

# **The Delegation of Powers by Justices' Clerks to Non Legally Qualified Staff in Magistrates' Courts in England and Wales**

**Response to Consultation carried out by HM Courts  
Service**

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**Response to consultation carried out by Her Majesty's  
Courts Service, part of the Department for Constitutional  
Affairs.**

**The Delegation of Powers by Justices' Clerks to Non Legally Qualified Staff in Magistrates'  
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Summary of responses

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## Introduction


This document is the post-consultation report for the consultation paper, 'The Delegation of Powers by Justices' Clerks to Non Legally Qualified Staff in Magistrates' Courts in England and Wales'.

It will cover:

- background;
- summary of the consultation responses;
- detailed report to each question raised in the consultation document; and
- conclusions and next steps.

Further copies of this report and the consultation paper can be obtained by contacting **David McIntosh** at the address below:

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This report is also available on the Department's website at: [www.dca.gov.uk](http://www.dca.gov.uk)

## **Background**

The consultation paper 'The Delegation of Powers by Justices' Clerks to Non Legally Qualified Staff in Magistrates' Courts in England and Wales,' was published on 8 September 2005. It invited comments on proposals for justices' clerks to be given the power to delegate certain functions contained in the Justices' Clerks Rules 2005 to designated non legally qualified staff. The consultation closed on 1 December 2005.

The proposal to delegate certain powers was made to assist a justices' clerk or assistant clerk by alleviating the current situation whereby non-legally qualified staff need to seek the authorisation of the justices' clerk or assistant justices' clerk for each decision. Within certain areas of England and Wales, the present situation has created duplication in effort and delay in decision making.

The proposal is intended to bring about improvements to the administration of magistrates' courts and would only apply to the limited day to day and uncontested functions of a justices' clerk. The delegation proposed would not affect the responsibilities of the justices' clerk who will remain accountable for how these functions are exercised.

The delegation proposed would in no way diminish the status or powers of the justices' clerks and while it would allow for the justices' clerk or their assistants to delegate certain functions at their discretion, this would not be mandatory.

The functions that could be carried out by non-legally qualified staff would be limited to out of courtroom work, applying to routine duties such as dealing with agreed adjournments and fixing of a later date for trial when such issues are non-contentious. The legally qualified justices' clerk and assistant clerks would continue to be responsible for the provision of legal advice to the lay bench in the courtroom and for remaining out of courtroom work.

There has been a drive throughout the criminal justice system to establish and foster effective trial management and tackle ineffective trials. We have seen the introduction of Case Progression Officers and Listing Officers in magistrates' courts who have responsibility for the effectiveness of trial preparation and the effective use of court time. The proposals to delegate certain functions are intended to support the work of these officers and the administration of justice.

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The proposal is being considered because of the commencement of sections 27 and 28 of the Courts Act 2003, which came into effect on 1 April 2005. Prior to 1 April 2005, justices' clerks would delegate specific functions set out in the Justices' Clerks Rules 1979, to legally and non legally qualified staff. The Justices' of the Peace Act 1997, was relied upon for this delegation, although some doubt has been cast on the validity of this. The Justices' of the Peace Act 1997 was repealed on 1 April 2005.

The paper posed four main questions. These were: **(1)** whether limited delegation to non qualified staff should be allowed, who should determine the parameters of delegation and should it be restricted to specific Rules; **(2)** which non legally qualified staff should perform these functions, how should this be decided and by whom; **(3)** what legislative route should be followed, whether it should be primary or secondary or retain the status quo; and **(4)** if respondents chose primary legislation in question 3, how should magistrates' courts cope with the operating difficulties of delegation at present.

This report summarises the main responses received, provides a detailed account of the responses to each question and proposes the way forward.

A list of respondents is at **Annex A**.

## **Summary of responses**

1. A total of 85 responses to the consultation paper were received from a wide range of individuals and groups involved in the work of magistrates' courts. Some of these responses were made by individuals in consultation with colleagues or by representative groups which had consulted within a Committee or with several of its members. A full list of respondents can be found at Annex A. The list includes: Regional and Area Directors; justices' clerks; Case Progression and Listing Officers; magistrates and other interested stakeholders, groups and individuals.
2. Prior to issuing the formal consultation paper, meetings were held with the Justices' Clerks Society, Office for Criminal Justice Reform, Public and Commercial Services Union and the Magistrates' Association who were given the opportunity to comment on the format and content of the paper before it was published.
3. The majority of respondents concentrated on answering questions 1 and 3; some respondents opted to provide a general response. 72 (85%) respondents agreed there was a need for an amendment to current legislation that would allow non-legally qualified staff to be able to carry out certain delegated functions as deemed fit by the justices' clerk. The majority felt only certain routine functions should be delegated and that these would need proper controls in the form of supervision if delegation was to be permitted.
4. A large segment of respondents stated that the proposal to permit delegation would produce a return to the position pre-April 2005, which had worked efficiently for many years without giving rise to complaint and contributing to the efficient running of the courts. Many of these respondents considered that the measures in place since the 1 April 2005 are causing delays and that the current position is not efficient or effective. The measures were often described by respondents as burdensome to court staff. However, it was noted that each area has been affected differently and that some areas are coping better than others are.
5. Some respondents mentioned that the proposal would support efficient case management and allow non-contentious (out of courtroom) listing decisions to be made swiftly.

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6. It was apparent that some respondents had misinterpreted how the powers were to be delegated and wrongly considered that giving justices' clerk powers to non legally qualified staff was being proposed. The intention of the proposal is to permit justices' clerks to delegate certain tasks to non legally qualified staff as they see fit. The distinction to be made is that the delegation would permit justices' clerks to delegate certain responsibilities to non legally qualified staff but not give powers to them in their own right. The delegation would not be mandatory and instead a decision would be made by a justices' clerk responsible for the powers delegated and for removing the delegation if desired. In some areas, particularly larger urban areas, a justices' clerk may wish to exercise this. However, we accept that delegation may not be appropriate in every instance and this is why it would be proposed that any final decision to delegate or not remains with the justices' clerk.
7. Of the 72 respondents in favour of a change 50 (69%) were in favour of an amendment by secondary legislation, with most citing it as the easiest and quickest route. 18 (25%) respondents were in favour of change by primary legislation, 4 of whom expressed concern that a new category of 'assistant clerk' would be created. Others considered parliament should decide what could rightly be delegated to non legally qualified staff, notwithstanding that this had been a routine practice prior to 1 April 2005. 4 of the 72 respondents did not state what route to take.
8. A small number of respondents stated that after 1 April 2005, when delegation to non legally qualified staff was not permitted, they had expected the efficiency of courts to be hampered. This point was based upon limitations to the role of staff performing case progression work. These respondents stated they were not aware of any courts experiencing difficulties.
9. A small number of respondents commented that the secondary legislation route would create a second tier of assistant justices' clerk or a second class assistant clerk. 3 respondents were concerned that this would encroach on the separate legal status of legally qualified clerks and stated that a clear distinction should be maintained. One respondent predicted that the definition of assistant justices' clerk would be altered, widened to include administrative staff and confuse the division of responsibilities.
10. 5 respondents did suggest that secondary legislation could be a temporary measure, with changes by primary legislation being made at a later date. Only 13 (15%) of the 85 respondents wished to retain the status quo, either because they felt no problem existed or that the justices' clerk functions proposed for

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delegation were of a judicial nature and should not be undermined by being delegated to non legally qualified staff.

11. The overwhelming majority of respondents viewed the justices' clerk as the best person to determine the parameters of delegation, with approximately 20 respondents commenting that it should be set out in Rules. 10 respondents expressed an expectation that the justices' clerk would consult the Area Director or other senior staff on who the functions should be delegated to. A small number of respondents said that the decision on who to delegate functions to should be made by senior managers if they are the line managers for the staff.
12. One response representing a number of justices' clerks and a Justices' Issues Group stated that legislation should not be restricted to the delegation of case progression rules, but should include the delegation of all of their powers (out of courtroom work only) to administrative staff, provided the justices' clerk was satisfied with their competence. This would place the magistrates' courts on a similar footing to the practice in the Crown Courts where listing office staff act under the overall supervision of the Resident Judge.
13. 4 respondents emphasised the need to ensure that there would be appropriate safeguards and scrutiny of any decisions to delegate, with appropriate management assurance mechanisms in place to deal with the risk of a potential misuse of powers. 2 respondents suggested there should also be a mechanism to remove delegation powers if not being exercised properly.
14. Although 62 (73%) respondents specifically named the Case Progression and Listing Officers as the best individuals to perform these functions, approximately half had concerns about limiting staff by a specific title. Many respondents explained that titles constantly change and that there might be other suitable staff with relevant experience/qualifications.

## Responses to Specific Questions

**Q1. Should non legally qualified staff be able to carry out certain delegated functions under the Justices' Clerks Rules 2005 provided they have the relevant qualifications/experience as deemed fit by the justices' clerk (who would retain the overall responsibility for these functions)? If so, should the justices' clerk determine the parameters of delegation or should it be restricted by legislation to specific Rules?**

The majority of respondents, 82 (96%) gave a definitive opinion, with 72 (85%) agreeing that non legally qualified staff should be able to carry out certain delegated functions, provided they had the relevant qualifications/experience and it was agreed with the justices' clerk. Some respondents commented that this would alleviate the limitations introduced by the Courts Act 2003, which prevents delegation to non legally qualified staff. Almost all respondents that agreed with the delegation of powers stated the justices' clerk should determine the parameters of delegation, although there were one or two reservations about the possibility of national inconsistency.

Approximately 20 (24%) respondents commented that although some functions should be delegated, each delegated function should be restricted to specific Rules. This would avoid any confusion about the separate roles of justices' clerks, their legally qualified assistants and non-legally qualified staff. One respondent considered that it was important for delegated functions to be allocated to Case Progression Officers in family cases.

A few responses questioned whether there was a need for such delegation because they were not aware of any great difficulties in the courts at present. It was stated that the speculation that courts would not be able to cope and that they would be less efficient post 1 April 2005, without delegated functions, had not been realised. Some respondents made this point when answering question 4.

Moreover, some respondents felt secondary legislation would create a different category of assistant clerk, which would expand the definition of an assistant clerk. These respondents stated that this should be decided by parliament and pointed to Baroness Scotland's comments during a debate in the House of Lords on the Courts Bill contained in paragraph 17 of DCA consultation paper

CP 22/05. The Home Office Minister stated that "there is no mention of any other person undertaking these functions". The debate was interpreted to mean that parliament did not contemplate that others would carry out the functions of a justices' clerk. In addition to the last point, one respondent stated that the Courts Act 2003, very clearly defines the roles and responsibilities of an assistant clerk where there is no mention of any one else conducting justices' clerks powers.

A small number of respondents stated that the advantage of case management functions being limited to legal staff or magistrates is that they have a greater insight into the "appropriateness" and "real necessity" for the agreement between parties and are therefore more robust in scrutinising and refusing unmeritorious applications.

One representative body noted that justices' clerks should have the power to delegate at their discretion to case progression and other listing officers Rules 8, 9 and 10. Additionally, the same respondent stated that the routine powers in Rules 23, 24 and 25 could be delegated to the same non legally qualified staff.

**Q2. Which non legally qualified staff should perform these functions (i.e. case progression officers and listing officers)? How will this be decided and by whom?**

A total of 62 (73%) respondents agreed that case progression officers and listing officers should be permitted to undertake delegated functions if they have the experience and are suitably qualified. Respondents also consistently identified a number of other posts where staff may be suitably qualified, including the deputies of the Case Progression Officers and Listing Officers, Area Directors, senior managers and team leaders. However, there was reluctance for these functions to be limited by job title. Staff performing the agreed functions could be categorised generally on the suitability and experience of the individual. Some respondents pointed out that many courts have staff with differing titles and that roles change from time to time and that specifying a title in legislation may become a future hindrance.

Almost all respondents agreed that, subject to rules setting out the parameters, the ultimate decision on which functions should be delegated and to whom, should be made by the justices' clerk. However, approximately 10 respondents agreed that this should be in consultation with management.

**Q.3 Which option do you believe represents the best way to proceed?**

- Retain the status quo
- Make legislative changes so as to authorise the proposed delegations?

**If you favour the second option, please say whether the Government should-**

- Proceed by primary legislation
- Proceed by secondary legislation

Only 13 (15%) respondents wished to maintain the status quo. A few respondents were concerned that maintaining the status quo would be a barrier to providing a quality and timely service. The majority of respondents agreed that there was a need for legislative changes and of the 72 responses received in favour of a change, 50 (69%) favoured proceeding by way of an amendment by secondary legislation to speed up the process and avoid delay. Conversely, 16 (25%) respondents of the 72 were in favour of primary legislation. 4 (6%) were either unsure or had no comment on the legislative route to give effect to proposed delegation.

The majority of those in favour of secondary legislation stated it was the quickest and most practical solution.

A small number of respondents suggested that secondary legislation would establish a new category of justices' clerk assistant, altering the definition of an assistant clerk and widening it to include administrative staff and in so doing confuse the division of responsibilities. One representative body stated that the creation of a new category of non legally qualified clerks devalues the role of the assistant clerk and fails to appreciate the importance of the education and training of the latter.

A small number of respondents considered that only parliament can decide whether this delegation to staff other than justices' clerks or their assistants should be permitted and to set the parameters. 2 respondents in particular cited the comments made by Baroness Scotland (see paragraph 17 of the consultation stating "there is no mention of any other person undertaking these functions") stating it demonstrates that parliament did not contemplate that "other people", such as non legally qualified staff, would undertake any of the functions of a justices' clerks.

A small number of respondents considered that if any changes were to be pursued, it should be by primary legislation, as there was no urgent need for change and parliament should be setting out the parameters.

**Q 4. If you consider the Government should pursue primary legislation only, please say if possible how you consider the magistrates' courts should cope with the current difficulties of operating the present system of delegation.**

A small number of respondents commented upon what alternative arrangements could be put in place in order to manage business under the current system. Those respondents commented that staff could have close liaison with a specified legal adviser (two or more advisers in larger courts) who would be available at a specified time each day. For experienced staff this would only be a matter of checking work already prepared and therefore should not take up too much time. The respondents noted that this seems to operate effectively in some areas.

## **Other comments**

Some respondents mentioned the effect of delegation on staff workload and on consistency across the magistrates' courts, and in Crown and County Courts where certain listing matters and other non contentious responsibilities are delegated and routinely operated.

One representative body queried the contention contained in the consultation document that consideration of agreed adjournments significantly adds to the workload of legally qualified staff.

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There were a small number of comments concerning the need for clear wording of any Rules to ensure that there would be no misinterpretation of how the delegation would work. A number of suggestions have been made on the content of the rules, including to clearly specify that only out of courtroom work is relevant and that any decision on delegation is for the justices' clerk to make and the justices' clerk alone.

Although any delegation given would be for justices' clerks to make at their discretion, there is an expectation by many respondents of a need to consult with senior managers with overall responsibility for allocating suitable staff to particular functions.

One representative body noted that where courts are merged and the administrative staff move into separate buildings from the justices' clerks delegation of justices' clerks powers is required to meet protocols and deadlines.

Some respondents noted that the proposal to delegate would mean that judicial decisions would be made by administrative staff who are not line managed by the justices' clerk. One respondent stated that it is not clear whether non legally qualified staff assisting justices' clerks should be line managed by a justices' clerk or alternatively be part of administrative staff answering to the Area Director.

## Conclusion and Next Steps

1. We are very grateful to all those who took the time to respond to the paper. The responses have been extremely helpful and we have carefully considered them all.
2. There was some confusion over whether the proposal would make it mandatory for justices' clerks and their assistants to delegate functions. The proposal is in fact aimed at permitting limited delegation and allowing the justices' clerk to decide what delegation is appropriate locally. A large section of the respondents stated this worked well before 1 April 2005 and the proposal therefore aims to restore the status quo that operated before 1 April 2005.
3. Overall, the consultation has demonstrated that the majority of respondents were in favour of limited delegation of justices' clerk functions to non qualified staff, subject to suitable training and experience. Many respondents stated that this would support case management and listing matters.
4. The majority of those wanting change agree that the most suitable way to achieve this is an amendment by secondary legislation with the justices' clerks deciding upon which non legally qualified staff are suitable to carry out certain tasks.
5. However, it is clear that some stakeholders do not agree that delegation should be permitted or considered that parliament should make this decision because delegation was not envisaged to be extended to non legally qualified staff in the Courts Act 2003.
6. As a result of the issues highlighted by respondents this matter is now to be considered by the Sir Ron de Witt, Chief Executive of Her Majesty's Court Service (HMCS) and at the forthcoming January HMCS Board and subsequently Ministers. Consultees/respondents/interested parties will then be informed of the chosen way forward.

## Consultation Co-ordinator contact details

If you have any complaints or comments about the **consultation process** rather than about the topic covered by this paper, you should contact the Department for Constitutional Affairs Consultation Co-ordinator, Laurence Fiddler, on 020 7210 2622 or email him at [consultation@dca.gsi.gov.uk](mailto:consultation@dca.gsi.gov.uk)

Alternatively, you may wish to write to the address below:

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**London**  
**SW1E 6QW**

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given on page 3.

## The Consultation Criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

**These criteria must be reproduced within all consultation documents.**

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## Annex A – List of Respondents

Area Directors – (some of the responses represented other staff or groups such as justices' clerks, Area Management Forums, Area Management Boards and Justices' Issues Groups)	13
District Legal Directors/Justices' Clerks /Justices' Clerk Assistants (some of these represented Area Directors or a number of justices' clerks)	23
Magistrates & Bench Chairmen or Deputy Chairmen	27
Court Staff (non legally qualified) i.e. Case Progression Officers	12
Department for Constitutional Affairs	1
Justices' Clerks Society	1
Home Office - Office of Criminal Justice Reform	1
Public & Commercial Services Union	1
Magistrates' Association - Judicial Policy & Practice Committee Northampton Branch Magistrates' Association	2
The Law Reform Committee of the General Council of the Bar	1
HM Inspectorate of Courts Administration	1
Law Society - Criminal Law Committee	1
London Magistrates' Clerks Association - represents all justices' clerks in the London area	1

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