) appropriate and adequate?

20. We do think that, notwithstanding practical difficulties given the relatively small size of the Criminal Appeal Office, that judicial functions ought to be carried out only by legally qualified staff. We consider this important, both in principle and for good administration. So far as principle is concerned, we would not want any (further) precedent to be set for judicial functions to be carried out by non-legally qualified personnel. Judicial functions are prescribed in law for good reason as involving the exercise of judicial judgment and discretion. We understand that this can be subcontracted to some degree to legally qualified personnel, for example, to Justice’s Clerks in the Magistrates Court. We do, however, question the wisdom of this being delegated to, in effect, staff without the appropriate training and qualifications. Notwithstanding the proximity of staff to the senior judicial members of the Court of Appeal, we consider it may lead to a reduction in the quality of decision-making.

21. We are also very doubtful of the appropriateness of potentially all the judicial functions of the Registrar of Criminal Appeals Office being exercised by other personnel, whether legally qualified or not. The purpose of the Registrar of the

Criminal Appeals Office, at its genesis, was to create a new judicial position for the purposes of making case management decisions relieving full members of the Court of Appeal from these relatively mundane, but nevertheless important, tasks. The post of Registrar is a judicial role which requires a high level of experience in practice and as a Judge. The proposal renders redundant or, at least, diminishes this role. We do not consider this is a decision that ought to be taken lightly. We do not consider the current round of procedural rules changes by the Rules Committee to be an appropriate forum for such a significant decision.

Question 5 - Rule 2.5 provides for judicial reconsideration of a decision made by court staff to the same extent, only, as the Criminal Appeal Act 1968 provides for judicial reconsideration of a decision made by the Registrar of Criminal Appeals, and subject to the same time limits. Is that provision appropriate and adequate?

22. Plainly judicial reconsideration of any decision made by court staff ought to be provided for. Provided that the decisions are made by legally qualified staff under close supervision of the Registrar and senior members of the judiciary, we are content with the proposed time limits.

Question 6 - Are the functions to be exercisable by court staff under rule 2.6 (functions of the High Court in extradition appeal cases) appropriate and sufficient?

23. We repeat our concern about the proposal that non-legally qualified personnel may exercise judicial functions under question (4) above.

Question 7 - Is the provision for judicial reconsideration of a decision made by court staff under rule 2.6 appropriate and adequate?

24. Plainly judicial reconsideration of any decision made by court staff ought to be provided for.

Question 8 - Are the functions to be exercisable by court staff under rule 2.7 (functions of the Crown Court) appropriate and sufficient?

25. As matters currently stand in the Crown Court no judicial function has been exercisable by court staff. We do not understand there to be any demand from Court users including litigants-in-person or Judges that there ought to be a change. There is presently a clear line as to who carries out what functions and this provides real clarity and accountability.

26. We foresee real difficulty in the judicial functions at proposed Rule 2.7 (2) (a) and (d) being exercised by staff, rather than Judges, in that the judgment as to where the line is to be drawn as to whether an extension of a time limit will affect the date of

any hearing that has been fixed, including trial, or significantly affect the progress of a case in any other way, is itself a matter which requires careful assessment of all the circumstances in which the application has been made. It, in other words, requires the application of judicial judgment. They are, therefore, wholly unsuitable to be sub-contracted to non-judicial staff. (We recognise that, on occasion, legally qualified Justices' Clerks have had the equivalent delegation of power, but do not consider this provides any sort of precedent for a similar power in the higher court being exercised by non-legally qualified administrators. Justices' Clerks have played a unique role in the lower court in supporting non-legally qualified lay magistrates, and have a status, salary and experience quite different to those of authorised court staff.)

Question 9 - Rule 2.7(3) allows for the reservation by a judge to a judge of the exercise of a judicial function in an individual case. Is that provision appropriate and adequate?

27. This ought to be a general rule to apply across the entire scheme not just in relation to the Crown Court. This would, in fact, reflect the position in law whereby Judges' retain the ability to exercise all judicial functions.

Question 10 - Is the provision for judicial reconsideration of a decision made by court staff under rule 2.7 appropriate and adequate?

28. The timescales are, in our view, unrealistically and unnecessarily short. The same considerations as for High Court extradition business considered in relation to rule 2.6 do not apply to general Crown Court work. There simply is not the urgency which may apply to extradition and the circumstances of its implementation. Nor is the provision for an application for reconsideration within just five business days of notice practical or workable. Barristers and solicitors working in Crown Court cases typically are in Court, conferences and police stations every day. They have very limited time for procedural paperwork. Were the proposed Rule to be implemented, it would require, in effect, these lawyers to prioritise consideration of every exercise of a judicial function by a staff member (which a competent lawyer would, following the introduction of the proposed rules, need to do) above most other work which have longer deadlines. We do not see, for example, why the deadline ought to be any shorter than the 28 days from the date of conviction, sentence or other verdict for the lodging of an appeal which is provided under s18 Criminal Appeal Act 1968 and Crim PR 39.2(1)).

Question 11 - Are the functions to be exercisable by court staff under rule 2.8 (functions of magistrates' courts) appropriate and sufficient?

29. Plainly the work of the Magistrate's Court is an area in which the legally-qualified Justices' Clerk formerly had a significant role and the holders of that post

undertook various judicial functions. This was appropriate given the nature of the jurisdiction, sentencing powers, the very high volume of work and, uniquely, the lay nature of a bench of Magistrates and the legally qualified nature of the Justices' Clerks.

30. We would resist any proposal that non-legally qualified personnel be permitted to carry out the work formerly carried out by Justices' Clerks or judges/magistrates listed at proposed Rule 2.8(2) for the same reasons as explained above.

31. The proposed new rules include (we think) 19 additional new judicial powers that were not exercised even by a legally-qualified Justices' Clerk.

Question 12: In this invitation to comment rule 2.8 shows alternative ways of providing for the exercise of judicial functions by legally qualified court officers, Version A and Version B. The potential advantages of each are listed at paragraphs 99 and 100 of this invitation to comment. Which version do you prefer, and why?

32. We are firmly in favour of a positive requirement to list functions which may be exercised by legally qualified court officers. We disagree that two of the stated advantages of Version A, in fact, exist:

32.1. We accept that clarity is essential. Version A does not provide clarity, but rather the opposite. We do not accept that it is easier to define with precision that which a court officer may not do, than what a court officer may do. Since what is being proposed are rules permitting an exception to the proper and historically normal exercise of judicial decision-making by judges, the Rules ought to provide clarity by setting out what those powers/functions falling into the exception may be. Express provision increases the prospect that practitioners and, more importantly given the increasing presence of litigants in person in the magistrates court, the public/lay users will understand clearly what is expected from the decision-making process in the Court system. Clarity, therefore, requires that the judicial functions a non-judge may exercise be expressly considered, provided for and stated in the Rules. The greatest clarity, by reference to any given power, is provided by an approach stipulating that unless it is expressly permitted a court officer does not have a power. We would, therefore, add 'clarity' as one of the advantages of Version B.

32.2. Adaptability, especially as explained, is not an advantage of Version A. If, as is implicit in the Committee's paper, there is a lack of confidence as to whether Version B has captured all of the existing judicial functions that may be exercised by court staff, then further research and

consideration is required at this stage. It is not a good reason for the basic starting point of the Rules to flip from expressly providing and defining which 'permitted powers' may be exercised by court staff, to stating exceptions by way of 'prohibited powers'. Adopting the logic of the consultation paper, there may, of course, be some exceptions to otherwise permitted judicial functions under the status quo that have been inadvertently omitted from the list in Version A but we do not consider this to be a reason for preferring this approach as a matter of principle.

Question 13 - Rule 2.8 includes no provision for judicial reconsideration of a decision made by court staff, for the reasons given at paragraph 103 of this invitation to comment. Is that appropriate? If not, to whom should an application for reconsideration be submitted, and what time limit should apply?

33. See above.

Question 14 - Are the functions to be exercisable by court staff under rule 2.9 (functions of District Judges (Magistrates' Courts) in extradition cases) appropriate and sufficient?

34. We simply do not understand nor agree that judicial functions hitherto exercised by judges and legally-qualified Justices' Clerks ought to be exercised by non-legally qualified court officers in an area so significant as extradition. It has never previously been the case that court staff in this area may exercise judicial functions. It is wrong that this position should change now. Extradition is a highly charged, legally as well as politically, sensitive matter in which judicial functions ought not to be exercised by unqualified administrative functionaries. That, we consider, would truly impinge on the Rule of Law.

Question 15 - Rule 2.9 includes no provision for judicial reconsideration of a decision made by court staff, for the reasons given at paragraph 106 of this invitation to comment. Is that appropriate? If not, to whom should an application for reconsideration be submitted, and what time limit should apply?

35. If the Committee disagrees and provides that judicial functions may be exercised by non-legally qualified staff, then plainly provision for judicial reconsideration must be provided for. Time must be permitted to the party seeking reconsideration for it to be real. We consider it better that the exercise of such judicial functions is better taken by the judges themselves and avoid the need for this kind of reconsideration at all.

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