

Title: Prisons and Courts Bill: Flexible judicial deployment IA No: MoJ037/2016 RPC Reference No: N/A Lead department or agency: Ministry of Justice Other departments or agencies: Judicial Office	Impact Assessment (IA)			
	Date: 22/02/2017			
	Stage: Final			
	Source of intervention: Domestic			
	Type of measure: Primary Legislation			
	Contact for enquiries: simon.quinn@justice.gsi.gov.uk			
Summary: Intervention and Options				RPC Opinion: Not Applicable

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANDCB in 2014 prices)	One-In, Three-Out?	Business Impact Target Status
N/A	N/A	N/A	Not in scope	Not in scope

What is the problem under consideration? Why is government intervention necessary?

Increasing the flexibility of judicial deployments across all jurisdictions is key to enabling it to respond to the changing demands of a reformed court system and making best use of the existing cohort and their time. The Lord Chief Justice of England and Wales (LCJ) and Senior President of Tribunals (SPT) have far reaching powers to do this, but there are three specific areas where current legislation could be amended to further facilitate this:

1. Recorders are unable to be deployed in the Upper Tribunal to support the transaction of business there: including Judicial Reviews.
2. In the High Court, only judges of the Commercial Court and Technology & Construction Court can be appointed to sit as judge-arbitrators, as opposed to other High Court judges.
3. When there is a need to appoint Deputy High Court Judges on a temporary basis for an immediate business need (e.g. to cover a period of sickness absence), these judges can only sit in the High Court and Crown Court and not more widely.

What are the policy objectives and the intended effects?

These changes are intended to increase the ability of the judiciary to be deployed flexibly in order to meet urgent business needs and respond to the changing demands of the wider reform of the courts and tribunals system. They will amend existing legislation to allow smoother transaction of judicial business. This will allow the deployment of judges in order to respond to changes, or anticipated changes, in demand in certain areas, such as the growth in demand for arbitration work for the Chancery Division of the High Court, or in Judicial Review work in the Asylum & Immigration Chamber.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 0: Do nothing;
 Option 1: Make Recorders deployable to the Upper Tribunal;
 Option 2: Enable more judges of the High Court to be appointed as a judge-arbitrator; and
 Option 3: Expand the range of courts and tribunals in which Deputy High Court Judges appointed temporarily can sit.
 Options 1-3 are the preferred option as they best meet the policy objectives.

Will the policy be reviewed? There is no plan to review the policy.						
Does implementation go beyond minimum EU requirements?			N/A			
Are any of these organisations in scope?			Micro No	Small No	Medium No	Large No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded: N/A		Non-traded: N/A	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:  Date: 22/02/2017

Summary: Analysis & Evidence

Policy Option 1-3

Description: Flexible Judicial Deployment

FULL ECONOMIC ASSESSMENT

Price Base Year 2015/16	PV Base Year 2015/16	Time Period Years 20yrs	Net Benefit (Present Value (PV)) (£m)		
			Low: £	High: £	Best Estimate: £
COSTS (£m)					
		Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)	
Low		Optional	£	Optional	
High		Optional	£	Optional	
Best Estimate		Nil	£	£	
Description and scale of key monetised costs by 'main affected groups' As these measures are intended to amend existing legislation to allow more flexible deployment, organisational structures are already in place to enable the deployment. Therefore we anticipate that there would not be additional costs to implement in this way.					
Other key non-monetised costs by 'main affected groups' N/A					
BENEFITS (£m)					
		Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)	
Low		Optional	Optional	Optional	
High		Optional	Optional	Optional	
Best Estimate		Nil	Nil	Nil	
Description and scale of key monetised benefits by 'main affected groups' As these measures are intended to allow judges to be deployed more flexibly to deal with existing demand, it is not expected that there will be significant monetised benefits. There could be a small increase in income to HMCTS for cases resolved by judicial-arbitration; this would be a benefit as these fees are charged above the cost of providing the service.					
Other key non-monetised benefits by 'main affected groups' Increasing the ability to deploy the judiciary flexibly to address regional or jurisdictional fluctuations in demand, allowing faster and more efficient disposal of cases; giving judges a wider range of experience in different jurisdictions and supporting career development; increasing the ability of the UK to remain competitive as a centre for arbitration internationally; allowing judges to be deployed to deal with a wider range of cases which are at risk of being disrupted or re-listed due to unforeseen events (e.g. sickness absence).					
Key assumptions/sensitivities/risks				Discount rate (%)	%
There will be a sufficient number of judges available to be deployed; that this will not cause shortages in other areas.					

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs: NA	Benefits: NA	Net: NA	NA

Evidence Base (for summary sheets)

A. Background

1. The Government is investing over £1 billion to transform the courts and tribunals system. We will create a straightforward, efficient court system that works for everyone, so that citizens can have the sort of confidence in using the system that is already enjoyed by our excellent legal services sector. Our reforms will give special care to those who need it – reducing unnecessary stress for victims and witnesses, reducing the emotional turmoil experienced as a result of major life events such as criminal activity, death or divorce. We will also cement our reputation for global legal excellence and enhance the reputation of our independent judiciary abroad.
2. This measure is part of a wider legislative package that underpins the court reform programme and collectively contributes to benefits of £252 million per annum at steady state from 2023-24. While most of the measures in the Bill produce significant direct savings, some do not. However, the measures are interdependent and all contribute to wider, indirect savings by streamlining processes, enabling more flexibility in judicial deployment, digitalisation, effective deployment and utilisation of our staff and estates. In short, each measure is vital for us to deliver the reform programme and associated savings as planned.
3. Increasing the flexibility of judicial deployments across all jurisdictions is key to enable the judiciary to respond to the changing demands of a reformed court system and making best use of the existing cohort and their time. The LCJ and SPT have far reaching powers to do this but there are three specific areas where existing legislation could be amended to allow more flexible deployment:
 - Recorders are currently unable to be deployed in the Upper Tribunal in order to support transaction of business there, including Judicial Reviews.
 - Currently in the High Court, only judges of the Commercial Court and judges doing official referees' business (now dealt with by judges of the Technology & Construction Court) can be appointed to sit as judge-arbitrators under section 93 of the Arbitration Act 1996, as opposed to other High Court judges.
 - When there is a need to appoint Deputy High Court Judges on a temporary basis for an immediate business need (e.g. to cover a period of sickness absence), these judges are limited to sitting in the High Court and Crown Court rather than more widely.
4. The measures discussed in this Impact Assessment (IA) are aimed at amending current legislation that prevents deployment in these specific areas as a key element of wider court and tribunal reform is ensuring that the judiciary can deploy judicial resources flexibly to where they are needed most.

B. Policy Rationale and Objectives

5. The conventional economic rationales for government intervention are based on efficiency and equity arguments. The government may consider intervening if there are failures in the way markets operate (e.g., monopolies overcharging consumers) or where there are failures with existing government interventions (e.g., waste generated by misdirected rules). The proposed new interventions should avoid creating a further set of disproportionate costs and distortions. The government may also intervene for equity (fairness) and re-distributional reasons (e.g., to reallocate goods and services to more the needy groups in society).
6. The rationale for the options discussed in this IA is efficiency. The proposed changes are intended to increase the ability of the judiciary to deploy flexibly in order to respond to fluctuations in workload in different jurisdictions within the courts and tribunals system.

7. Legislation sets out in which jurisdictions different types of judges can work, so the main policy objective of these measures is to build on statutory provisions to allow further flexible deployment in certain areas. This will allow the judiciary to respond to changes or anticipated changes in demand in certain areas, such as the growth in demand for judicial arbitration work for the Chancery Division of the High Court, or in Judicial Review work in the Upper Tribunal's Asylum & Immigration Chamber.

C. Affected Stakeholder Groups, Organisations and Sectors

8. The main groups and stakeholders who will be affected by the options in this IA is shown below:
- The judiciary, including salaried and fee-paid judicial office holders throughout the courts and tribunals in England and Wales
 - HM Courts and Tribunal Service (HMCTS) which is the part of the Ministry of Justice (MoJ) which is responsible for administering the courts and tribunals service
 - Wider society, including taxpayers and users of the courts and tribunals service.

D. Description of Options Considered

9. In order to meet the policy objectives a number of options have been considered:
- **Option 0/Base Case: Make no legislative changes to the deployment of judges**
 - **Option 1: Make Recorders deployable to the Upper Tribunal**
 - **Option 2: Enable more judges of the High Court to be appointed as a judge-arbitrator under section 93 of the Arbitration Act 1996;**
 - **Option 3: Expand the range of courts and tribunals in which Deputy High Court Judges appointed temporarily can sit**
10. Options 1-3 are the preferred options as they best meet the policy objectives.

Option 0 – Do nothing

11. This option would see no changes to the current legislation on flexible deployment. Recorders would not be able to conduct judicial business in the Upper Tribunal; only judges of the Commercial Court and Technology & Construction Court would continue to be able to be appointed as judge-arbitrators; temporary appointments of Deputy High Court Judges would remain only available for deployment in the High Court or Crown Court. The length of time needed to resolve these cases would not be reduced and backlogs could increase.

Option 1 – Make Recorders deployable to the Upper Tribunal

12. The list of judicial office holders who are also judges of the Upper Tribunal is set out in section 6 of the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007). The Upper Tribunal has a wide jurisdiction, including a limited number of first instance appeals, appeals against decisions of the First-tier Tribunal and judicial review of most challenges to decisions under the immigration legislation. A judge (other than an Upper Tribunal Judge or Deputy Upper Tribunal Judge) may only sit in the Upper Tribunal by request of the SPT with the agreement of the LCJ.
13. Currently, individuals who are Recorders are eligible to apply for appointment as a Deputy Upper Tribunal Judge under paragraph 7 to Schedule 3 the TCEA 2007. Recorders are also competent to act on request as a judge in the High Court under section 9 of the Senior Courts Act 1981. However, both of these appointments require a Judicial Appointments Commission (JAC) competition and so do not enable flexible deployment within a time frame suitable to meet business need in the Upper Tribunal.

14. Under this option, the 2007 Act would be amended to include Recorders in this list of judges to allow them to be deployed to the Upper Tribunal without the delay of a JAC process. This would allow swifter reaction to increases in demand in particular jurisdictions.

Option 2 – Enable more judges of the High Court to be appointed as a judge-arbitrator

15. Section 93 of the Arbitration Act 1996 currently enables judges of the Commercial Court or Technology & Construction Court (divisions of the High Court) to sit as judge-arbitrators, in order to conduct arbitration in commercial disputes. Under this option, puisne judges of the High Court and judges sitting in the High Court by virtue of section 9(1) of the Senior Courts Act 1981 with the permission of the LCJ would be able to be appointed in this way.
16. The primary reason for this change is to enable more High Court judges, such as judges of the Chancery Division, to act as judge-arbitrators under section 93 of the Arbitration Act 1996. In recent years, there has been a particular growth in demand for judicial arbitrations in a number of areas that fall within the jurisdiction of the High Court; this option would allow the appointment of additional judge-arbitrators to meet that demand.
17. For reasons of operational efficiency, the LCJ will be able to delegate his power to permit judges to accept an appointment under section 93 of the Arbitration Act. This delegation power is analogous to similar powers to delegate similar functions, which have been introduced into numerous statutory provisions relating to the LCJ since (and including) the enactment of the Constitutional Reform Act 2005.

Option 3 – Expand the range of courts and tribunals in which Deputy High Court Judges appointed temporarily can sit

18. Section 94AA of the Constitutional Reform Act 2005 sets out circumstances under which the LCJ may appoint a person to sit in the High Court on a temporary basis where there is an immediate business need to do so. This appointment does not require a JAC process and therefore can be used to react quickly to an urgent need, for example, to cover an unexpected sickness absence and avoid cases having to be disrupted or re-listed.
19. Currently, the legislation sets out that these appointments can only be made for a person to sit in the Crown Court or High Court. Under this option the legislation would be expanded to cover any court or tribunal in which a Deputy High Court judge could sit.

E. Cost and Benefit Analysis

20. This IA follows the procedures and criteria set out in the Impact Assessment Guidance and is consistent with the HM Treasury Green Book.
21. Where possible, this IA identifies both monetised and non-monetised impacts on individuals, groups and businesses in England and Wales with the aim of understanding what the overall impact on society might be from the proposals under consideration. IAs place a strong focus on the monetisation of costs and benefits. There are often, however, important impacts that cannot sensibly be monetised. These might be impacts on certain groups of society or some data privacy impacts, positive or negative. Impacts in this IA are therefore interpreted broadly, to include both monetisable and non-monetisable costs and benefits, with due weight given to those that are non-monetisable.
22. The costs and benefits of each proposal are compared to option 0, the do nothing or 'baseline' case. As the 'baseline' option is compared to itself, the costs and benefits are necessarily zero, as is its Net Present Value (NPV).
23. The annual costs and benefits are presented in steady state throughout this IA. All estimates, unless stated otherwise, are annualised figures in 2015-16 prices.

Option 1 - Make Recorders judges of the Upper Tribunal

Costs of Option 1

HMCTS

24. It is unlikely that this measure would carry significant costs, as it is intended to allow Recorders with existing experience to be deployed to the Upper Tribunal to cover business need; therefore we do not anticipate that there would be significant training required.

Benefits of Option 1

HMCTS

25. As this measure would allow a greater range of judicial office holders to hear cases in the Upper Tribunal it would allow more scope for judicial resources to be deployed there in order to meet any increases in demand or deal with any backlogs.

Wider Society

26. This option would have benefits to wider society in that it could increase the speed and efficiency in disposal of cases.

Judiciary

27. It could also benefit the judges concerned by allowing them to build a wider range of experience and enhance their career prospects.

Option 2 - Enable judges of the High Court to be appointed as a judge-arbitrators

Costs of Option 2

HMCTS

28. As requests for arbitration under section 93 of the Arbitration Act 1996 would be in areas where the judge in question would already hold expertise, it is not expected that this measure would result in the demand or provision of additional training. Therefore, no additional costs are anticipated.

Benefits of Option 2

HMCTS

29. This measure would allow a greater range of High Court judges to be deployed to conduct judicial arbitrations under section 93 of the Arbitration Act 1996. This is particularly significant for the Chancery Division of the High Court, where a rise in cases requiring arbitration is predicted, potentially causing delays or backlogs if the resource is not available.

Wider Society

30. Being better able to meet demand for arbitration cases may also increase the ability of UK to remain competitive as a centre for arbitration internationally.

Option 3 - Expand the range of courts and tribunals in which Deputy High Court Judges appointed temporarily can sit

Costs of Option 3

31. We do not anticipate any costs associated with this measure.

Benefits of Option 3

HMCTS and the Judiciary

32. This measure would allow the LCJ to appoint a Deputy High Court judge on a temporary basis to address an urgent business need in a wider range of courts and tribunals than currently available. This could potentially avoid cases having to be disrupted or re-listed in an emergency (e.g. unexpected sickness absence) and the associated costs of this.

Wider Society

33. This option would have benefits to wider society in that it could increase the speed and efficiency in disposal of cases.

F. Assumptions, Risks and Sensitivity Analysis

Assumptions

34. It is assumed that the current Recorder pool have the existing skills and knowledge to be deployable to the Upper Tribunal.
35. The power to appoint Deputy High Court Judges on a temporary basis is intended to be used in limited circumstances where there is an immediate business need that cannot be addressed by other means (for example to cover a sickness absence), therefore we have assumed volumes would be low. We do not anticipate that there will be training needs since the judge would only be deployed to jurisdictions with which he or she was familiar and would need to be deployed at very short notice.

Risks and Sensitivities

36. We do not anticipate that there would be significant risk associated with these measures.
37. However, if the assumption described above is not appropriate, Recorders may have to undertake training. The primary costs for this training would be the cost of the Recorder's time and travel & subsistence, though this might vary based on, for example, the number of people the training was delivered to or the location. The table below shows how these costs might vary with the number of judges impacted by the proposed reforms.

Sensitivity 1 – Annual training costs for Recorders to sit as Upper Tribunal Judges

	Annual volume of Recorders to train as Upper Tribunal Judges		
	3	5	10
Daily Rate of Recorder	£1,851	£3,035	£6,070
T&S	£150	£250	£500
Total	£2,001	£3,285	£6,575

G. Wider Impacts

38. An equality statement has been prepared and should be read in conjunction with this IA.

H. Enforcement and Implementation

39. Implementing these measures would largely follow existing processes e.g. for deploying judges to the Upper Tribunal or appointing a judge as a judge-arbitrator. We are exploring the need for putting safeguards in place to make sure that these measures do not bypass the principles of fair and open

competition for judicial roles, for example by using expression of interest exercises to advertise opportunities.

I. Business Impact Target and One in Three out status

40. These proposals do not meet the definition of regulation under the Small Business, Enterprise and Employment Act 2015 and so are out of scope of the regulatory framework. The measure does not count toward the business impact target nor qualify for the One-In Three-Out burden reduction incentive.

This publication was archived in June 2017.