

CRIMINAL PROCEDURE RULE COMMITTEE

CRIMINAL PROCEDURE RULES PART 2

A PROPOSAL TO MAKE NEW RULES TO PROVIDE FOR THE EXERCISE OF JUDICIAL FUNCTIONS BY AUTHORISED COURT OFFICERS

INVITATION TO COMMENT

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CRIMINAL PROCEDURE RULE COMMITTEE

RULES TO PROVIDE FOR THE EXERCISE OF JUDICIAL FUNCTIONS BY AUTHORISED COURT OFFICERS

Invitation to comment on proposed new rules

Introduction

1. The Criminal Procedure Rule Committee is considering a proposal to make rules under the new power conferred by section 67B(1) and (2) of the Courts Act 2003,¹ which read:

(1) Rules of court may provide for the exercise of relevant judicial functions by persons who—

(a) are appointed under section 2(1) of this Act or section 40(1) of the Tribunals, Courts and Enforcement Act 2007, and

(b) satisfy any requirements specified in the rules as to qualifications or experience.

(2) A person may exercise functions by virtue of subsection (1) only if authorised to do so by the Lord Chief Justice.

2. The Rule Committee is the body appointed under section 70 of the Courts Act 2003 to make rules governing the practice and procedure to be followed in the criminal courts (that is, magistrates' courts and the Crown Court, when they deal with criminal matters; the High Court, when it deals with an extradition appeal; and the Court of Appeal, criminal division). The rules currently in force are the Criminal Procedure Rules 2015. Information about the Committee and about the Rules may be found on the website of the Ministry of Justice at: www.justice.gov.uk/courts/procedure-rules/criminal.

3. The Committee invites comments on the proposal generally, or on any aspect of it. Some questions that those consulted are asked to consider in particular appear at paragraph 107, on page 24.

Please reply to the Criminal Procedure Rule Committee secretariat at the Ministry of Justice, 102 Petty France, London SW1H 9AJ by **Friday 5th July, 2019**.

Responses by email may be sent to: CriminalProcedureRuleEnquiries@justice.gov.uk.

4. The Committee would be especially grateful for the views of those members of the judiciary and of the legal professions, and of those prosecuting and other authorities, to whom this invitation has been addressed in particular. The Committee would welcome, too, the views of any others whom those consulted may know to have an interest in the subject matter.

¹ Inserted by section 3 of, and paragraph 32 of the Schedule to, the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018.

5. Although the Committee does not intend to publish a list of those who comment, or the content of their comments, respondents are asked to bear in mind that responses will be treated as public documents in accordance with the Freedom of Information Act 2000 and may be made available to enquirers on request.

6. Annexed to this invitation are:

(a) at page 27, the text of CrimPR Part 2 (presently entitled, ‘Understanding and applying the Rules’) showing, by underlining and striking through,² the proposed amendments to rule 2.2 (Definitions) and proposed new rules 2.4 to 2.9, namely:

Exercise of court’s functions by authorised court officers: general rules	2.4
Exercise of functions of the Court of Appeal	2.5
Exercise of functions of the High Court	2.6
Exercise of functions of the Crown Court	2.7
Exercise of functions of magistrates’ courts	2.8
Exercise of functions of a District Judge (Magistrates’ Courts) in extradition cases	2.9

(b) at page 41 a table showing the derivation of the functions for the exercise of which rule 2.8 provides (magistrates’ courts) and identifying those few which have no direct precedent in current legislation;

(c) at page 43 extracts from the Explanatory Notes published with the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018;

(d) at page 45 a list of the legislative provisions which the Rule Committee considers relevant to this proposal;

(e) at page 47 a list of those to whom this invitation has been addressed in particular.

Principal features of the proposal

7. In summary, the Rule Committee’s proposal is intended to:

(a) maintain, while rationalising, the status quo, with few changes to the judicial functions already exercised by court staff;

(b) provide for judicial reconsideration of decisions made by court staff in the senior courts;

(c) allow for the reservation to a judge in the Crown Court, or to a District Judge (Magistrates’ Courts), lay justice or justices’ legal adviser in a magistrates’ court, of a judicial function otherwise exercisable by court staff;

(d) offer alternative provisions for the exercise of judicial functions by legally qualified staff in magistrates’ courts, on the choice of which alternatives views are sought.

Maintaining the status quo

8. The Committee proposes to maintain substantially the same provision as now for the exercise of judicial functions by court staff in the courts in which the Criminal Procedure Rules apply, with some adjustments (a) to implement one of the

² Where a whole rule is added only the heading is underlined.

recommendations of the President of the Queen’s Bench Division’s 2015 *Review of Efficiency in Criminal Proceedings*,³ and (b) to remove some anomalies in the powers now exercisable by staff in magistrates’ courts; but to do so in rules expressed in terminology consistent with other Criminal Procedure Rules and with other contemporary legislation.

9. The proposed expansion of the Criminal Procedure Rules will appear marked, however, because, with one exception,⁴ the status quo in the criminal courts is not to be found now in the Rules but in the delegation to Criminal Appeal Office staff of some functions of the Registrar of Criminal Appeals and, in relation to magistrates’ courts, in section 50(4) of the Crime and Disorder Act 1998 (powers exercisable by a justices’ clerk at an early administrative hearing), in the Justices’ Clerks Rules 2005, and in the Assistants to Justices’ Clerks Regulations 2006.⁵

Providing for judicial reconsideration of decisions by court staff

10. The Committee proposes providing for reconsideration by a judge of a court officer’s judicial decision in the Court of Appeal, in the High Court and in the Crown Court. The Committee does not propose making additional provision for the reconsideration of a court officer’s decision in a magistrates’ court because in that court there applies already, in the Committee’s view, adequate comparable provision.

Allowing for the reservation to a judge, magistrate or legal adviser of a function otherwise exercisable by court staff

11. The Committee proposes allowing for the reservation to a judge in an individual Crown Court case of a judicial function which otherwise court staff could exercise; for the reservation of such a function to a District Judge (Magistrates’ Courts), to a justice of the peace or to a justices’ legal adviser in an individual magistrates’ court case; and for the reservation to a District Judge (Magistrates’ Courts) or to a justices’ legal adviser of such a function in an individual extradition case.

Alternative ways of providing for the exercise of functions by legally qualified staff in magistrates’ courts

12. The judicial functions exercisable in a magistrates’ court by an authorised court officer who is legally qualified are presented in the proposed rules in two different ways, and views are sought on which of those two is preferable. One lists sixteen functions that such an officer may not exercise, while the other lists thirty-two functions that such an officer may exercise (all subject to other provisions of the rules).

³ The Review appears at: www.judiciary.gov.uk/publications/review-of-efficiency-in-criminal-proceedings-final-report/. See also paragraphs 50 and 96 beneath

⁴ The exception is CrimPR 50.30, the rule about the constitution of the High Court in extradition appeal cases, which exercises powers conferred on rules of court by section 19(3) of the Senior Courts Act 1981 to allow nominated members of court staff to exercise functions of that court.

⁵ The latter Rules and Regulations will be revoked when the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 comes into force, to be replaced by rules of court including Criminal Procedure Rules.

Background and context

(1) Jurisdiction; judicial functions; courts; procedure rules

Introduction

13. Section 5 of the Interpretation Act 1978 provides, ‘In any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed according to that Schedule.’ One of the definitions in Schedule 1 to that Act provides, ‘‘Rules of Court’ in relation to any court means rules made by the authority having power to make rules or orders regulating the practice and procedure of that court, ... and the power of the authority to make rules of court (as above defined) includes power to make such rules for the purpose of any Act which directs or authorises anything to be done by rules of court.’

14. By section 69(1) of the Courts Act 2003, ‘There are to be rules of court (to be called ‘Criminal Procedure Rules’) governing the practice and procedure to be followed in the criminal courts’. By section 68 of that Act, ‘In this Part ‘criminal court’ means (a) the criminal division of the Court of Appeal; (b) when dealing with any criminal cause or matter, (i) the Crown Court, (ii) a magistrates’ court; (c) the High Court in relation to its jurisdiction under the Extradition Act 2003.’⁶ This proposal, therefore, is for rules of practice and procedure to confer on court staff elements of the jurisdiction of each of the courts in which those rules apply, under a new power that so permits. The following paragraphs in this section of this invitation to comment offer some observations about those courts and about the criminal and other procedure rules now in force, which may assist those consulted in assessing the proposal.

Jurisdiction; practice and procedure

15. The distinction drawn in law between jurisdiction, on the one hand, and, on the other, practice and procedure, can be summarised thus:

- (a) a court’s ‘jurisdiction’ is what that court has the power in law to do; and
- (b) a court’s ‘practice and procedure’ is that which governs the process by which that jurisdiction can be invoked and exercised.

16. The Rule Committee has adopted those descriptions as working definitions for the purposes of this proposal.

17. From the distinction between jurisdiction and procedure it follows that, absent explicit authority to do so – such as that conferred by the new provisions of the Courts Act 2003 – it is beyond the power of Criminal Procedure Rules, or of any other procedure rules,⁷ to confer jurisdiction upon a court, or to define the extent of a court’s jurisdiction, or to assign all or part of a court’s jurisdiction to a judge or other person. Procedure rules lawfully, and usefully, can prompt parties, and courts, as a matter of procedure, to address relevant jurisdictional considerations and rules therefore are competent, for example, to list the jurisdictional criteria that an applicant

⁶ The scope of the Rules was extended to the High Court in this respect in 2014 by section 174 of the Anti-social Behaviour, Crime and Policing Act 2014, which among other things amended section 68 of the Courts Act 2003.

⁷ But see the paragraphs beneath which describe the extra authority conferred on Civil Procedure Rules, Family Procedure Rules and Tribunals Procedure Rules.

must attempt to satisfy in an application to a court. But that is not the same as conferring that jurisdiction, and although the distinction in practice sometimes may be fine it is real.⁸

Judicial functions

18. There exists no definitive list of functions that are judicial in the courts in which the Criminal Procedure Rules apply; nor does there exist any such list of functions exercised in, by or for those courts which are not judicial functions.

19. New section 67A(1) of the Courts Act 2003 defines the expression ‘relevant judicial function’ to mean ‘(a) a function of a court to which the general duty of the Lord Chancellor under section 1 of this Act applies [*which includes, therefore, those courts the practice and procedure of which is governed by Criminal Procedure Rules*]; (b) a judicial function of a person holding an office that entitles the person to exercise functions of such a court [*which includes, therefore, those functions of Circuit judges and of District Judges (Magistrates’ Courts) which those judges exercise in their individual capacity and not in the exercise of the jurisdiction of the Crown Court or a magistrates’ court*]. Subsection (1) then excepts from that definition ‘a function to which any of the following subsections applies’, and subsections (2) to (6) list five functions which Parliament therefore must have considered judicial or it would not have been necessary to exclude them. However, the new statutory provisions offer no definition of what constitutes a judicial function, and little assistance can be extrapolated from those five exceptions.

20. One encyclopaedia⁹ defines ‘judicial act’ as meaning an act that ‘involves an exercise of discretion or an unbiased decision by a court or judge, as opposed to a ministerial, clerical or routine procedure. A judicial act affects the rights of the parties or property brought before the court. It is the interpretation and application of the law to a particular set of facts contested by litigants in a court of law, resulting from discretion and based upon an evaluation of the evidence presented at a hearing. Judicial connotes the power to punish, sentence and resolve conflicts.’

21. Section 9 of the Human Rights Act 1998 limits the means by which a challenge under the Act may be brought to a ‘judicial act’. It provides that in that section ‘‘judicial act’ means a judicial act of a court and includes an act done on the instructions, or on behalf, of a judge’.

22. Paragraph A.1 of Division XIII of the Criminal Practice Directions issued by the Lord Chief Justice declares:

‘Listing is a judicial responsibility and function. The purpose is to ensure that all cases are brought to a hearing or trial in accordance with the interests of justice, that the resources available for criminal justice are deployed as effectively as possible, and that cases are heard by an appropriate judge or bench with the minimum of delay.’

⁸ At paragraph 39 of the judgment in *R v Yasain* [2015] EWCA Crim 1277 the Court of Appeal cited Lord Woolf’s observation in *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528 that, “It is very easy to confuse questions as to what is the jurisdiction of a court and how that jurisdiction should be exercised.”

⁹ West’s Encyclopaedia of American Law, edition 2.

23. The practice direction does not contemplate that all administrative activity associated with listing must be treated as the exercise of a judicial function. There is a distinction to be drawn between (i) activity that in itself constitutes the exercise of a judicial function, and (ii) activity that constitutes the implementation of a judicial decision: which latter is the ordinary responsibility of court staff, including court listing officers. For the purposes of this proposal the Committee has assumed that a truly judicial function (a) exercises the jurisdiction of a court or judge, in the sense of the word ‘jurisdiction’ described above,¹⁰ (b) exercises a power that engages Article 6(1) of the European Convention on Human Rights,¹¹ (c) requires the exercise of discretion, and (d) does not merely constitute ‘an act done on the instructions, or on behalf, of a judge’, in the words of section 9 of the Human Rights Act 1998.¹²

The Court of Appeal, criminal division; powers of a single judge and of the Registrar of Criminal Appeals

24. Section 2 of the Senior Courts Act 1981 lists the judges of whom the Court of Appeal is constituted. Section 3 of the 1981 Act divides the court into civil and criminal divisions. Section 15 defines the general jurisdiction of the court. Section 55 specifies the number of judges required to form a duly constituted court of the criminal division: namely, for any purpose an uneven number not less than three, and two for all purposes save those listed in section 55(4) (notably, appeals against conviction).

25. Notwithstanding the provisions of the 1981 Act, section 31 of the Criminal Appeal Act 1968 confers on ‘a single judge’ nineteen discrete powers of the criminal division of the Court of Appeal; section 31A confers some of those powers on the Registrar of Criminal Appeals; and section 31B confers on a single judge and on the Registrar the powers of the Court of Appeal to give ‘procedural directions’ as defined in that section. By section 45 of the 1968 Act, references to ‘a single judge’ are to any judge of the Court of Appeal or of the High Court.

26. Other powers and responsibilities are conferred on the Registrar by section 21 of the Criminal Appeal Act 1968. She is required to ‘take all necessary steps for obtaining a hearing of any appeal or application of which notice is given ... and which is not referred and dismissed summarily’ and to ‘obtain and lay before the Court of Appeal in proper form all documents, exhibits and other things which appear necessary for the proper determination of the appeal or application’.

The High Court in extradition appeal cases

27. By sections 26, 28, 103, 105, 108 and 110 of the Extradition Act 2003, jurisdiction is conferred on the High Court to determine appeals from decisions made by District

¹⁰ At paragraph 15.

¹¹ ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.’

¹² Cited above at paragraph 21.

Judges (Magistrates' Courts) or by the Secretary of State in extradition cases. Of the courts in which the Criminal Procedure Rules apply, only in relation to the High Court on such an appeal is there provision – in section 19(3) of the Senior Courts Act 1981 – allowing rules to confer jurisdiction on 'a master, registrar or other officer of the court, or ... any other person'. The power has been exercised (as well as the power under section 66 of that Act to assign business to a divisional court), without controversy as far as is known, by CrimPR 50.30.

The Crown Court

28. Under section 8(1) of the Senior Courts Act 1981, the general jurisdiction of the Crown Court may be exercised by a High Court judge, a Circuit judge, a Recorder, a qualifying judge advocate or a District Judge (Magistrates' Courts), and its appellate jurisdiction may be exercised by a High Court judge, a Circuit judge, a Recorder or a qualifying judge advocate sitting with not more than four justices of the peace. At present there is no provision for judicial functions of the Crown Court to be exercised by anyone other than such a judge.

Magistrates' courts, justices of the peace and District Judges (Magistrates' Courts)

29. Sections 9 and 10 of the Courts Act 2003 provide for the appointment of a 'lay justice' and define that expression to mean 'a justice of the peace who is not a District Judge (Magistrates' Courts)'. By section 148 of the Magistrates' Courts Act 1980, the expression 'magistrates' court' means, for the purposes of the 1980 Act, 'any justice or justices of the peace acting under any enactment or by virtue of his or their commission or under the common law'; and by reason of the definition of 'magistrates' court' which appears in Schedule 1 to the Interpretation Act 1978 (inserted there by the 1980 Act) the same equation of 'justice of the peace' with 'magistrates' court' applies for the purposes of all other legislation. Thus on the face of it any one justice of the peace constitutes, by herself or himself, a magistrates' court, and can exercise all the functions of such a court.

30. However, there are limitations to that equivalence. Section 121 of the 1980 Act requires trial to be by at least two justices, unless statute otherwise provides; requires committal for non-payment to be by at least two justices; and confines the sentencing powers of a single justice. Section 49(1) of the Crime and Disorder Act 1998 lists seventeen discrete functions that may be exercised by a single justice of the peace, from which it must be inferred that, absent that provision, those would be functions which could not be so exercised.¹³

31. By section 25 of the Courts Act 2003 a District Judge (Magistrates' Courts) is, in effect, a legally qualified justice of the peace. By reason of the definition of what constitutes a magistrates' court in section 148 of the Magistrates' Courts Act 1980, such a judge constitutes such a court, therefore. But by section 26 of the 2003 Act, 'Nothing in the 1980 Act (a) requiring a magistrates' court to be composed of two or

¹³ The reason is understood to be a perception that all of the functions listed in section 49(1) are ancillary to the trial of an information by a magistrates' court, meaning that section 121 of the 1980 Act otherwise would require them to be exercised by at least two justices. Whether that explanation convinces, and whether the most elegant legislative device available was employed to achieve the ostensible objective of restoring to a single justice of the peace powers that that justice would have possessed anyway but for section 121, are not matters which this invitation need address.

more justices, or (b) limiting the powers of a magistrates' court when composed of a single justice, applies to a District Judge (Magistrates' Courts)', and 'A District Judge (Magistrates' Courts) may (a) do any act, and (b) exercise alone any jurisdiction, which can be done or exercised by two justices, apart from granting or transferring a licence.' For that reason section 121 of the 1980 Act does not prevent trial, committal or sentencing by a District Judge (Magistrates' Courts) acting alone.

Judges and procedure rules in extradition cases

32. For convenience, Part 50 of the Criminal Procedure Rules describes extradition cases as proceeding in a magistrates' court. In fact, by sections 66 and 139 of the Extradition Act 2003 only a nominated District Judge (Magistrates' Courts) may exercise the powers conferred by the Act to adjudicate in proceedings concerning an extradition request dealt with under Part 1 of the Act (extradition to a designated territory, including in response to a European arrest warrant) or under Part 2 (extradition to other territories). Thus the jurisdiction to conduct extradition proceedings is not conferred on a magistrates' court constituted of a District Judge (Magistrates' Courts) but on a nominated such judge in his or her own judicial capacity.

33. For that reason, neither the Justices' Clerks Rules 2005 nor the Assistants to Justices' Clerks Regulations 2006¹⁴ apply in extradition proceedings; and because in such proceedings the District Judge (Magistrates' Courts) does not come within the scope of section 68 of the Courts Act 2003, the provision which confers the Committee's main power to make Criminal Procedure Rules, the rules in Section 2 of CrimPR Part 50 depend for their efficacy upon section 210 of the Extradition Act 2003, which provides "Rules of court may make provision as to the practice and procedure to be followed in connection with proceedings under this Act".

Court officers

34. Section 82 of the Senior Courts Act 1981 confers certain functions on 'officers of the Crown Court'. None are, or are described as, powers or functions of the court itself.

35. Section 2 of the Courts Act 2003 allows the Lord Chancellor to appoint 'such officers and other staff as appear to him appropriate for the purpose of discharging his general duty in relation to the courts'. That 'general duty' is the duty imposed upon the Lord Chancellor by section 1 of the 2003 Act to 'ensure that there is an efficient and effective system to support the carrying on of the business of (a) the Senior Courts, (aa) the Court of Protection, (b) the county court, (ba) the family court, and (c) magistrates' courts'.

36. Corresponding with section 2 of the Courts Act 2003, section 40 of the Tribunals, Courts and Enforcement Act 2007 allows the Lord Chancellor to appoint 'such staff as appear to him appropriate for the purpose of discharging his general duty in relation to the tribunals'. In this case, the 'general duty' is that imposed on the Lord

¹⁴ As to which, see paragraphs 41 and 42 beneath.

Chancellor by section 39 of the 2007 Act, a duty which corresponds with the duty under section 1 of the Courts Act.

37. The distinction drawn in some legislation between ‘officers’ and ‘other staff’ of a court is obscure. Perhaps ‘officers’ is an expression that Parliament considered apt to those who, although employed, were also appointed to a statutory office, such as a justices’ clerk; and ‘other staff’ apt to everyone else employed to assist in the court’s business. In any event, the distinction is immaterial if, as in every case, the statutory authority to confer powers or functions can be exercised in relation to all such people.

Powers of a single justice of the peace and of a justices’ clerk under the Crime and Disorder Act 1998

38. Section 49(1) of the Crime and Disorder Act 1998 is mentioned above.¹⁵ By section 49(2), ‘Criminal Procedure Rules may, subject to subsection (3) below, provide that any of the things which, by virtue of subsection (1) above, are authorised to be done by a single justice of the peace for any area may, subject to any specified restrictions or conditions, be done by a justices’ clerk for that area’. Subsection (3) lists five exceptions to those seventeen powers of a single justice capable of assignment to a justices’ clerk by means of Criminal Procedure Rules, and subsection (4) provides that ‘Before making any Criminal Procedure Rules which make such provision as is mentioned in subsection (2) above in relation to any area, the Criminal Procedure Rule Committee shall consult justices of the peace and justices’ clerks for that area.’

39. The power conferred on the Criminal Procedure Rules by section 49 has not been exercised. It substantially overlaps with the power to make rules conferred on the Lord Chancellor by section 28 of the Courts Act 2003, discussed beneath, and given the content of the Justices’ Clerks Rules 2005 it would be, at best, difficult to make Criminal Procedure Rules that served a useful purpose, neither repeating nor conflicting with the 2005 Rules.

40. Section 50(1) of the Crime and Disorder Act 1998 provides, ‘Where a person (“the accused”) has been charged with an offence at a police station, the magistrates’ court before whom he appears or is brought for the first time in relation to the charge may consist of a single justice’, who, by subsection (3), ‘(a) may exercise ... such of his powers as a single justice as he thinks fit, and (b) on adjourning the hearing, may remand the accused in custody or on bail.’ Section 50(4) of the 1998 Act extends that provision thus: ‘This section applies in relation to a justices’ clerk as it applies in relation to a single justice; but nothing in subsection (3)(b) above authorises such a clerk to remand the accused in custody or, without the consent of the prosecutor and the accused, to remand the accused on bail on conditions other than those (if any) previously imposed.’

¹⁵ At paragraph 30.

Powers of justices' clerks and assistant clerks under the Justices' Clerks Rules 2005 and the Assistants to Justices' Clerks Regulations 2006

41. At present section 27 of the Courts Act 2003 provides for the appointment of justices' clerks and assistant clerks; specifies the legal qualifications and experience that each must possess; and allows the Lord Chancellor by regulations to allow for functions to be performed nevertheless by an assistant clerk who has no legal qualification.¹⁶ Section 28 of the 2003 Act presently provides that rules '(1) ... may make provision enabling things authorised to be done by, to or before a single justice of the peace to be done instead by, to or before a justices' clerk', and '(2) ... may also make provision enabling things authorised to be done by, to or before a justices' clerk (whether by virtue of subsection (1) or otherwise) to be done instead by, to or before an assistant clerk.' Such rules are not, however, Criminal Procedure Rules. By section 28(8) of the 2003 Act, 'In this section 'rules' means rules made by the Lord Chancellor with the concurrence of the Lord Chief Justice'.

42. Under section 28 of the 2003 Act there have been made and amended the Justices' Clerks Rules 2005, while under section 27 there have been made the Assistants to Justices' Clerks Regulations 2006. As amended, the 2005 Rules now list thirty-six functions of a single justice of the peace which a justices' clerk may exercise, and which may be exercised also by an assistant clerk 'provided that that person has been specifically authorised by the justices' clerk for that purpose'. The 2006 Regulations allow an assistant clerk who has no legal qualification to exercise eleven of those thirty-six functions 'to the extent that they are performed out of court, provided that that person has been specifically authorised by the justices' clerk for that purpose'.

43. The Justices' Clerks Rules 1970, made under section 15 of the Justices' of the Peace Act 1949, had allowed justices' clerks to exercise functions substantially the same as those now numbered 1, 2, 7, 9 and 10, 24, 25, 30, 32 and 33 in the Schedule to the 2005 Rules (and expressed in the same terms). The 1970 Rules were superseded by the Justices' Clerks Rules 1999, made under section 144 of the Magistrates' Courts Act 1980, which provided for the exercise of criminal and non-family civil functions in the same terms as the current rules. When the 2005 Rules were proposed, a letter addressed to the Criminal Procedure Rule Committee in its capacity as a statutory consultee,¹⁷ explained "These rules are being put in place to ensure continuity of existing functions carried out by Justices' Clerks and assistants authorised by Justices' Clerks and no substantive changes are proposed; in particular at a time of major transition to HMCS. The overriding criterion is to ensure that what Justices' Clerks and assistants currently do carries on after 1st April 2005 into HMCS. This is therefore a routine transition issue to assure normal business continuity and for this to happen we need re-enacted rules to be effective."

Problems with the Justices' Clerks Rules 2005

44. The thus long-standing assignment to justices' clerks and assistant clerks of some powers of a justice of the peace is, at least in the view of some, not entirely

¹⁶ The Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 will repeal sections 27 to 29 of the Courts Act 2003 and replace them with new sections 28 and 29. See paragraph 63 beneath.

¹⁷ By present section 28(9) of the Courts Act 2003 the Criminal Procedure Rule Committee must be consulted before such rules are made, but plays no other part in their production.

satisfactory. The thirty-six ostensibly discrete powers now listed in Schedule 1 to the Justices' Clerks Rules 2005 are not easy in every instance to reconcile with the power to which each instance seems intended to refer, and the fact that the list includes references to powers exercisable in both criminal and civil cases can make interpretation even more difficult.

45. In the course of discussing magistrates' courts in Chapter 5 of his 2015 *Review of Efficiency in Criminal Proceedings* the President of the Queen's Bench Division made the following recommendation, reproduced as extracted to Chapter 11 of the *Review*:

“27. A Justices' Legal Advisor should have power to extend time pursuant to the Criminal Procedure Rules subject only to the trial date remaining unaffected. To support a more focused approach to out of court case progression consideration should be given to extending case progression powers of Justices' Legal Advisers. [Paragraph 114 and 117]”

46. Taking that function as one example of the conferring of jurisdiction on justices' clerks in terms which are not conspicuously easy to understand, the paragraphs of Schedule 1 to the 2005 Rules which might be relevant are those numbered 9, 10, 15, 17, 18 and 19. Paragraph 9 allows a justices' clerk to 'further' adjourn proceedings, so *a fortiori* assuming that the proceedings already have been adjourned, but only if all parties agree and only if there is agreement as to the extension of any bail to which the defendant is subject. Paragraph 10 allows a justices' clerk, again, to 'further' adjourn proceedings, this time if (i) the defendant is absent, (ii) the defendant is on bail, (iii) the defendant is again remanded on bail on the same terms, and (iv) the prosecutor has registered no objection (which might reflect acquiescence, or might simply reflect a lack of opportunity to object, perhaps by reason of the prosecutor's own absence). Paragraph 15 allows a justices' clerk not only to set a date for trial but also to set that date aside, without conditions attached by the rule to the exercise of that power. Paragraph 17 – which perhaps the most closely coincides with what was recommended by the *Review* – permits 'the giving, variation or revocation of directions for the conduct of a criminal trial' by a justices' clerk. Paragraph 18 allows for joinder or severance with the parties' consent. Paragraph 19 permits the extension of an overall time limit (but no such time limit yet has been prescribed), if the defendant agrees.

47. Plainly, these ostensibly discrete powers are in some respects overlapping and interdependent. For example, setting a trial date aside may, and in practice frequently will, require the proceedings to be adjourned. But does that mean that paragraph 15 is to be read as supplying powers ancillary to the exercise of the main power conferred by that paragraph independently of paragraphs 9 and 10? Or does it mean that the otherwise unconfined power conferred by paragraph 15 often will be constrained by the conditions precedent to the exercise of the powers conferred by paragraphs 9 or 10, as the case may be, because those powers, too, must be exercised? And if that latter proposition is correct, does it then mean that a justices' clerk is powerless to postpone a trial, irrespective of the circumstances and reasons for doing so, unless the proceedings happen already at least once to have been adjourned, which often will be the case but not invariably? And although this perhaps might be implied into paragraph 17, not one of the paragraphs recited above declares unequivocally that a

justices' clerk may perform any of those most basic of pre-trial case preparation functions, namely extending time, or declining to do so, for objecting to the introduction of evidence in a written statement, under CrimPR 16.4(4)(b), or for the service of any of the notices and applications for which CrimPR Parts 18 to 23 provide.

48. Illustrating the confusion capable of being caused by the 2005 Rules, the case of *R (Director of Public Prosecutions) v Lancashire Magistrates Court*¹⁸ concerned the prosecution of a youth for committing a common assault against a young woman by spitting at her. The trial was fixed for a date on which the complainant was due to be on holiday. Having discovered that, the prosecutor applied by letter for the trial date to be postponed. In circumstances of some confusion, first it was said on the court's behalf by a legal adviser that the defendant had objected and that the application therefore had been listed for hearing by magistrates in two days' time; and then, later the same day, by a different legal adviser, that that hearing of the application should not have been arranged, that the application to vacate the trial was refused, and that 'It is, of course open to the Crown to apply to the Magistrates on the day of trial, however, unless there are any new grounds to put before the court, your application would be unlikely to succeed'. Although the application was indeed renewed on the trial date, it was again refused; and, in the complainant's absence, the prosecutor was compelled to offer no evidence with the result that the case was dismissed.

49. The prosecutor applied successfully to the High Court to quash as unreasonable the second legal adviser's decision to refuse to postpone the trial. By way of a postscript to the judgment the court observed:¹⁹

"Both counsel have invited me to say something about the processes adopted about issues of adjournment in the Lancaster Youth Court. I am anxious not to go beyond what is appropriate because I am unaware of practices in other courts and I have not received submissions on behalf of the court. However, it is clear from paragraph 7 of the Schedule to the Justices' Clerks Rules 2005 that a Justice's Clerk or a duly authorised assistant may sanction the adjournment of a case where both parties agree. It does not, however, as it seems to me, mean that such a person has the power to refuse an adjournment simply because one party objects. Since questions of adjournment essentially involve the exercise of a judicial discretion, it seems to me that where there is no agreement about adjourning a case, the application for the adjournment should be listed before the Magistrates for consideration before the date of trial. This, as I understand it, was what was intended originally in this case. If that had happened, the question of what happened to the case would have been in the control of the Magistrates, which it seems to me is where the true exercise of the relevant judicial discretion lies. If the practice is that all questions concerning possible adjournments within the Lancaster Youth Court are handled by legal advisors, then I think it is an area that needs reconsideration."

50. Paragraph 7 of Schedule 1 to the 2005 Rules, to which the court there referred, applies not to the hearing of an 'information', by means of which criminal

¹⁸ [2010] EWHC 662 (Admin).

¹⁹ At paragraph 30.

proceedings are initiated, but to the hearing of a ‘complaint’, the procedural device by which civil proceedings in magistrates’ courts begin: see, for example, paragraph 1 of the Schedule (and see CrimPR 7.2). Paragraphs 9 and 10 of Schedule 1 potentially would apply, subject to the criteria for the exercise of those powers outlined above; and in that event the High Court’s observation still holds good, that an authority to allow an application in prescribed circumstances does not without more imply authority to refuse an application where those circumstances do not obtain. But presumably paragraph 15 of Schedule 1 also might apply, the paragraph conferring power to set aside the date of a criminal trial. Nothing in that paragraph appears to prevent a justices’ legal adviser from simply declining to vacate a trial date, as happened in the *Lancashire Magistrates’ Court* case, and leaving it to the applicant to take it up again with the court if he or she so wishes, as happened in that case. Self-evidently, however, that reading of the 2005 Rules did not suggest itself to the parties or to the High Court in that case.

Criminal Procedure Rules which confer jurisdictional powers

51. Many Criminal Procedure Rules govern the exercise of a court’s jurisdictional powers and in so doing reference the extent of those powers. Of those, the most expansive is CrimPR 3.5 (The court’s case management powers), which declares, ‘In fulfilling its duty under rule 3.2 the court may give any direction and take any step actively to manage a case unless that direction or step would be inconsistent with legislation, including these Rules.’²⁰

52. However, only two Criminal Procedure Rules presently confer, confine or assign jurisdiction, namely (i) CrimPR 34.11 (constitution of the Crown Court for the purposes of appeal), which exercises statutory powers conferred on rules of court to provide for the constitution of an appellate Crown Court,²¹ and (ii) CrimPR 50.30 (constitution of the High Court for the purposes of extradition appeal) which exercises statutory powers conferred on rules of court to delegate and assign some of the High Court’s powers.²²

*Other procedure rules which confer jurisdictional powers*²³

53. Section 1 of the Civil Procedure Act 1997 provides for Civil Procedure Rules made by the Civil Procedure Rule Committee to govern practice and procedure in the civil division of the Court of Appeal, in the High Court, except in relation to that court’s jurisdiction under the Extradition Act 2003, and in the county court. By paragraph 2 of Schedule 1 to the 1997 Act, ‘Civil Procedure Rules may provide for the exercise of the jurisdiction of any court within the scope of the rules by officers or other staff of the court.’ That is a more extensive power than any presently exercisable by Criminal Procedure Rules, except in relation to the High Court.

²⁰ The rule thus recognises that a court may possess powers of case management which derive explicitly or implicitly from a legislative source, or which derive from an inherent common law power; all of which only conflicting legislation therefore would confine.

²¹ See sections 73 and 74 of the Senior Courts Act 1981.

²² Under sections 19(3) and 66 of the Senior Courts Act 1981. See paragraph 27 above.

²³ Some of the provisions to which the following paragraphs refer will be amended by the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018.

54. Section 75 of the Courts Act 2003 provides for Family Procedure Rules, made by the Family Procedure Rule Committee. Among those Rules' other powers, by section 76 of the 2003 Act, as amended by the Crime and Courts Act 2013, 'Family Procedure Rules may ... provide, subject to any provision that may be made in rules under section 31O(1) of the Matrimonial and Family Proceedings Act 1984, for any functions of a court in family proceedings to be carried out by officers or other staff of the court.'

55. Section 31O of the Matrimonial and Family Proceedings Act 1984, which was added to that Act by the Crime and Courts Act 2013, corresponds with present section 28 of the Courts Act 2003. It provides that rules made by the Lord Chancellor – not by the Family Procedure Rule Committee – may enable justices' clerks and assistant clerks to exercise functions of the family court, or of a judge of that court. Under that section there have been made the Justices' Clerks and Assistants Rules 2014, the Schedule to which lists one hundred and ninety-seven such functions by reference to the legislative provision under which each is conferred on the court; in some cases subject to exceptions, such as 'Only in undefended cases', or 'Only where the parties consent'.

56. Nothing in those 2014 Rules applies to any other court officer or court staff, either to empower or to disempower them. No doubt the expectation is that where a function is conferred on a justices' clerk by the 2014 Rules it may not be conferred concurrently on anyone else by the Family Procedure Rules under the authority of section 76 of the 2003 Act; although the 1984 and 2003 Acts do not seem to obviate that possibility, and the 2014 Rules, to which the Family Procedure Rules are expressed to be subject in this respect, do not in terms prohibit those latter Rules from doing so.

57. Section 22 of the Tribunals, Courts and Enforcement Act 2007 provides for the making of Tribunal Procedure Rules by a Tribunal Procedure Rule Committee. Under paragraph 3 of Schedule 5 to that Act, the rules may provide for functions of a tribunal to be exercised by staff appointed under section 40(1) of the Act.

Reconsideration of judicial decisions made by court staff

58. In exercise of the powers conferred by Schedule 1 to the Civil Procedure Act 1997, rule 52.24 of the Civil Procedure Rules provides for the exercise of some functions of the civil division of the Court of Appeal by a court officer who is a solicitor or a barrister and who acts with the consent of the Master of the Rolls. The rule specifies some functions the exercise of which is permitted and some the exercise of which is prohibited. CPR 52.24(5) allows a party to request the reconsideration of a court officer's decision by a judge on application made within 7 days of service of notice of that decision. CPR 54.1A makes corresponding provision for legally qualified staff in the Administrative Court Office²⁴ who act with the consent of the President of the Queen's Bench Division. In the County Court, CPR Practice Direction 2E provides for the exercise by a legal adviser of twenty-two judicial

²⁴ When dealing with High Court cases other than those to which the Criminal Procedure Rules apply.

functions listed in that Direction, subject to specified restrictions.²⁵ Paragraph 3 of that Direction provides:

3. Reconsideration of a decision made by a legal adviser

3.1 Decisions of a legal adviser will be made without a hearing.

3.2 A party may request any decision of a legal adviser to be reconsidered by a District Judge.

3.3 A request must be filed within 14 days after the party is served with notice of the decision.

3.4 The request must include a summary of the issue and an explanation of why the reconsideration is sought.

3.5 Reconsideration will take place without a hearing.

59. By way of example of the exercise of the powers conferred by Schedule 5 to the Tribunals, Courts and Enforcement Act 2007, rule 3 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 provides:

Delegation to staff

3.(1) Anything of a formal or administrative nature which is required or permitted to be done by the Tribunal under these Rules may be done by a member of the Tribunal's staff.

(2) Staff appointed by the Lord Chancellor may, with the approval of the Senior President of Tribunals, carry out functions of a judicial nature permitted or required to be done by the Tribunal.

(3) The approval referred to at paragraph (2) may apply generally to the carrying out of specified functions by members of staff of a specified description in specified circumstances.

(4) Within 14 days after the date on which the Tribunal sends notice of a decision made by a member of staff under paragraph (2) to a party, that party may apply in writing to the Tribunal for that decision to be considered afresh by a judge.

60. The Criminal Appeal Act 1968 provides for the review, by a single judge of the criminal division of the Court of Appeal, of a decision made by the Registrar of Criminal Appeals, and for the review by a fully constituted court of a decision made by such a judge. Hitherto, however, there has been no provision, in Criminal Procedure Rules or elsewhere, for the decision of a justices' clerk or assistant clerk to be reviewed by a justice of the peace; or for the decision of a single justice of the peace to be reviewed by a court comprising two or more such justices; or for the review of a decision of a District Judge (Magistrates' Courts). Nor has there been provision for the review of a decision made by Administrative Court Office staff in an extradition appeal case.²⁶ The Family Procedure Rules, the Justices' Clerks Rules 2005 and the Justices' Clerks and Assistants Rules 2014 contain no such provision.

²⁵ See at: www.justice.gov.uk/courts/procedure-rules/civil/rules/part02/practice-direction-2e-jurisdiction-of-the-county-court-that-may-be-exercised-by-a-legal-adviser?SQ_VARIATION_174753=0.

²⁶ At least not formally. In practice, staff who exercise judicial functions under CrimPR 50.30 will refer to a judge any case in which a party asks for the reconsideration of a judicial decision taken by such staff.

(2) The Courts and Tribunals (Judiciary and Functions of Staff) Act 2018

61. The Courts and Tribunals (Judiciary and Functions of Staff) Act 2018²⁷ received the Royal Assent on 20th December, 2018. Paragraph 32 of the Schedule, by which there are inserted into the Courts Act 2003 the new provisions that prompt this proposal, has not yet been brought into force. The Rule Committee understands that that paragraph, and associated statutory amendments made by the Act, may be brought into force in April, 2020.

62. The Act provides for the deployment of judges and for the alteration of judicial titles as well as for the exercise of judicial functions by authorised court officers. There are some extracts from the Explanatory Notes published with the Act in the annexe to this invitation at page 43.

63. The Act amends a number of statutes but the provision of particular significance for the Committee's purposes is that amending the Courts Act 2003. Under a new section 28 of that Act the Lord Chief Justice will be empowered to authorise as legal advisers to justices of the peace those who possess the qualifications prescribed by regulations made by the Lord Chancellor. Under a new section 29, when exercising advisory functions such persons would be subject to (but only subject to) directions given by the Lord Chief Justice or under his authority: a novel and potentially significant new judicial power to direct court staff. Most importantly of all, for present purposes, the new section 67B of the 2003 Act provides as set out at paragraph 1 above; the expression 'relevant judicial function' is defined by new section 67A(1) as set out at paragraph 19 above; and in relation to the exercise of judicial functions by authorised members of court staff new section 67D makes provision corresponding with that made for legal advisers by the new section 29 (and correspondingly novel and significant). Thus under new section 67B the Lord Chief Justice may authorise an individual member of staff to exercise a judicial function of a court, or of a judge, but only to the extent, and only for the duration, of that authorisation; and only in respect of judicial functions permitted to be exercised by such a member of staff by the applicable rules of court, and only if the staff member concerned possesses such qualifications or experience as the applicable rules of court may require.

64. It follows that under this new regime no member of court staff, including a staff member on whom a judicial function has been conferred hitherto under the current provisions, may exercise such a function unless three conditions are satisfied:

- 1) the function is one that the relevant rules of court permit to be exercised by such a person;
- 2) the person concerned possesses such qualifications or experience as the relevant rules of court require for the exercise of the function in question by such a person; and
- 3) the person concerned possesses in his or her individual capacity an authorisation for the exercise of the function in question, which authorisation may confine the circumstances in which that individual may do so.

²⁷ The Act can be found at: www.legislation.gov.uk/ukpga/2018/33/contents/enacted

65. Moreover, for what is thought to be the first time ever, those nominated by the Lord Chief Justice are empowered under the authority of a statutory provision to give directions to a member of staff who is exercising a judicial function.

The proposed rules

Location and arrangement

66. The Rule Committee has chosen Part 2 (Understanding and applying the Rules) as the most appropriate location for the new rules. Like the current Part 2 rules, the new rules would apply in all the courts to which the Criminal Procedure Rules apply, and to judicial functions to which many other parts of the Rules apply. It would be at best inconvenient, and potentially confusing and misleading, for readers if provisions for the exercise by staff of judicial functions were scattered throughout the Rules instead of gathered together.

Amendments to rule 2.2

67. The amendments to definitions in rule 2.2(1) are consequential on statutory amendments to be made by the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 and on the proposed new rules.

Arrangement of lists of functions

68. In each of the lists of judicial functions contained in the new rules the sequence of entries has been arranged to follow, as nearly as may be, the sequence of rules in the Criminal Procedure Rules with which each function is most closely associated, so that, for example, functions concerned primarily with case management (Part 3) precede those concerned primarily with evidence (Parts 16 to 23), which in turn precede those concerned primarily with trial (Parts 24 to 27), and so on. While this is most apparent in Version B of rule 2.8(3) to (11) it is true also of the lists in other rules.

Listing decisions

69. Listing is a judicial function but the associated administration is not.²⁸ In the Court of Appeal, the High Court and the Crown Court listing officers exercise administrative functions under judicial superintendence and that will not change. In magistrates' courts, the judicial listing functions of justices of the peace already are conferred also on justices' clerks and assistant clerks under the Justices' Clerks Rules 2005 and under the Assistants to Justices' Clerks Regulations 2006. Under the proposed new rules, that will not change either.

Exercise of court's functions by authorised court officers: general rules: rule 2.4

70. This rule contains the principal exercise of the power conferred on the Rules by section 67B(1) of the Courts Act 2003 (rule 2.4(1)); supplies definitions (rule 2.4(2)); lists the principal categories of judicial function the exercise of which by court staff is prohibited (rule 2.4(3)); and sets out some other general provisions (rule 2.4(4), (5)).

²⁸ See paragraphs 22 and 23 above.

71. Rule 2.4(2) defines legal qualifications for court staff by reference to the qualifications that must be possessed by those who will be authorised under the new section 28 of the Courts Act 2003 to give legal advice to justices of the peace. The Committee thinks it appropriate to require of every authorised court officer who is legally qualified the same professional qualifications as those to be required of such advisers. It is understood that those requirements are likely to be that such a person (a) is a barrister in England and Wales, a solicitor of the Senior Courts of England and Wales, or a Fellow of the Chartered Institute of Legal Executives; (b) is qualified to become a barrister in England and Wales, a solicitor of the Senior Courts of England and Wales, or a Fellow of the Chartered Institute of Legal Executives by virtue of (i) having passed the necessary examinations, (ii) having been granted an exemption in relation to any such examination by the appropriate examining body, or (iii) any combination of those two; (c) holds a valid training certificate granted by a magistrates' courts committee before 1st January, 1999; or (d) acted as a clerk in court before 1st January, 1999, and was qualified to act as such under the Justices' Clerks (Qualification of Assistants) Rules 1979 as they stood immediately before that date.

72. The rule incorporates the prohibitions imposed by section 67A(2) and (3) of the Courts Act 2003 (authorising committal to prison; authorising arrest) as well as reciting those prohibitions in the note to the rule. It is not necessary thus to list those functions in the rule: neither could be exercised by a court officer even if the Criminal Procedure Rules appeared not to prohibit that, Parliament having excepted each from the definition of a 'relevant judicial function'. Nevertheless, the list in the rule of prohibited functions might appear incomplete, and might mislead readers, if those two important entries were omitted.

73. In addition to those two statutory prohibitions the Committee considers it appropriate explicitly to prohibit the exercise by court staff of certain core judicial functions in criminal proceedings, namely the determination of guilt, sentence, appeal, and the grant or withholding of bail, except in circumstances in which there is no material dispute. In the Committee's view, those other core judicial functions, listed in rule 2.4(3)(c) to (l), are apt only to exercise by the holder of a judicial office, not by a member of staff acting under the powers conferred by the new legislation; and in the Committee's view it is convenient and appropriate to list them explicitly and comprehensively as functions incapable of exercise by staff in any criminal court.

74. Rule 2.4(4) imposes on an authorised court officer when exercising a judicial function no requirement that the general law does not impose anyway upon the exercise of such a function, by reason of its judicial character. However, the Criminal Procedure Rules already incorporate as procedural requirements obligations imposed by statute or by the common law, in the interests of making the rules more readily understood than otherwise they might be, and this is analogous.²⁹

Exercise of functions of the Court of Appeal: rule 2.5

75. This rule defines the functions of the criminal division of the Court of Appeal that might be exercised by an authorised court officer by reference to the functions that

²⁹ The incorporation effected by rule 2.4(3)(a), (b), described in paragraph 72, would be another example.

may be exercised by the Registrar herself under the provisions referenced at paragraphs 25 and 26 above. It reflects current practice in the Criminal Appeal Office.

76. Note that the rule provides for the potential exercise by court officers of any judicial function exercisable by the Registrar in her own right, as well as for the exercise of functions of the court defined by reference to the Registrar's powers in that regard. That is permissible by reason of the second limb of the definition of 'relevant judicial function' in section 67A(1) of the Courts Act 2003; and it is necessary because the functions conferred on the Registrar herself by section 21 of the Criminal Appeal Act 1968 include some which in some circumstances are judicial and others which clearly are not.³⁰

77. Just as the powers that might be exercised by a court officer would correspond with those functions of the court exercisable by the Registrar of Criminal Appeals, so too would the right to reconsideration of a decision made by a court officer correspond with the existing regime for reconsideration of a judicial decision made by the Registrar.

78. It is likely that only those members of staff of the Criminal Appeal Office who have a legal qualification will be authorised to exercise some functions. However, given the comparatively small number of staff in that office and given their ready access to, and supervision by, the senior judicial members of that court, the distribution of functions among legally qualified and other staff can be established satisfactorily by the terms of the Lord Chief Justice's authorisations and need not be established by the rules.

Exercise of functions of the High Court: rule 2.6

79. This rule reproduces, and will replace, the substance of CrimPR 50.30 insofar as that applies to court officers.³¹ Because new rule 2.4 lists general prohibitions some of which appear in current rule 50.30, the current rule is not reproduced verbatim in new rule 2.6.

80. Current practice already accommodates, informally, an application for the judicial reconsideration of a decision made by a court officer.³² The new rule provides formally for an application to reconsider in the circumstances described in paragraph (5). Paragraphs (6), (7) and (8) govern procedure on such an application.

81. The time limit imposed by paragraph (6)(a) – as soon as reasonably practicable and in any event no later than five business days (the equivalent of a week) after the date on which notice of the impugned decision is served – in the Committee's view is realistic and reasonable. There is no explicit provision for its extension, but CrimPR Part 1, the overriding objective, will apply in any event.

³⁰ As a matter of general law, nothing impedes delegation by the Registrar of a non-judicial function to staff of the Criminal Appeal Office, but provision for that is not within the competence of Criminal Procedure Rules.

³¹ CrimPR 50.30 will be retained insofar as it assigns business to a divisional court and confers jurisdiction on a master or deputy master of the High Court.

³² See footnote 26 above.

82. Paragraph (8) is not intended to confer on a party a right to a hearing of such an application, or to confer a right to insist that any hearing which there may be must be convened at a time of either party's choosing. As long as a reasonable opportunity is afforded any respondent to make written representations then the judge, who will have received a written application, probably submitted by email, can make a determination in all parties' absence and therefore without a hearing. The terms of that paragraph are deliberately reminiscent of CrimPR 3.6, with which in practice this provision often will overlap.

83. As listing is a 'relevant judicial function' within the meaning of section 67A of the Courts Act 2003, the right to judicial reconsideration will apply to the exercise of that function by a court officer.³³

84. The right to reconsideration excludes any such right in respect of an agreement to postpone extradition under section 36(3)(b) of the Extradition Act 2003, or to decline to do so. In order to comply with the international agreements the operation of which in the United Kingdom the Extradition Act 2003 facilitates, the Act imposes time limits on the removal of a defendant in respect of whom an extradition order has been made, and the expiry of such a time limit allows the defendant to apply to the magistrates' court to be discharged: see CrimPR 50.16(b)(v). In relation to an extradition order under Part 1 of the Act, the time limit for removal under which is especially short, the Act includes provision the effect of which is to permit postponement where the requesting authority and the High Court agree.³⁴

85. Where, therefore, a flight is delayed, or where for some other reason it is proposed that the arrangements for a defendant's removal should be postponed, it is likely that the High Court will be asked to agree to such a postponement, and perhaps in circumstances in which that request has had to be made only a very short time before the time limit otherwise would expire. Such requests now are usually dealt with by members of the staff of the Administrative Court Office nominated for the purpose under CrimPR 50.30, and the Committee accepts that it would be impracticable to allow for the decision on such a request to be challenged, by either party, and subsequently reconsidered by a judge, in the time likely to be available.

86. As in relation to the Court of Appeal,³⁵ the rule does not distinguish between functions exercisable by those with a legal qualification and functions exercisable by those without. As in the Criminal Appeal Office so too in the Administrative Court Office some judicial functions may be exercisable only by those who are lawyers, but that will be established by the terms of the Lord Chief Justice's authorisation not by the terms of the rules: as is the case now, under current rule 50.30.

Exercise of functions of the Crown Court: rule 2.7

87. In the Crown Court no judicial function has been exercisable by court staff hitherto. The Committee has proceeded with caution, therefore, and will ask judges

³³ But not to the administration of listing under judicial superintendence.

³⁴ The High Court in this instance because there has been an appeal.

³⁵ See paragraph 78 above.

and others to report their experience of the operation of whatever rule in due course is made.

88. Rule 2.7(2)(a) and (d) reproduce the criteria imposed by CrimPR 3.7 (Agreement to vary a time limit fixed by a direction) and correspond with the provision for magistrates' courts recommended by the President of the Queen's Bench Division's *Review of Efficiency in Criminal Proceedings*.³⁶

89. Rule 2.7(2)(b) recognises the close connection between implementing a judicial listing decision and giving a live link direction. The exercise of this function by authorised court staff is proposed bearing in mind that a judge could rescind a direction under the provisions of the relevant sections of the Crime and Disorder Act 1998, especially if it became apparent that the criteria set by the Criminal Procedure Rules or by the Criminal Practice Directions were not met, or were no longer met.³⁷

90. The function exercisable by reason of rule 2.7(2)(c) is judicial but barely so, in that the condition precedent for appointing an advocate to cross-examine witnesses must first be met: which will be as a matter of law, or by the decision of a judge, not by the decision of a court officer.

91. The rule provides for the reservation to a judge in an individual case of a judicial function that otherwise would be exercisable by an authorised court officer: rule 2.7(3). This is reminiscent of CrimPR 3.5(2)(a), a provision of the rule about the court's powers of case management, but not identical to it.

92. Rule 3.5(2)(a) acknowledges the power of a court to nominate a judge, magistrate or justices' legal adviser to manage a specific case, in order to achieve continuity of overall case management where that is feasible and desirable. New rule 2.7(3) applies not to the overall management of a given case but to the exercise of any one or more specified judicial functions in that case, to accommodate the possibility that, for example, any application for the extension of a particular time limit in that particular case predictably will raise unusual and difficult considerations such that the application ought to be determined by a judge, not by a court officer.

93. Finally, the rule provides for judicial reconsideration of a decision of an authorised court officer (rule 2.7(4), (5), (6), (7)), in the same terms as that suggested for the High Court.

Exercise of functions of magistrates' courts: rule 2.8

94. The exercise by court staff of judicial functions of magistrates' courts is the longest established, the most extensively legislated and the most extensively litigated of any such regime. The Justices' Clerks Rules 2005 have accumulated a deposit of interpretative case law, not every decision in which is entirely consistent with others. Despite, or because of, that the status quo in magistrates' courts is not always fully appreciated. In those circumstances the Committee has found especially demanding the formulation of satisfactory Criminal Procedure Rules to provide for the exercise of

³⁶ See paragraphs 45 above and 96 beneath.

³⁷ See in particular CrimPR 3.2(4)(b)(ii) and CrimPD I 3N.5 and 6.

judicial functions of magistrates' courts. Nevertheless, and notwithstanding the dissimilar terms of the current and of the new enabling provisions,³⁸ and the sometimes opaque provisions of the Justices' Clerks Rules 2005, in the preparation of rule 2.8 those rules and the associated Assistants to Justices' Clerks Regulations 2006 have been used as a reference point to establish the status quo.

95. The table at page 41 of this invitation to comment shows the derivations of functions listed in rule 2.8 and identifies those few which have no direct precedent in the 2005 Rules or in other current legislation. As that table indicates, in most instances the precedent legislation has been paraphrased, and in some instances its provisions have been condensed and combined, in an effort to clarify what those current provisions appear to mean, and in order to adopt terminology consistent with other contemporary legislation applicable, including other provisions of the Criminal Procedure Rules. For example, a number of presently discrete powers to postpone or adjourn a hearing have been collected together (see rule 2.8(2)(a)), and a number of discrete associated powers on adjourning to grant bail, on existing or agreed terms, have been brought together, but in a distinct entry (see rules 2.8(2)(f) and 2.8(6) [Version B] (b)).

96. Rule 2.8(2) lists judicial functions of a magistrates' court which could be exercised by any authorised court officer, whether legally qualified or not. Paragraph (2)(c) derives from paragraph 17 of Schedule 1 to the Justices' Clerks Rules 2005, adjusted to implement the recommendation of the President of the Queen's Bench Division's *Review of Efficiency in Criminal Proceedings*.³⁹

97. Rule 2.8(3) provides for the exercise of judicial functions of a magistrates' court by an authorised court officer who is legally qualified. This provision is arranged in alternative ways, as follows:

(a) paragraph (3) [Version A] confers all the court's functions then lists those which such a court officer may *not* exercise, in addition to those prohibited by rule 2.4(3);

(b) paragraph (3) [Version B], read with paragraphs (4) – (11) in that version,⁴⁰ lists functions which such a court officer *may* exercise, in addition to those permitted by rule 2.8(2).

98. Thus it follows that where the exercise of a function would be prohibited by Version A, subject to exceptions, those exceptions appear as permitted functions in Version B; and, conversely, where a function would be permitted by Version B, subject to exceptions, the exceptions appear as prohibitions in Version A. For an example, compare rule 2.8(3) [Version A] (b) with 2.8(4) [Version B] (d).

³⁸ Section 67B of the Courts Act 2003 allows rules of court to provide for the exercise of a judicial function of a court or of a person holding an office that entitles the person to exercise functions of such a court. Current section 28 of the 2003 Act allows rules to be made enabling the exercise by a justices' clerk of 'things authorised to be done by, to or before' a single justice of the peace; so not confined to a judicial function of such a justice, and not extending to every potential function of a magistrates' court.

³⁹ See paragraph 45 above. For staff with a legal qualification, the rules confer the function more expansively by rule 2.8(4) [Version B] (c).

⁴⁰ The reason for the additional paragraph numbers and descriptors is that the total number of permitted functions exceeds the number of letters in the alphabet, making their presentation as consecutive sub-paragraphs inelegant with some otherwise requiring double letters (aa), (bb), (cc), etc.

99. The Committee has reached no settled view on which of the two potential arrangements to adopt, and views are sought. The advantages of Version A, the ‘prohibited functions’ version, might be:

- (1) brevity, which is desirable (the list of prohibited functions is half the length of the list of permitted functions);
- (2) clarity, which is essential (it is easier to define with precision that which a court officer may not do than it is satisfactorily to describe what a court officer may do); and
- (3) adaptability. Any power encountered so rarely as to have been overlooked when the rules were made nonetheless could be exercised by a legally qualified court officer where the justice of the case so required; and if the exercise of that power by such court officers were thought to be undesirable then the terms of all such officers’ authorisations could be amended promptly by the Lord Chief Justice to prohibit it, using the power conferred by section 67B(4)(b) of the Courts Act 2003. By contrast, if the Version B ‘permitted functions’ rule had been adopted, then a rule change would be required before any such – rarely encountered and, let it be assumed, uncontroversial – power could be exercised by a court officer.

100. Conversely, the advantages of Version B, the ‘permitted functions’ version, might be:

- (1) familiarity, for the benefit of those used to the formulation of the Justices’ Clerks Rules 2005;
- (2) reassurance, for the benefit of those, including staff members, who prefer lists of what staff can do to lists of what they cannot; and
- (3) consistency with the expression of some other proposed new rules, and notably rule 2.8(2), which rules list permitted, not prohibited, functions (although current rule 50.30 and new rule 2.6 confer all of the High Court’s powers subject to prohibited exceptions, like Version A of rule 2.8(3)).

101. In the text which accompanies this invitation to comment rules 2.4(3), 2.8(2), 2.8(3) [Version A] and 2.8(3) – (11) [Version B], read together, thus constitute a list of all, or at least all the principal, judicial functions of a magistrates’ court. That list is not constructed by reference to every legislative provision and every common law power capable of exercise by such a court: to construct such a list would be a formidable task and predictably would result in an unwieldy list. However, it has been constructed by adopting descriptions of functions that the Committee hopes are comprehensive and will be capable of being readily understood by users of the Criminal Procedure Rules. Moreover, it is hoped that the inclusion in this invitation of both lists, the list of prohibited functions and the list of permitted functions, will help readers of this invitation to assess whether all, or at least all the principal, judicial functions of a magistrates’ court have been identified and described satisfactorily, and their exercise by staff prohibited or permitted appropriately as the case may be.

102. Corresponding with new Crown Court rule 2.7(3), and for the same reasons as prompt the formulation of that Crown Court rule,⁴¹ rule 2.8(4) [Version A] and rule 2.8(12) [Version B] provide for the reservation of a specified judicial function in an individual case in a magistrates' court to a District Judge (Magistrates' Court), to a lay justice or to a justices' legal adviser. In this instance, however, the rule provides for the exercise of the reserved function 'in an emergency' by an authorised court officer who but for the reservation would have been able to exercise it, to obviate any difficulty that might arise in circumstances of urgency where no such judge, justice or legal adviser is available.

103. No new provision is proposed for the judicial reconsideration of a decision of an authorised court officer in a magistrates' court for these reasons:

- (a) CrimPR 3.6 already allows a party to apply to vary a direction which the court gave without a hearing, or gave at a hearing in that party's absence, or where circumstances have changed, which rule in the overwhelming majority of instances will apply to a decision by an authorised court officer in a magistrates' court;
- (b) to the extent, if any in practice, that an authorised court officer had determined under section 8A of the Magistrates' Courts Act 1980 a question of law within the meaning of section 8A(4),⁴² that decision could be discharged or varied under section 8B(3) if circumstances had changed; and
- (c) those provisions would apply to the exercise of functions by an authorised court officer by reason of rule 2.4(4).⁴³

Exercise of functions of a District Judge (Magistrates' Courts) in an extradition case: rule 2.9

104. No judicial function has been exercisable hitherto by court staff in relation to extradition proceedings, and for the reasons given at paragraphs 32 and 33 above new rule 2.8 will not apply to those proceedings. Therefore, a separate new rule is required.

105. As in the case of the Crown Court so here, too, the Committee has proceeded with caution and will ask District Judges (Magistrates' Courts) and others to report in due course their experience of the operation of the rule. Meanwhile, rule 2.9 adopts provisions corresponding with some of those that appear in rules 2.7 and 2.8.

106. No new provision is proposed for the judicial reconsideration of a decision of an authorised court officer, for the same reasons as those given in relation to rule 2.8.⁴⁴

⁴¹ See paragraphs 91 and 92 above.

⁴² Section 8A applies to a pre-trial ruling on 'any question as to the admissibility of evidence' and 'any other question of law relating to the case'; but by reason of proposed CrimPR 2.4(3)(d) an authorised court officer will not be able to determine the admissibility of evidence.

⁴³ And by reason of the fact that relevant judicial functions exercised by an authorised court officer are, *a fortiori*, functions of the court concerned; to the exercise of which all the usual governing provisions apply.

⁴⁴ At paragraph 103.

Questions for consideration

107. The Criminal Procedure Rule Committee invites respondents to comment on any aspect of this proposal, general or specific, and on any aspect of the draft new rules. Views on the following questions would be appreciated especially:

- (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?
- (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?
- (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?
- (4) Are the functions made exercisable by court staff under rule 2.5 (functions of the Court of Appeal) appropriate and adequate?
- (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?
- (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?
- (7) Is the provision for judicial reconsideration of a decision made by court staff under rule 2.6 appropriate and adequate?
- (8) Are the functions to be exercisable by court staff under rule 2.7 (functions of the Crown Court) appropriate and sufficient?
- (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?
- (10) Is the provision for judicial reconsideration of a decision made by court staff under rule 2.7 appropriate and adequate?
- (11) Are the functions to be exercisable by court staff under rule 2.8 (functions of magistrates' courts) appropriate and sufficient?
- (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?
- (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?

(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?

(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?

Criminal Procedure Rule Committee
April, 2019

Proposed new rules

PART 2

UNDERSTANDING AND APPLYING THE RULES; POWERS OF AUTHORISED COURT OFFICERS

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UNDERSTANDING AND APPLYING THE RULES

When the Rules apply

2.1.—(1) In general, Criminal Procedure Rules apply—

- (a) in all criminal cases in magistrates' courts and in the Crown Court;
- (b) in extradition cases in the High Court; and
- (c) in all cases in the criminal division of the Court of Appeal.

(2) If a rule applies only in one or some of those courts, the rule makes that clear.

(3) These Rules apply on and after 5th October, 2015, but—

- (a) unless the court otherwise directs, they do not affect a right or duty existing under the Criminal Procedure Rules 2014⁽⁴⁵⁾; and
- (b) unless the High Court otherwise directs, Section 3 of Part 50 (Extradition – appeal to the High Court) does not apply to a case in which notice of an appeal was given before 6th October, 2014.

(4) In a case in which a request for extradition was received by a relevant authority in the United Kingdom on or before 31st December, 2003—

- (a) the rules in Part 50 (Extradition) do not apply; and
- (b) the rules in Part 17 of the Criminal Procedure Rules 2012⁽⁴⁶⁾ (Extradition) continue to apply as if those rules had not been revoked.

[Note. The rules replaced by the first Criminal Procedure Rules (the Criminal Procedure Rules 2005⁽⁴⁷⁾) were revoked when those Rules came into force by provisions of the Courts Act 2003,

⁽⁴⁵⁾ S.I. 2014/1610; amended by S.I. 2015/13, 2015/646.

⁽⁴⁶⁾ S.I. 2012/1726; amended by S.I. 2012/3089.

⁽⁴⁷⁾ S.I. 2005/384; amended by S.I. 2006/353, 2006/2636, 2007/699, 2007/2317, 2007/3662, 2008/2076, 2008/3269 and 2009/2087.

the Courts Act 2003 (Consequential Amendments) Order 2004⁽⁴⁸⁾ and the Courts Act 2003 (Commencement No. 6 and Savings) Order 2004⁽⁴⁹⁾. The first Criminal Procedure Rules reproduced the substance of all the rules they replaced.

The rules in Part 17 of the Criminal Procedure Rules 2012 applied to extradition proceedings under the Backing of Warrants (Republic of Ireland) Act 1965⁽⁵⁰⁾ or under the Extradition Act 1989⁽⁵¹⁾. By section 218 of the Extradition Act 2003, the 1965 and 1989 Acts ceased to have effect when the 2003 Act came into force. By article 2 of the Extradition Act 2003 (Commencement and Savings) Order 2003⁽⁵²⁾, the 2003 Act came into force on 1st January, 2004. However, article 3 of that Order⁽⁵³⁾ provided that the coming into force of the Act did not apply for the purposes of any request for extradition, whether made under any of the provisions of the Extradition Act 1989 or of the Backing of Warrants (Republic of Ireland) Act 1965 or otherwise, which was received by the relevant authority in the United Kingdom on or before 31st December, 2003.]

Definitions

2.2.—(1) In these Rules, unless the context makes it clear that something different is meant:

‘advocate’ means a person who is entitled to exercise a right of audience in the court under section 13 of the Legal Services Act 2007⁽⁵⁴⁾;

‘authorised court officer’ has the meaning given by rule 2.4;

‘business day’ means any day except Saturday, Sunday, Christmas Day, Boxing Day, Good Friday, Easter Monday or a bank holiday;

‘court’ means a tribunal with jurisdiction over criminal cases. It includes a judge, recorder, District Judge (Magistrates’ Courts), lay justice and, when exercising their judicial powers, the Registrar of Criminal Appeals ~~a justices’ clerk or assistant clerk~~ and an authorised court officer;

‘court officer’ means the appropriate member of the staff of a court;

‘justices’ legal adviser’ means ~~a justices’ clerk or an assistant to a justices’ clerk~~ a person authorised under section 28 of the Courts Act 2003⁽⁵⁵⁾ to give advice about law to justices of the peace;

‘legal representative’ means:

- (i) the person for the time being named as a party’s representative in any legal aid representation order made under section 16 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012⁽⁵⁶⁾, or
- (ii) subject to that, the person named as a party’s representative in any notice for the time being given under rule 46.2 (Notice of appointment, etc. of legal representative: general rules), provided that person is entitled to conduct litigation in the court under section 13 of the Legal Services Act 2007;

‘live link’ means an arrangement by which a person can see and hear, and be seen and heard by, the court when that person is not in the courtroom;

⁽⁴⁸⁾ S.I. 2004/2035.

⁽⁴⁹⁾ S.I. 2004/2066.

⁽⁵⁰⁾ 1965 c. 45; the Act was repealed by section 218(a) of, and Schedule 4 to, the Extradition Act 2003 (c. 41).

⁽⁵¹⁾ 1989 c. 33; the Act was repealed by section 218(b) of, and Schedule 4 to, the Extradition Act 2003 (c. 41) with savings and territorial exceptions.

⁽⁵²⁾ S.I. 2003/3103.

⁽⁵³⁾ S.I. 2003/3103; article 3 was substituted by article 2 of S.I. 2003/3312.

⁽⁵⁴⁾ 2007 c. 29.

⁽⁵⁵⁾ 2003 c. 39; section 28 was substituted by section 3 of, and paragraph 26 of the Schedule to, the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 (c. 33).

⁽⁵⁶⁾ 2012 c. 10.

‘Practice Direction’ means the Lord Chief Justice’s Criminal Practice Directions, as amended, and ‘Criminal Costs Practice Direction’ means the Lord Chief Justice’s Practice Direction (Costs in Criminal Proceedings), as amended;

‘public interest ruling’ means a ruling about whether it is in the public interest to disclose prosecution material under sections 3(6), 7A(8) or 8(5) of the Criminal Procedure and Investigations Act 1996⁽⁵⁷⁾; and

‘Registrar’ means the Registrar of Criminal Appeals or a court officer ~~acting with the Registrar’s authority~~ exercising a function of the Registrar.

(2) Definitions of some other expressions are in the rules in which they apply.

[Note. The glossary at the end of the Rules is a guide to the meaning of certain legal expressions used in them.]

References to legislation, including these Rules

2.3.—(1) In these Rules, where a rule refers to an Act of Parliament or to subordinate legislation by title and year, subsequent references to that Act or to that legislation in the rule are shortened: so, for example, after a reference to the Criminal Procedure and Investigations Act 1996⁽⁵⁸⁾ that Act is called ‘the 1996 Act’; and after a reference to the Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 2011⁽⁵⁹⁾ those Regulations are called ‘the 2011 Regulations’.

(2) In the courts ~~to~~ in which these Rules apply—

- (a) unless the context makes it clear that something different is meant, a reference to the Criminal Procedure Rules, without reference to a year, is a reference to the Criminal Procedure Rules in force at the date on which the event concerned occurs or occurred;
- (b) a reference to the Criminal Procedure Rules may be abbreviated to ‘CrimPR’; and
- (c) a reference to a Part or rule in the Criminal Procedure Rules may be abbreviated to, for example, ‘CrimPR Part 3’ or ‘CrimPR 3.5’.

POWERS OF AUTHORISED COURT OFFICERS

Exercise of court’s functions by authorised court officers: general rules

2.4.—(1) This rule and rules 2.5, 2.6, 2.7, 2.8 and 2.9 provide for the exercise of relevant judicial functions within the meaning of section 67A of the Courts Act 2003⁽⁶⁰⁾—

- (a) in a court to which these Rules apply;
- (b) by a person authorised for the purpose by the Lord Chief Justice under section 67B of that Act⁽⁶¹⁾.

(2) In this rule and in rules 2.5, 2.6, 2.7, 2.8 and 2.9—

- (a) ‘authorised court officer’ means any such person;
- (b) a reference to an authorised court officer who is legally qualified is a reference to one who has such qualifications as are for the time being prescribed by regulations made under section 28(3) of the Courts Act 2003⁽⁶²⁾.

⁽⁵⁷⁾ 1996 c. 25; section 7A was inserted by section 37 of the Criminal Justice Act 2003 (c. 44).

⁽⁵⁸⁾ 1996 c. 25.

⁽⁵⁹⁾ S.I. 2011/209.

⁽⁶⁰⁾ 2003 c. 39; section 67A is inserted by section 3 of, and paragraph 32 of the Schedule to, the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 (c. 33) with effect from a date to be appointed.

⁽⁶¹⁾ 2003 c. 39; section 67B is inserted by section 3 of, and paragraph 32 of the Schedule to, the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 (c. 33) with effect from a date to be appointed.

⁽⁶²⁾ 2003 c. 39; section 28 is substituted by section 3 of, and paragraph 26 of the Schedule to, the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 (c. 33) with effect from a date to be appointed.

- (3) No court officer may—
- (a) authorise a person’s committal to prison;
 - (b) authorise a person’s arrest (but that exclusion does not apply to the issue of a warrant of arrest, whether or not endorsed for bail, to secure that a person attends court proceedings relating to an offence of which the person has been accused or convicted in a case in which no objection is made by or on behalf of that person to the issue of the warrant);
 - (c) adjudicate on guilt, or on the act or omission with which a defendant is charged, except to the extent of—
 - (i) acquitting a defendant against whom the prosecutor offers no evidence,
 - (ii) convicting a defendant who pleads guilty, or
 - (iii) giving a prosecutor permission to withdraw a case;
 - (d) determine the admissibility of evidence;
 - (e) set ground rules for the conduct of questioning where rule 3.9(6), (7) applies;
 - (f) make findings of fact for the purpose of sentence, defer or pass sentence, impose a penalty or commit a defendant to the Crown Court for sentence;
 - (g) make an order for a party or other person to pay costs, unless that party or person agrees;
 - (h) make any other order consequent upon acquittal, conviction or a finding that the accused did the act or made the omission charged, except to the extent that rule 2.8 allows;
 - (i) vary, discharge, remit, remove, revoke, review or suspend a sentence, penalty or other order consequent on acquittal or conviction, except to the extent that rule 2.8 allows;
 - (j) order the search, confiscation, restraint, detention or seizure of property except to the extent that rule 2.8 allows;
 - (k) determine an appeal or reference to an appeal court, or an application for permission to appeal or refer, except to the extent that rule 2.6 allows; or
 - (l) determine an allegation of contempt of court.
- (4) An authorised court officer may exercise a relevant judicial function for which rule 2.5, 2.6, 2.7, 2.8 or 2.9 provides—
- (a) only if—
 - (i) the court or person whose function it is could have exercised that function in corresponding circumstances, and
 - (ii) each party affected has had the same opportunity to make representations as that party would have had to make representations to that court or person in corresponding circumstances; and
 - (b) only subject to—
 - (i) such legislation as applies to the exercise of that function, including these Rules, and
 - (ii) such of the Lord Chief Justice’s Criminal Practice Directions as apply to its exercise.
- (5) Unless the context makes it clear that something different is meant, provision in rule 2.5, 2.6, 2.7, 2.8 or 2.9 permitting the exercise of a relevant judicial function by an authorised court officer includes a power to decline to exercise that function.

[Note. Under section 67A of the Courts Act 2003, ‘relevant judicial function’ means a function of a court to which the general duty of the Lord Chancellor under section 1 of that Act applies and a judicial function of a person holding an office that entitles the person to exercise functions of such a court, but does not include in a court to which Criminal Procedure Rules apply—

- (a) any function so far as its exercise involves authorising a person’s committal to prison; or
- (b) any function so far as its exercise involves authorising a person’s arrest, except the issue of a warrant of arrest (whether or not endorsed for bail) to secure that a person attends

court proceedings relating to an offence of which the person has been accused or convicted in a case in which no objection is made by or on behalf of that person to the issue of the warrant.

Under section 67B of the 2003 Act, in a court to which Criminal Procedure Rules apply the Rules may provide for the exercise of relevant judicial functions by persons who are appointed under section 2(1) of that Act and who satisfy any requirements specified in the Rules as to qualifications or experience. Such a person may exercise such a function only if authorised to do so by the Lord Chief Justice.

Section 28 of the 2003 Act provides for persons authorised by the Lord Chief Justice to give advice to justices of the peace about matters of law. Such a person may be authorised for that purpose only if appointed under section 2(1) of that Act and possessed of such qualifications as may be prescribed by regulations made under section 28. See also rule 2.2 (Definitions).]

Exercise of functions of the Court of Appeal

2.5.—(1) This rule provides for the exercise by an authorised court officer of relevant judicial functions of—

- (a) the criminal division of the Court of Appeal; and
- (b) the Registrar of Criminal Appeals.

(2) Subject to rule 2.4, an authorised court officer may exercise—

- (a) any function of the criminal division of the Court of Appeal that may be exercised by the Registrar of Criminal Appeals; and
- (b) any other judicial function of the Registrar.

(3) Where an authorised court officer exercises a function of the court—

- (a) the same provision as that made by section 31A(4) or section 31C(3), as the case may be, of the Criminal Appeal Act 1968⁽⁶³⁾ applies as if that function had been exercised by the Registrar; and
- (b) rule 36.5 (Renewing an application refused by a judge or the Registrar) applies.

[Note. See also rule 2.4, which makes general rules about the exercise of judicial functions by authorised court officers.

For the functions of the criminal division of the Court of Appeal that may be exercised by the Registrar of Criminal Appeals, see sections 31A and 31B of the Criminal Appeal Act 1968⁽⁶⁴⁾. For other functions of the Registrar, see section 21 of that Act⁽⁶⁵⁾.

Sections 31A(4) and 31C(3) of the 1968 Act provide for the reconsideration by a judge of a decision by the Registrar to which those provisions apply.]

Exercise of functions of the High Court

2.6.—(1) This rule provides for the exercise by an authorised court officer of relevant judicial functions of the High Court in relation to its jurisdiction under the Extradition Act 2003⁽⁶⁶⁾.

(2) An authorised court officer may exercise any such function of the High Court to which the rules in Section 3 of Part 50 apply (Extradition; Appeal to the High Court), subject to—

⁽⁶³⁾ 1968 c. 19; section 31A was inserted by section 6 of the Criminal Appeal Act 1995 (c. 35) and amended by sections 87 and 109 of, and Schedule 10 to, the Courts Act 2003 (c. 39) and paragraphs 86 and 88 of Schedule 36 to the Criminal Justice Act 2003 (c. 44). Section 31C was inserted by section 87 of the Courts Act 2003 (c. 39) and amended by sections 47 and 149 of, and paragraphs 1 and 12 of Schedule 8 and part 3 of Schedule 28 to, the Criminal Justice and Immigration Act 2008 (c. 4).

⁽⁶⁴⁾ 1968 c. 19; section 31B was inserted by section 87 of the Courts Act 2003 (c. 39).

⁽⁶⁵⁾ 1968 c. 19.

⁽⁶⁶⁾ 2003 c. 41.

- (a) rule 2.4; and
 - (b) paragraph (3) of this rule.
- (3) No court officer may—
- (a) grant or withhold bail;
 - (b) impose or vary a condition of bail; or
 - (c) reopen a decision which determines an appeal or an application for permission to appeal,
- unless paragraph (4) applies
- (4) If making a decision to which the parties have agreed in writing, an authorised court officer may—
- (a) give or refuse permission to appeal;
 - (b) determine an appeal;
 - (c) grant or withhold bail; or
 - (d) impose or vary a condition of bail.
- (5) Paragraph (6) of this rule—
- (a) applies where a party wants a judge to reconsider a decision made by an authorised court officer;
 - (b) does not apply where such an officer agrees to postpone the date on which the required period for extradition begins under section 36(3) of the Extradition Act 2003⁽⁶⁷⁾.
- (6) Such a party must—
- (a) apply for such a reconsideration as soon as reasonably practicable, and in any event no later than the fifth business day after the date on which notice of the decision is served on the applicant;
 - (b) serve the application on—
 - (i) the court officer, and
 - (ii) each other party (if any) affected by the decision; and
 - (c) in the application—
 - (i) specify the decision in issue,
 - (ii) explain why it is appropriate for the decision to be reconsidered and what decision the applicant thinks would be appropriate, and
 - (iii) ask for a hearing, if one is wanted, and explain why it is needed.
- (7) The judge may determine the application—
- (a) at a hearing (which may be in public or private), or without a hearing;
 - (b) in the absence of—
 - (i) the applicant,
 - (ii) each other party (if any) affected by the decision.
- (8) But the judge must not determine the application in the absence of an affected party unless that party has had—
- (a) such notice as the nature and urgency of the application permits; and
 - (b) a reasonable opportunity to make written representations.

[Note. See also—

⁽⁶⁷⁾ 2003 c. 41; section 36 was amended by section 40 of, and paragraph 81 of Schedule 9 to, the Constitutional Reform Act 2005 (c. 4).

- (a) rule 2.4, which makes general rules about the exercise of judicial functions by authorised court officers;
- (b) rule 3.6 (Application to vary a direction); and
- (c) rule 50.18 (Case management in the High Court).

For the functions of the High Court for which this rule provides, see the introductory note to Section 3 of Part 50. See also rule 50.30 for the constitution of the High Court when exercising the powers to which that Section of that Part applies.

Under section 36 of the Extradition Act 2003, where an extradition order has been made under Part 1 of the Act and the outcome of an appeal by the defendant is that he or she is to be extradited then (a) the defendant must be removed to the requesting territory within 10 days starting with the day on which the decision of the relevant court on the appeal becomes final or proceedings on the appeal are discontinued, unless (b) the requesting authority and the High Court agree to postpone that starting date.]

Exercise of functions of the Crown Court

2.7.—(1) This rule provides for the exercise by an authorised court officer of relevant judicial functions of the Crown Court in a criminal cause or matter.

- (2) Subject to rule 2.4 and to paragraph (3) of this rule, an authorised court officer may—
- (a) determine an application to extend a time limit set by a rule or by a judge, unless the effect would be—
 - (i) to affect the date of any hearing that has been fixed, including a trial, or
 - (ii) significantly to affect the progress of the case in any other way;
 - (b) give a live link direction under section 57B, 57E or 57F of the Crime and Disorder Act 1998⁽⁶⁸⁾ (Use of live link at preliminary hearings where accused is in custody; Use of live link in sentencing hearings; Use of live link in certain enforcement hearings);
 - (c) exercise the court’s functions listed in rule 23.2 (Appointment of advocate to cross-examine witness) and appoint such an advocate as that rule describes (but a court officer may not decline to appoint such an advocate where that rule applies);
 - (d) determine an application to extend a time limit set by a judge for the conduct of confiscation proceedings, unless the effect would be—
 - (i) to affect the date of any confiscation hearing that has been fixed, or
 - (ii) significantly to affect the progress of the case in any other way.
- (3) An authorised court officer may not exercise a function of the court in a case in which a judge reserves the exercise of that function to a judge.
- (4) Paragraph (5) of this rule applies where a party or an advocate appointed under rule 23.2 (Appointment of advocate to cross-examine witness) wants a judge to reconsider a decision made by an authorised court officer.
- (5) Such a party or advocate must—
- (a) apply for such a reconsideration as soon as reasonably practicable, and in any event no later than the fifth business day after the date on which notice of the decision is served on the applicant;
 - (b) serve the application on—
 - (i) the court officer, and

⁽⁶⁸⁾ 1998 c. 37; sections 57A to 57E were substituted for section 57 as originally enacted by section 45 of the Police and Justice Act 2006 (c. 48). Sections 57B and 57E were amended, and section 57F was inserted, by section 106 of the Coroners and Justice Act 2009 (c. 25).

- (ii) each other party (if any) affected by the decision; and
- (c) in the application—
 - (i) specify the decision in issue,
 - (ii) explain why it is appropriate for the decision to be reconsidered and what decision the applicant thinks would be appropriate, and
 - (iii) ask for a hearing, if one is wanted, and explain why it is needed.
- (6) The judge may determine the application—
 - (a) at a hearing (which may be in public or private), or without a hearing;
 - (b) in the absence of—
 - (i) the applicant,
 - (ii) each other party (if any) affected by the decision.
- (7) But the judge must not determine the application in the absence of an affected party unless that party has had—
 - (a) such notice as the nature and urgency of the application permits; and
 - (b) a reasonable opportunity to make representations.

[Note. See also—

- (a) *rule 2.4, which makes general rules about the exercise of judicial functions by authorised court officers; and*
- (b) *rule 3.6 (Application to vary a direction).*

For the constitution and powers of the Crown Court, see the note to rule 25.1 (Trial and sentence in the Crown Court; When this Part applies).]

Exercise of functions of a magistrates' court

2.8.—(1) This rule provides for the exercise by an authorised court officer of relevant judicial functions of a magistrates' court in a criminal cause or matter.

- (2) Subject to rule 2.4 and to paragraph [(4)] [(12)] of this rule, an authorised court officer may—
 - (a) fix, cancel or vary the date, time or place for a hearing, including a trial, or adjourn a hearing;
 - (b) adjourn, remit or transfer proceedings from one local justice area to another;
 - (c) determine an application to extend a time limit set by a rule or by the court, unless the effect would be—
 - (i) to affect the date of any hearing that has been fixed, including a trial, or
 - (ii) significantly to affect the progress of the case in any other way;
 - (d) issue a summons at the request of a public prosecutor, or under section 16B of the Magistrates' Courts Act 1980⁽⁶⁹⁾ (Cases not tried in accordance with section 16A) or section 83 of that Act (Process for securing attendance of offender)⁽⁷⁰⁾;
 - (e) give a prosecutor permission to withdraw a case;
 - (f) grant bail where the defendant already is on bail and—
 - (i) the conditions, if any, to which that bail is subject will remain the same, or
 - (ii) bail conditions will be varied or imposed with both parties' agreement;

⁽⁶⁹⁾ 1980 c. 43; section 16B was inserted by section 48 of the Criminal Justice and Courts Act 2015 (c. 2).

⁽⁷⁰⁾ 1980 c. 43; section 83 was amended by articles 46 and 47 of S.I. 2006/1737 and sections 97(2) and 106 of, and Part V (table 8) of Schedule 15 to, the Access to Justice Act 1999 (c. 22).

- (g) give consent for another magistrates' court to deal with a defendant for an offence in respect of which the defendant, when an adult, was discharged conditionally;
 - (h) order a convicted defendant to produce his or her driving licence;
 - (i) require a statement of the defendant's assets and other financial circumstances;
 - (j) amend an attendance centre order to—
 - (i) vary the day or hour specified in that order for the defendant's first attendance, or
 - (ii) substitute an alternative centre;
 - (k) amend the local justice area or responsible officer named in an order of the court;
 - (l) amend a sentence or order by requiring it to be completed in Northern Ireland or Scotland;
 - (m) extend the time for service of a statutory declaration to which applies—
 - (i) rule 24.17 (Statutory declaration of ignorance of proceedings), or
 - (ii) rule 29.4 (Statutory declaration to avoid fine after fixed penalty notice);
 - (n) fix a later time at which a defendant must attend court for the purposes of an enquiry or hearing under section 82 of the Magistrates' Courts Act 1980⁽⁷¹⁾ (Restriction on power to impose imprisonment for default);
 - (o) conduct a means enquiry;
 - (p) make a collection order;
 - (q) issue a warrant of control;
 - (r) extend the time for payment of a fine or sum to which Part 30 (Enforcement of fines and other orders for payment) or Part 33 (Confiscation and related proceedings) applies;
 - (s) vary an order for the payment by instalments of such a fine or sum;
 - (t) make a transfer of fine order;
 - (u) make a disclosure order under section 125CA Magistrates' Courts Act 1980⁽⁷²⁾ (Power to make disclosure order) for the purposes of securing the execution of a warrant;
 - (v) make an attachment of earnings order;
 - (w) make or withdraw an application for deductions to be made from a defendant's benefit payments;
 - (x) take any step listed in paragraph 38 of Schedule 5 to the Courts Act 2003⁽⁷³⁾ (range of further steps available against defaulters).
- (3) [*Version A*] In addition to the functions listed in paragraph (2), subject to rule 2.4 and to paragraph (4) of this rule an authorised court officer who is legally qualified may exercise any other function of a magistrates' court except—
- (a) staying proceedings as an abuse of process;

⁽⁷¹⁾ 1980 c. 43; section 82 was amended by section 77 of, and paragraph 52 of Schedule 14 to, the Criminal Justice Act 1982 (c. 48), sections 61 and 123 of, and paragraphs 1 and 2 of Schedule 8 to, the Criminal Justice Act 1988 (c. 33), section 55 of and paragraph 10 of Schedule 4 to the Crime (Sentences) Act 1997 (c. 43), paragraph 220 of Schedule 8 to the Courts Act 2003 (c. 39), section 62 of, and paragraphs 45 and 51 of Schedule 13 to, the Tribunals, Courts and Enforcement Act 2007 (c. 15) and section 179 of the Anti-social Behaviour, Crime and Policing Act 2014 (c. 12) and section 54 of, and paragraphs 2 and 3 of Schedule 12 to, the Criminal Justice and Courts Act 2015 (c. 2). It is further amended by paragraphs 58 and 63 of Part II of Schedule 7 to the Criminal Justice and Court Services Act 2000 (c. 43) and Part 7 of Schedule 37 to the Criminal Justice Act 2003 (c. 44), with effect from dates to be appointed.

⁽⁷²⁾ 1980 c. 43; section 125CA was inserted by section 28 of the Domestic Violence, Crime and Victims Act 2004 (c. 28) and amended by section 62 of, and paragraphs 45 and 60 of Schedule 13 to, the Tribunals, Courts and Enforcement Act 2007 (c. 15).

⁽⁷³⁾ 2003 c. 39; paragraph 38 of Schedule 5 was amended by articles 2, 4 and 26 of S.I. 2006/1737, section 62 of, and paragraphs 148 and 149 of Schedule 13 to, the Tribunals, Courts and Enforcement Act 2007 (c. 15), section 80 of the Criminal Justice and Immigration Act 2008 (c. 4) and section 88 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c. 10).

- (b) giving, varying or revoking an order for separate or joint trials in respect of two or more offences or two or more defendants, unless all parties agree;
- (c) determining an application under rule 5.7(5) (supply to a party of information or documents from records or case materials; information to which paragraph (4) of that rule does not apply), unless—
 - (i) rule 5.7(6) applies (information about the grounds on which an order was made, or a warrant was issued, in the absence of the party or person applying for that information), and
 - (ii) no notice of objection under that paragraph is given within the time for which that paragraph provides;
- (d) determining an application for reporting or access restrictions to which Part 6 applies (Reporting, etc. restrictions), unless—
 - (i) the application is for an order under section 45 of the Youth Justice and Criminal Evidence Act 1999⁽⁷⁴⁾ (identity of a person under 18), and
 - (ii) the application is not opposed;
- (e) allocating a case for trial under the powers to which Part 9 applies (Allocation and sending for trial);
- (f) sending a defendant to the Crown Court for trial, unless the only condition for sending is—
 - (i) that prescribed by section 51(2)(a), of the Crime and Disorder Act 1998⁽⁷⁵⁾ (offence triable only on indictment other than one in respect of which notice is given under section 51B or 51C of that Act), or
 - (ii) the service of a notice under section 51B or 51C of that Act⁽⁷⁶⁾ (prosecutor’s notice requiring sending for trial in a case of serious or complex fraud or a case in which a child is to be called as a witness);
- (g) withholding bail, unless in consequence of the issue of a warrant of arrest;
- (h) imposing or varying bail conditions, unless both parties agree;
- (i) extending pre-charge bail, unless the defendant agrees;
- (j) determining an application to which rule 14.18 applies (Application to extend a custody time limit);
- (k) determining an application to which rule 15.3, 15.5, 15.6 or 15.7 applies (Disclosure: Prosecutor’s application for public interest ruling; Defendant’s application for prosecution disclosure; Review of public interest ruling; Defendant’s application to use disclosed material);
- (l) declining to appoint an advocate where rule 23.2 applies (Restriction on cross-examination by a defendant: Appointment of advocate to cross-examine witness);
- (m) making a witness anonymity order;
- (n) determining an application to withdraw a guilty plea;
- (o) exercising a power to which Part 47 applies (Investigation orders and warrants);
- (p) refusing legal aid.

⁽⁷⁴⁾ 1999 c. 23.

⁽⁷⁵⁾ 1998 c. 37; section 51 was substituted by paragraphs 15 and 18 of Schedule 3 to the Criminal Justice Act 2003 (c. 44) and amended by section 52 of the Criminal Justice and Courts Act 2015 (c. 2).

⁽⁷⁶⁾ 1998 c. 37; sections 51B and 51C were inserted by paragraphs 15 and 18 of Schedule 3 to the Criminal Justice Act 2003 (c. 44). Section 51B was amended by section 50 of, and paragraph 69 of Schedule 4 to, the Commissioners for Revenue and Customs Act 2005 (c. 11), paragraphs 46 and 48 of Schedule 5 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c. 10) and article 3 of, and paragraphs 14 and 15 of Schedule 2 to, S.I. 2014/834. Section 51C was modified by section 63 of, and paragraph 36 of Schedule 6 to, the Serious Crime Act 2007 (c. 27) and amended by regulations 8 and 9 of S.I. 2016/244.

(4) [Version A] Except in an emergency, an authorised court officer may not exercise a function of the court in a case in which a District Judge (Magistrates' Courts), a lay justice or a justices' legal adviser reserves the exercise of that function to such a judge, justice or adviser.

(3) [Version B] In addition to the functions listed in paragraph (2), subject to rule 2.4 an authorised court officer who is legally qualified may exercise the other functions of a magistrates' court listed in paragraphs (4) to (11).

(4) [Version B] In connection with the rules about general matters (Parts 1 to 6)—

- (a) exercising the powers to which section 50 of the Crime and Disorder Act 1998⁽⁷⁷⁾ (Early administrative hearings) refers, where that section applies and subject to the restrictions that it contains;
- (b) giving, varying or revoking a live link direction under Part IIIA of the Crime and Disorder Act 1998⁽⁷⁸⁾ (Live links for accused's attendance at certain preliminary, sentencing and other hearings);
- (c) determining an application to extend a time limit set by a rule or by the court;
- (d) giving, varying or revoking an order for separate or joint trials in respect of two or more defendants or two or more offences, if all parties agree;
- (e) giving, varying or revoking directions for the conduct of proceedings, including—
 - (i) the timetable for the case,
 - (ii) the attendance of the parties,
 - (iii) the service of documents (including summaries of any legal arguments relied on by the parties),
 - (iv) the manner in which evidence is to be given, insofar as this rule makes no other provision and except the making, varying or revocation of a witness anonymity order;
- (f) determining an application under rule 5.7(5) (supply to a party of information or documents from records or case materials; information to which paragraph (4) of that rule does not apply) where—
 - (i) rule 5.7(6) applies (information about the grounds on which an order was made, or a warrant was issued, in the absence of the party or person applying for that information), and
 - (ii) no notice of objection under that paragraph is given within the time for which that paragraph provides;
- (g) imposing a reporting restriction under section 45 of the Youth Justice and Criminal Evidence Act 1999 (identity of a person under 18) where there is no objection to the order;
- (h) giving permission for proceedings to be recorded;
- (i) asking a court security officer to remove a person from a courtroom.

(5) [Version B] In connection with the rules about preliminary proceedings (Parts 7 to 12)—

- (a) issuing a summons and giving directions for service;
- (b) under section 4 of the Summary Jurisdiction (Process) Act 1881⁽⁷⁹⁾, endorsing a summons or warrant issued by a court in Scotland;
- (c) giving a prosecutor permission to withdraw a charge;

⁽⁷⁷⁾ 1998 c. 37; section 50 was amended by section 106 of, and Schedule 15 to, the Access to Justice Act 1999 (c. 22), sections 41 and 332 of, and paragraphs 15 and 16 of Schedule 3 and Part 4 of Schedule 37 to, the Criminal Justice Act 2003 (c. 44), regulation 8 of S.I. 2006/2493 and section 39 of, and paragraphs 46 and 47 of Schedule 5 to, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c. 10). It is further amended by section 3 of, and paragraphs 20 and 22 of the Schedule to, the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 (c. 33) with effect from a date to be appointed.

⁽⁷⁸⁾ 1998 c. 37; Part IIIA was substituted by section 45 of the Police and Justice Act 2006 (c. 48).

⁽⁷⁹⁾ 1881 c. 24.

- (d) dismissing a prosecution where the prosecutor offers no evidence;
 - (e) amending a charge;
 - (f) sending a defendant to the Crown Court for trial where the only condition for sending is—
 - (i) that prescribed by section 51(2)(a), of the Crime and Disorder Act 1998 (offence triable only on indictment other than one in respect of which notice is given under section 51B or 51C of that Act), or
 - (ii) the service of a notice under section 51B or 51C of that Act (prosecutor’s notice requiring sending for trial in a case of serious or complex fraud or a case in which a child is to be called as a witness).
- (6) [*Version B*] In connection with the rules about custody and bail (Parts 13 and 14)—
- (a) issuing or withdrawing a warrant for a person’s arrest to secure that the person attends court proceedings relating to an offence of which the person has been accused or convicted in a case in which no objection is made by or on behalf of that person to the issue of the warrant;
 - (b) granting bail where—
 - (i) the defendant is present,
 - (ii) the prosecutor agrees to the grant of bail, and
 - (iii) the conditions, if any, to which that bail will be subject will remain the same as before, or will be varied or imposed with the parties’ agreement.
- (7) [*Version B*] In connection with the rules about evidence (Parts 16 to 23)—
- (a) requiring a person who has made a written statement to attend before the court to give evidence;
 - (b) issuing a witness summons and giving directions for its service.
 - (c) exercising the court’s functions listed in rule 23.2 (Appointment of advocate to cross-examine witness) and appointing such an advocate as that rule describes (but a court officer may not decline to appoint such an advocate where that rule applies);
- (8) [*Version B*] In connection with the rules about trial (Parts 24 to 27)—
- (a) convicting a defendant who has pleaded guilty;
 - (b) requesting a pre-sentence report where a defendant pleads guilty;
 - (c) directing the commissioning of a medical report;
 - (d) accepting the withdrawal of a guilty plea prior to sentence, if the prosecutor agrees;
 - (e) setting aside a conviction, or varying or rescinding an order, under section 142 of the Magistrates’ Courts Act 1980⁽⁸⁰⁾, if both parties agree.
- (9) [*Version B*] In connection with the rules about appeal (Parts 34 to 44)—
- (a) stating a case for the opinion of the High Court where the decision under appeal was made by an authorised court officer;
 - (b) requiring the appellant to enter into a recognizance under section 114 of the Magistrates’ Courts Act 1980⁽⁸¹⁾ on an application to state a case for the opinion of the High Court.
- (10) [*Version B*] In connection with the rules about costs (Part 45)—
- (a) making or varying an order for a party to pay costs, if both parties agree;

⁽⁸⁰⁾ 1980 c. 43; section 142 was amended by sections 26 and 29 of, and Schedule 3 to, the Criminal Appeal Act 1995 (c. 35).

⁽⁸¹⁾ 1980 c. 43; section 114 was amended by section 90 of, and paragraphs 95 and 113 of Schedule 13 to, the Access to Justice Act 1999 (c. 22) and section 109 of, and paragraph 235 of Schedule 8 to, the Courts Act 2003 (c. 39). It is further amended by section 3 of, and paragraphs 5 and 7 of the Schedule to, the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 (c 33), with effect from a date to be appointed.

- (b) making or varying an order for another person to pay costs, if that person agrees;
- (c) making any other costs order.

(11) *[Version B]* In connection with the rules about other proceedings (Parts 46 to 50)—

- (a) making a legal aid representation order on an appeal against a refusal of legal aid (but a court officer may not decline to make such an order);
- (b) determining an application for a change of legal representative.

(12) *[Version B]* Except in an emergency, an authorised court officer may not exercise a function of the court in a case in which a District Judge (Magistrates' Courts), a lay justice or a justices' legal adviser reserves the exercise of that function to such a judge, justice or adviser.

[Note. See also—

- (a) *rule 2.4, which makes general rules about the exercise of judicial functions by authorised court officers; and*
- (b) *rule 3.6 (Application to vary a direction).*

Under section 148 of the Magistrates' Courts Act 1980⁽⁸²⁾, the expression 'magistrates' court' means any justice or justices of the peace acting under any enactment or by virtue of their commission or under the common law. For a court's power to try an allegation of an offence, see the note to rule 24.1 (Trial and sentence in a magistrates' court; When this Part applies).

Under section 50 of the Crime and Disorder Act 1998, where a defendant has been charged with an offence at a police station the magistrates' court before whom he or she appears or is brought for the first time in relation to the charge may consist of a single justice; and where on such an occasion the powers of a single justice are exercised by an authorised court officer that court officer may not remand the defendant in custody or, without the consent of the prosecutor and the defendant, remand the defendant on bail on conditions other than those (if any) previously imposed.

Under section 8B(3) of the Magistrates' Courts Act 1980⁽⁸³⁾, a magistrates' court may discharge or vary (or further vary) a pre-trial ruling within the meaning of section 8A of that Act if the court has given the parties an opportunity to be heard and if, among other things, there has been a material change of circumstances since the ruling was made or, if a previous application has been made, since the application (or last application) was made.

Under section 53(4) of the Courts Act 2003⁽⁸⁴⁾, a court security officer acting in the execution of that officer's duty may remove any person from a courtroom at the request of a judge or a justice of the peace.]

Exercise of functions of a District Judge (Magistrates' Courts) in extradition cases

2.9.—(1) This rule provides for the exercise by an authorised court officer of relevant judicial functions of a District Judge (Magistrates' Courts) in a case to which Part 50 (Extradition) applies.

(2) Subject to rule 2.4, an authorised court officer may—

- (a) fix, cancel or vary the date, time or place for a hearing, including an extradition hearing;
- (b) determine an application to extend a time limit set by a rule or by the court, unless the effect would be—
 - (i) to affect the date of any hearing that has been fixed, including an extradition hearing,
 - or

⁽⁸²⁾ 1980 c. 43; section 148 was amended by section 109 of, and paragraph 248 of Schedule 8 to, the Courts Act 2003 (c. 39).

⁽⁸³⁾ 1980 c. 43; section 8B was inserted by section 45 of, and Schedule 3 to, the Courts Act 2003 (c. 39) and amended by paragraph 51 of Schedule 3, and Part 4 of Schedule 37, to the Criminal Justice Act 2003 (c. 44).

⁽⁸⁴⁾ 2003 c. 39.

- (ii) significantly to affect the progress of the case in any other way.
- (3) Except in an emergency, an authorised court officer may not exercise a function of the court in a case in which a District Judge (Magistrates' Courts) or a justices' legal adviser reserves the exercise of that function to such a judge or adviser.

[Note. See also—

- (a) rule 2.4, which makes general rules about the exercise of judicial functions by authorised court officers;*
- (b) rule 3.6 (Application to vary a direction); and*
- (c) rule 50.4 (Case management in the magistrates' court and duty of court officer).]*

**Derivation of functions listed in rule 2.8
(Exercise of functions of a magistrates' court)**

*In this table a number in the 'Source' column is a reference to the corresponding paragraph number in Schedule 1 to the Justices' Clerks Rules 2005; and a number followed by * indicates that that function is one which, under regulation 5 of the Assistants to Justices' Clerks Regulations 2006, may be performed by an assistant clerk who is not qualified under regulation 3 of those Regulations (legal, etc. qualifications).*

See also the notes beneath this table.

<i>Rule</i>	<i>Source</i>
2.8(2)(a)	9*, 10*, 11*, 15*
2.8(2)(b)	9*, 10*, 15*, 22
2.8(2)(c)	17
2.8(2)(d)	2
2.8(2)(e)	4
2.8(2)(f)	8*, 9*, 10*, 11*
2.8(2)(g)	24*
2.8(2)(h)	23
2.8(2)(i)	33*
2.8(2)(j)	26*
2.8(2)(k)	25*
2.8(2)(l)	New power; cf 25
2.8(2)(m)	28*
2.8(2)(n)	34*
2.8(2)(o)	30*, 31*
2.8(2)(p)	New power; believed to be uncontroversial
2.8(2)(q)	29*
2.8(2)(r)	30*
2.8(2)(s)	31*
2.8(2)(t)	32*
2.8(2)(u)	New power; cf powers of fines officers
2.8(2)(v)	New power; cf powers of fines officers
2.8(2)(w)	35*, 36*
2.8(2)(x)	New power; cf powers of fines officers
2.8(4) [Version B] (a)	s.50, Crime and Disorder Act 1998
2.8(4) [Version B] (b)	17
2.8(4) [Version B] (c)	17
2.8(4) [Version B] (d)	18
2.8(4) [Version B] (e)	17
2.8(4) [Version B] (f)	New power; exercisable only where there is no objection
2.8(4) [Version B] (g)	New power; exercisable only where there is no objection
2.8(4) [Version B] (h)	New power; believed to be uncontroversial
2.8(4) [Version B] (i)	New power; believed to be uncontroversial

2.8(5) [Version B] (a)	2
2.8(5) [Version B] (b)	New power; believed to be uncontroversial
2.8(5) [Version B] (c)	4
2.8(5) [Version B] (d)	5
2.8(5) [Version B] (e)	1
2.8(5) [Version B] (f)	New power; cf 12
2.8(6) [Version B] (a)	3
2.8(6) [Version B] (b)	8*, 9*
2.8(7) [Version B] (a)	17
2.8(7) [Version B] (b)	2
2.8(7) [Version B] (c)	17
2.8(8) [Version B] (a)	14
2.8(8) [Version B] (b)	20
2.8(8) [Version B] (c)	21
2.8(8) [Version B] (d)	New power; only with parties' agreement
2.8(8) [Version B] (e)	New power; only with parties' agreement
2.8(9) [Version B] (a)	s.111, Magistrates' Courts Act 1980
2.8(9) [Version B] (b)	New power; believed to be uncontroversial
2.8(10) [Version B] (a)	New power; only with consent
2.8(10) [Version B] (b)	New power; only with consent
2.8(10) [Version B] (c)	6
2.8(11) [Version B] (a)	New power; believed to be uncontroversial
2.8(11) [Version B] (b)	New power; believed to be uncontroversial

Notes

(1) The functions listed in rule 2.8 are not described in the same terms as those listed in Schedule 1 to the 2005 Rules. The new rule is rearranged and rationalised the better to correspond with other Criminal Procedure Rules and legislation. See paragraph 95 of this invitation to comment.

(2) Where a defendant who is 18 or over is liable to pay a sum which is, or is treated for the purposes of Part 3 of the Magistrates' Courts Act 1980 as, a sum adjudged to be paid by a conviction of a magistrates' court, then the court must make a collection order under Part 4 of Schedule 5 to the Courts Act 2003 unless it is impracticable or inappropriate to do so. That allows a fines officer appointed under the 2003 Act to exercise various enforcement powers. Fines officers are members of court staff. The Rule Committee sees no good reason why an authorised court officer should not be permitted to exercise analogous powers where those powers could be exercised by the court, and no good reason why an authorised court officer should not be permitted to make a collection order to allow the exercise of the Schedule 5 enforcement powers.

(3) The description of the function for which rule 2.8(6) [Version B] (a) provides is that used in new section 67A(3) of the Courts Act 2003.

Extracts from the Explanatory Notes published with the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018

The paragraph numbers beneath are those of the Explanatory Notes from which these extracts are taken.

Overview of the Act

1. The Queen's speech announced that legislation would be brought forward to modernise the courts system. This Act 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 Act:
 - 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.

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 Act 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", the functions of the court, or of any judge of the court. A similar power already exists in tribunals (specifically relating to functions of the FtT and UT). The Act 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 Act 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.

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

45. 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.
46. 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.

67C Exercise of relevant judicial functions: reconsideration of decisions

54. 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.

Relevant statutory provisions

<i>Act</i>	<i>Section</i>
Criminal Appeal Act 1968	21
	31
	31A
	31B
	31C
	45
Interpretation Act 1978	5
	Schedule 1
Magistrates' Courts Act 1980	8A
	8B
	8C
	9
	10
	16B
	82
	83
	121
	125CA
	142
	148
	Senior Courts Act 1981
82	
Matrimonial and Family Proceedings Act 1984	31O
Civil Procedure Act 1997	1
	Sched 1, para 2
Crime and Disorder Act 1998	51
	51B
	51C
	57A
	57B
	57C
	57D
57E	
57F	
Youth Justice and Criminal Evidence Act 1999	45

Courts Act 2003	1
	2
	25
	26
	27
	28
	29
	<i>new</i> 28
	<i>new</i> 29
	67A
	67B
	67C
	67D
	67E
	67F
	67G
	68
	69
	70
	75
	76
	Schedule 5
Extradition Act 2003	8
	36
	66
	75
	139
	210
Justices' Clerks Rules 2005	1 – 4
	Schedule 1
Assistants to Justices' Clerks Regulations 2006	1 – 5
Tribunals, Courts and Enforcement Act 2007	22
	40
	Sched 5, para 3
Justices' Clerks and Assistants Rules 2014	1 – 4
	Schedule
Courts and Tribunals (Judiciary and Functions of Staff) Act 2018	3
	Schedule, Part 1

**Institutions, organisations and individuals to whom this invitation is addressed
in particular**

Copies of this invitation have been directed to:

The Senior Presiding Judge and the presiding judges
Resident judges
The Council of HM Circuit Judges
The Senior District Judge (Chief Magistrate)
The Council of HM District Judges (Magistrates' Courts)
The Magistrates' Association
The Magistrates' Leadership Executive
The Justices' Clerks' Society
The Registrar of Criminal Appeals
The Bar Council
The Criminal Bar Association
The Law Society
The Criminal Law Solicitors' Association
The London Criminal Courts Solicitors' Association
Solicitors Association of Higher Court Advocates
The Institute of Legal Executives
Lawyers in Local Government
The Attorney General
The Home Office
The National Police Chiefs Council
The Crown Prosecution Service
The Serious Fraud Office
The Whitehall Prosecutors' Group
The Ministry of Justice
HM Courts and Tribunals Service
Ministry of Justice departmental trade unions (PCS; FDA; Prospect)