



Document number      **16/18**

Date                      **20 December 2016**

Response to            **A consultation on the creation of a new senior leadership structure for lawyers working within HM Courts and Tribunals Service**

Issued by              **HM Courts and Tribunals Service**

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## **1. What are your views on:**

### *a. the removal of the statutory role of justices' clerk;*

Independent legal advice for magistrates must be available and guaranteed. Quite aside from the provision of advice to magistrates, justices' clerks currently have a significant range of delegated powers, many of which are fundamental to the operation of the magistrates' courts.

The fact that these are statutory responsibilities reflects their significance and the separation of powers between the executive and judiciary, and the MA does not support removing them from statute and replacing them with either a protocol or a key responsibilities document. Such a development would also cut across the principle of clarifying the distinct accountabilities to the judiciary and to HMCTS. The MA is particularly concerned at such weakening of the legislative control of such functions, given the intention to significantly expand the role of case officers performing tasks under the control of the judiciary – which in the case of the magistrates' court caseload would involve the increased delegation of powers currently held by a justices' clerk.

In any event, there must be clarity for all magistrates about what structures are in place for appealing or reviewing decisions around appraisal, authorisations, approvals or any other management decisions.

### *b. the regionalisation of the leadership of lawyers who advise magistrates;*

The MA can understand why HMCTS might want to organise a new structure on a regional basis in terms of flexibility. However, it is important that leadership structures for lawyers who advise magistrates are aligned with the structures by which magistrates themselves are organised, which are also being considered at the moment. Whatever happens, there needs to be a clear link between a justices' clerk (or an equivalent clear point of contact for benches) and all courts in the new structure, though some functions may be delegated on a day-to-day basis to deputies or others.

### *c. removing the title of "justices' clerk";*

The MA's priority would be ensuring clarity around the role, duties and structures of different individuals involved in the provision of independent legal advice to magistrates rather than the existence of the title of justices' clerk in and of itself. However, we note that there may be concern around the difficulties involved in amending legislation, which would require the title to remain for the moment. It is also worth noting that many feel the title of justices' clerk serves as an indicator of the independent function of providing legal advice, separate from management roles. It may be that the retention of the title (and appropriate equivalents for deputies) also serves to clarify the capacity in

which legal advisers are acting (see below). Fundamentally, there needs to be a recognition that the provision of legal advice to magistrates will continue to be a significant part of the responsibilities of the regional head.

*d. to whom should the title be allocated, if it is to be retained?*

The MA would highlight that changing the roles of existing justices' clerks without changing legislation could have some significant consequences. Should that title be held in the interim at regional level, we reject the potential consequence of organising magistrates' courts' management groups such as JBGs and TAAACs to be at that level too; it is too remote from magistrates in court. It will thus be important to ensure that the geographical scope of key groupings affecting the magistracy and the courts is not inadvertently altered as a knock-on consequence of these changes. Any changes to the boundaries of these groups should be consequent upon the agreement of new magistrates' leadership structures which should include the provision of appropriate structures, organised at relevant levels.

## **2. Do you have any comments on the creation of a cross-jurisdictional leadership role for lawyers working in HMCTS?**

We appreciate the benefit of having a cross-jurisdictional leadership role at the regional level, as long as there are clearly defined leadership structures at lower levels for all jurisdictions. It is important that the distinct needs for the different jurisdictions are properly acknowledged as part of this.

The Lord Chief Justice, in the joint vision statement he issued with the Lord Chancellor and Senior President of Tribunals, made clear that unifying the criminal courts is an aim. It is clear, therefore, that at all levels there must be strong links between those providing legal advice to magistrates and leadership judges. The Family Court model of using the Designated Family Judge (DFJ) level for this to occur which we propose below, might be considered amongst the options for the criminal courts.

## **3. Are there any issues relating to the responsibilities of the justices' clerk in the Family Court that require more specific consideration?**

It is difficult to answer without understanding any possible changes to the way family magistrates are organised or managed. It is important, however, to note that the majority of family magistrates sit in the criminal jurisdiction as well as family. This must be taken into account when considering training and leadership for this group.

We consider it would be sensible to structure legal advice for family magistrates at the level of the DFJ. This is an opportunity to ensure that the legal advice provided to magistrates in the Family Court is ring-fenced, properly organised and discretely led. The DFJs already have, since the inception of the single Family Court in 2014, a considerable role in providing advice on the law to the lower tiers of the Family Court – to the legal advisers in court. However, the deputy justices' clerk, in effect a senior legal adviser, is likely to have a far better knowledge and understanding of administration and the legal processes and procedures at this level and the importance of this type of legal advice cannot be overestimated. While ready access to a justices' clerk (or equivalent) would not be necessary for family law advice, it would certainly be so for advice on all the other facets of the magistracy working within the Family Court. Again, structuring at the level of the DFJ would help ensure that this access, and relationships between the DFJ and those providing legal advice in court, remained in place.

This approach would be beneficial in all parts of England and Wales. Structuring advice at the level of the DFJ would, for instance, work much better for the situation in London, where the size of the bench and the workload, with three main Family Court centres, and two other family court houses, means that the three DFJs are a much better level at which to operate than simply having one Head of Legal

Operations. This role should not be diluted by being subsumed into other jurisdictions, including the criminal work of the magistrates' courts.

Clarity on what is envisaged in terms of staff at deputy justices' clerk level will be crucial in the family context and follows on from our suggestion of structuring advice at the level of the DFJ. It is at this level that Family Court magistrates receive advice and guidance, liaison happens with DFJs, management of legal teams takes place and committees are supported. In the Midlands, for instance, two deputy justices' clerks serve as the link between the Family Court as an overall institution and the magistracy.

#### **4. What are your views on the general approach to implementation and transitional arrangements?**

Since 2005 and the creation of HMCS (now HMCTS), magistrates have been increasingly concerned about perceptions of the independence of legal advice, as justices' clerks became ever further drawn into the operational strategy of HMCTS as an executive agency. The MA therefore warmly welcomes the acknowledgment that there must be a clear line of accountability to the judiciary for legal advisers to clarify such perceptions. It is very positive that the dual structure of being accountable under the Lord Chief Justice in relation to certain duties, while being civil servants under HMCTS for others, is now being recognised and clarified.

However, it is important to ensure that the dual accountability which is being proposed is clear and transparent in practice. It will be very important for the capacity in which legal advisers are operating at any given point to be clear, so magistrates know under which structure advice or a directive from a legal adviser (both in and out of the courtroom) is being given. Magistrates must be clear whether something is a clear instruction, given under the powers delegated by the Lord Chief Justice, or whether it is a recommendation by a civil servant.

At present, the independence of justices' clerks in advising magistrates, exercising delegated powers and sitting on rules committees is set out in Section 29(1) of the Courts Act 2003. This currently serves as a vital safeguard to ensure independence in these capacities. Any change to this position has potentially major consequences, and it will be vital to ensure that creating a line of judicial accountability does not inadvertently undermine the independence of legal advice from executive direction.

The MA would be concerned if many of the delegated roles around bench support, JBGs and TAAACs were not assigned to specific, named individuals. For example, it would be unfortunate if attendance at JBG meetings were rotated among a number of different delegated deputies; for the benefit of cohesion, effectiveness and efficiency, maintaining the same personnel wherever possible should be encouraged. It is important that magistrates have a clear understanding of who to speak to about specific matters on a local level.

The MA notes the expectation set out in the proposals that comprehensive changes will be made to LJAs. The MA is concerned that changes to LJAs, leadership structures for magistrates and legal advisers must be carried out not just following full and open consultation, but also ultimately in conjunction with each other. It would be potentially damaging if changes were made in a piecemeal way without full consideration of the impact of other reforms. Magistrates are increasingly concerned that strategic changes are being introduced without them having sight of the whole picture.

The MA would be concerned about the suggestion that the new Heads of Legal Operations would not be expected to have the "same detailed knowledge of the law as is currently required of justices' clerks" – especially if the existing role of justices' clerk is to be temporarily retained by them. Clearly, we recognise the logistical and cross-jurisdictional role intended for Heads of Legal Operations, but our understanding would be that ensuring the provision of legal advice for magistrates will remain the

dominant workload, so it is logical to assume they should have personal knowledge of this aspect of that workload. We would welcome clarification on both the expected balance of workload and the level of expertise expected of HLOs.

**5. Are there any particular transitional issues that are not mentioned in the paper that merit further consideration? Are there any other key responsibilities?**

We would want to see, for the avoidance of doubt, ensuring that independent legal advice is provided to magistrates and judges listed as an explicit key responsibility. It is common ground that this is a fundamental responsibility, and this should be made clear.

It is concerning that training of magistrates is not listed as a key responsibility. Magistrates are keen for more training and the existing training is core to the operation of a lay justice system. The MA would say that this is a key, and indeed vital, responsibility. Such responsibility should extend well beyond the ownership of the training budget.

Currently, justices' clerks have statutory duties around the elections of bench chairs, and involvement in TAAACs and JBGs. The MA would presume that the newly amended Justice of the Peace Rules 2016 will require updating, along with other key pieces of legislation.

At present, certain justices' clerks are given lead roles for different jurisdictions as well as training. It is unclear whether the new Heads of Legal Operations would be able to designate among themselves leads in these important areas.

Whilst it is not for the MA to comment on the organisation or provision of a professional body for legal advisers, we have a long, successful and historically close working relationship with the Justices' Clerks' Society and it is much to be hoped that the new leadership structure will still afford the opportunity for such representative partnership working to continue.

The MA would note that the number of consultations taking place relating to different, but closely interconnected, changes to the organisation of the courts and justice system, makes it harder to respond properly to a number of key aspects, as it remains uncertain how the different elements reflect each other. Clarity on the relationship between the different consultations and proposed changes would be welcome.