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The Prisons and Courts Bill: Court Reform

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The Prisons and Courts Bill was published on 23 February 2017. It is due to have its second reading on 20 March 2017.

- Part 1 of the Bill deals with prison reforms
- Parts 2 and 3 would introduce court reforms designed to integrate technology and enhance efficiency
- Part 4 concerns judicial terms and conditions, and the role of the Judicial Appointments Commission
- Part 5 deals with compensation claims for whiplash injuries

Library Briefing Paper CBP 7892: Prison and Court Statistics, England and Wales gives statistics on the Bill to accompany this Briefing Paper.

The Ministry of Justice has published Explanatory Notes. The Gov.UK website has a "latest news" page, Prisons and Courts Bill: what it means for you and a collection of relevant documents including factsheets on the Bill, impact assessments and equalities statements.

The Bill's progress can be followed on the Prisons and Courts Bill page of the Parliamentary website, which also provides relevant documents such as proposed amendments and versions of the Bill. This paper just covers the court reform provisions. It forms part of a longer paper which covers the whole of the Prisons and Courts Reform Bill. I

Most of the Bill extends to England and Wales only. However, some aspects of the prison reforms also extend to Scotland and Northern Ireland, because Her Majesty's Inspectorate of Prisons and the Prisons and Probation Ombudsman have functions relating to immigration detention, and this is a reserved matter.

Reforming the Court and Tribunal System

Parts 2 and 3 of the Prison and Courts Bill will make significant changes to the courts and tribunals system in England and Wales. The provisions includes reforms to the criminal courts, civil courts, the family courts and tribunals in England and Wales.

The provisions in **Parts 2 and 3** predominantly relate to Her Majesty's Court and Tribunal's (HMCTS) Reform Programme, which was launched in March 2014.[1] The programme, and this Bill, aim to modernise the justice system and improve access to justice, through a series of reforms designed to integrate technology and enhance efficiency. The aims and principles of the programme were set out in a joint statement by the Lord Chancellor, the Lord Chief Justice and the Senior President of

[1] Lord Chief Justice of England and Wales, Senior President of Tribunals and Lord Chancellor and Secretary of State for Justice, Joint Letter (2014)

Tribunals, titled Transforming Our Justice System, which was published in September 2016.

The proposed reforms to the criminal courts focus on expanded use of technology, in particular by providing for more hearings and decisions to be conducted in writing (including electronically) or virtually via audio and video links. The proposals that have attracted most comment are those to enable "fully virtual" court hearings, and those to introduce a new automated online conviction procedure for certain low-level non-imprisonable offences.

Part 2 of the Bill also provides the legal foundations for the introduction of new online procedures and online dispute resolution (ODR) for the civil courts, family courts and tribunals. The clauses enable the creation of a new online court that could deal with low value money claims below £25,000, as was recommended by Lord Justice Briggs' Civil Courts Structure Review.[2] The clauses would allow new online procedures to apply to existing civil courts, family courts and tribunals. The Government's Transforming our justice system paper indicates that the Social Security and Child Support Tribunal is going to be one of the first "to be moved entirely online, with an end-to-end digital process that will be faster and easier to use for people that use it".[3]

Judiciary and the Judicial Appointments Commission

Part 4 of the Bill concerns judicial terms and conditions, and the role of the Judicial Appointments Commission. The former provisions of the Bill largely follow from the Ministry of Justice's consultation on Modernising Judicial Terms and Conditions, while the latter follow from certain recommendations in the Triennial Review of the Judicial Appointments Commission. There are also minor changes to the law on deployment of judges and the remuneration of Employment Tribunal members.

At present, some leadership roles are held on a fixed term basis whereas others are not. Many leadership judge positions are non-statutory, and thus can already be held on a fixed-term basis without the need for legislation. **Clause 56** amends the law to allow the remaining statutory judicial leadership positions to be held on a fixed-term basis, in line with the conclusions of the Ministry of Justice's consultation. The Government claim that this will create a clearer career path and improve diversity in the judiciary. The Bill does not specify how long the term will be for any such appointments, as this is left to the Lord Chancellor to decide following consultation with the judiciary. Proposals to appoint all fee-paid judges on fixed-term appointments were included in the consultation but are not being taken forward in the Bill.

Clause 60 amends the law to allow the Lord Chancellor to direct the Judicial Appointments Commission (JAC) to provide its advice on

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2 Lord Justice Briggs, Civil Courts Structure Review: Final Report (2016) p

3 Transforming our justice system: summary of reforms and consultation (September 2016) Cm 9321 p10

appointments both within and without the United Kingdom, even where those appointments are non-judicial in nature. The JAC is also empowered to set up a charging model to recoup the costs of providing this advice. This is following a recommendation in the Triennial Review that these duties were formalised, as they were already being sought out due to the JAC's expertise in the realm of appointments.

1. Introduction

The Prisons and Courts Bill was published on 23 February 2017. It is due to have its second reading on 20 March 2017.

- Part 1 of the Bill deals with prison reforms
- Parts 2 and 3 would introduce court reforms designed to integrate technology and enhance efficiency
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The Ministry of Justice has published Explanatory Notes. The Gov.UK website has a "latest news" page, Prisons and Courts Bill: what it means for you and a collection of relevant documents including factsheets on the Bill, impact assessments and equalities statements.

The Bill's progress can be followed on the Prisons and Courts Bill page of the Parliamentary website, which also provides relevant documents such as proposed amendments and versions of the Bill.

This paper just covers the court reform provisions. It forms part of a longer paper, Commons Library Analysis: The Prisons and Courts Bill, which covers the whole of the Bill.

Most of the Bill extends to England and Wales only. However, immigration and employment are both reserved matters, and some aspects of the Bill touch on these.

The First-tier Tribunal (Immigration and Asylum) and the Upper Tribunal (Immigration and Asylum Chamber) hear appeals against some immigration decisions, and cover England, Wales, Scotland and Northern Ireland.[4] Employment tribunals also cover Scotland as well as England and Wales.

Consequently the online procedures set out in **clauses 37 to 45** and **schedule 8** extend to Scotland in relation to employment tribunals and Employment Appeals Tribunals, and to Scotland and Northern Ireland in relation to the First-tier Tribunal and Upper Appeal Tribunal.

For full details see clause 70 and pages 28–31 of the Explanatory Notes.

[4] In the context of Scotland, the Scotland Act 2016 enabled the administration of reserved tribunals to be transferred, so that a reserved tribunal can be absorbed within Scotland's own tribunal structure.

2. Overview of Parts 2 and 3 of the Bill

Parts 2 and 3 of the Prison and Courts Bill will make significant changes to the courts and tribunals system in England and Wales. The provisions includes reforms to the criminal courts, civil courts, the family courts and tribunals in England and Wales.

The administration of justice is largely within devolved competence in Scotland and Northern Ireland. It is not devolved in Wales as England and Wales are a unified legal jurisdiction. However, reserved tribunals are notable exceptions in relation to Scotland and Northern Ireland. The administration of reserved tribunals is not devolved. For example, the Immigration and Asylum Tribunal, which is administered by HMCTS, operates in both Scotland and Northern Ireland. The changes outlined in this Bill that relate to these reserved tribunals are relevant to Scotland and Northern Ireland.[5]

In relation to Scotland, section 39 of the *Scotland Act 2016* would devolve to the Scottish Parliament competence for reserved tribunals' administration and procedure, including that which affects employment tribunals, to which this Bill make a number of changes (see **Section 3.6**). To come into effect, section 39 requires an Order in Council specifying the functions that may be devolved, followed by the Scottish Parliament giving effect to the transfer. This means that the provisions of the Bill relating to reserved tribunals (for example, **Clauses 37-45** creating online procedures that could apply to tribunals) would affect Scotland, but may in future be amended by the Scottish Parliament.

The provisions in **Parts 2 and 3** predominantly relate to Her Majesty's Court and Tribunal's (HMCTS) Reform Programme, which was launched in March 2014.[6] The programme, and this Bill, aim to modernise the justice system and improve access to justice, through a series of reforms designed to integrate technology and enhance efficiency. The aims and principles of the programme were set out in a joint statement by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals, Transforming Our Justice System, which was published in September 2016.

Clause 47 prohibits the cross-examination in person in family proceedings. This provision has attracted considerable interest but is not directly related to the HMCTS reform programme. **Clause 47** is covered in Section 3.5 of this Briefing Paper below.

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5 In the context of Scotland, the *Scotland Act 2016* enabled the administration of reserved tribunals to be transferred, so that a reserved tribunal can be absorbed within Scotland's own tribunal structure.

6 Lord Chief Justice of England and Wales, Senior President of Tribunals and Lord Chancellor and Secretary of State for Justice, Joint Letter (2014)

Part 2

Part 2 contains a number of changes to the law designed to increase efficiency and enhance the use of technology in the justice system in England and Wales. The main changes in Part 2 are the following:

- allows certain proceedings to be conducted in writing (Clauses 23-31);
- extends the use of live audio and video links, and 'virtual' hearings where no parties are present in the court room but attend by telephone or video conferencing facilities (Clauses 32-33);
- makes provision which will apply across the civil, criminal and tribunal jurisdictions to ensure public participation in proceedings which are heard virtually, including the creation of new criminal offences to guard against abuse (Clause 34);
- allows some offenders charged with summary-only, non-imprisonable offences to be convicted and given standard penalties using a new online procedure (Clauses 35-36)
- creates a new online procedure rules committee that will be able to create new online procedure rules in relation to the civil, tribunal and family jurisdictions (Clauses 37-45);
- enables the Crown Court to send cases to a Magistrate Court (Clause 46);
- bans cross-examination of vulnerable witnesses in certain family cases (Clause 47);
- confers the power to make procedure rules for employment tribunals and the Employment Appeal Tribunal on the Tribunal Procedure Committee (Clause 48);
- extends the membership of the Committee to include an employment law practitioner and judge or non-legal member (Clause 49).

Part 3

Part 3 makes changes to the organisation and functions of courts and tribunals. The provisions includes the following changes:

- extends the role of HMCTS staff (Clause 50);
- abolishes local justice areas (Clause 51);
- brings the Employment tribunal system in line with the rest of the tribunal system (Clause 52);
- for traffic enforcement offences, removes the requirement for a statutory declaration and replaces it with a requirement for a witness statement (Clause 54);

- reforms Attachment of Earning Orders ("AEOs") – to enable the High Court judgment AEOS to be calculated by the fixed deduction scheme instead of through a case-by-case system of calculation by court staff as it is currently (**Clause 55**).

This section is organised as follows. **Section 3.2** sets out the context of the Bill, with a particular focus on the development of the HMCTS Reform Programme, Sir Brian Leveson's Review of Efficiency in Criminal Proceedings and Lord Justice Briggs' Civil Courts Structure Review. **Sections 3.3** covers the changes to the criminal courts. **Section 3.4** addresses the new proposed online procedure for the civil courts, family courts and tribunals. **Section 3.5** examines the provision on vulnerable witnesses in family cases. **Section 3.6** outlines the provisions relating to employment tribunals. **Section 3.7** covers changes to the roles of court staff. **Section 3.8** addresses the abolition of Local Justice Areas. **Section 3.9** looks at the reform of Attachment of Earnings Orders in the High Court. Finally, **Section 3.10** discusses the use of witness statements instead of statutory declarations for certain traffic offences.

3. Context of the Bill

There is widespread recognition of the need to modernise and invest in HMCTS' infrastructure. In June 2015 the HMCTS Annual Report explained that the services they supplied were often inefficient as they had often been "designed in silos", resulting in a user experience that is "inconsistent and unnecessarily confusing, particularly for our vulnerable users".[7]

Some of the proposals within **Parts 2 and 3** of the Bill, in particular those relating to technology, have provoked comment on the changing nature of the justice system in England and Wales. Penelope Gibbs, Chief Executive of Transform Justice, has argued that the "over-riding motivation for much of the court reform seems to be cost reduction".[8] For example, Gibbs questions whether the Government has sufficiently explored the potential implications of using technology to take certain elements of criminal procedure outside of the court room.[9] Similarly, Andrew Langdon QC, Chairman of the Bar Council, expressed concern that the proposals to introduce online pleas "might encourage defendants to plead guilty out of convenience, when in fact they may not be guilty of an offence, no matter how small, risks injustice".[10]

Taken together the changes in **Parts 2 and 3** of this Bill represent the legal foundations of the Government's plan to transform the justice system in England and Wales. Although it is worth noting, that as with prison reform, important elements of HMCTS reform programme, such as court closures, do not require primary legislation. The substance of these measures will have a major impact upon the nature of the justice system and how it develops in the coming decades. The total budget for the court modernisation programme is "around £1 billion".[11]

In general terms the court modernisation provisions in the Bill are a diverse collection of necessary procedural changes to laws already on the statute book, most of which are united by the common themes of enhancing efficiency and enabling technology.

In legal terms, these provisions do not represent a new freestanding legal framework, and this reflects the wide-ranging nature of the proposals, which amend a number of different Acts which underpin different elements of the justice system. This can make the Bill difficult to follow, and the explanatory notes contain a number of pages setting out the complex legal background to the changes.[12]

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7 HM Courts and Tribunals Service, Annual Report and Accounts 2014-15, p 20

8 Penelope Gibbs, 'The new prisons and courts bill – a Pandora's Box?' Transform Justice Blog, 24 February 2017

9 Ibid

10 'Bar Council cautions MOJ over virtual justice' Politics Home, 23 February 2017

11 Prison and Courts Bill, Overarching Impact Assessment MoJ018/2016 p5

12 Explanatory Notes to the Prisons and Courts Bill 145-EN 56/2 p21-27

The Bill relies on a number of delegated powers. The Government has produced a 77 page memorandum setting out why the powers are needed.[13] The memorandum states that there is a "well-established legal framework" in relation to the use of delegated powers in this context, namely enabling the various procedural rules committees to produce rules independently from Government.[14]

3.1 The HMCTS Reform programme

> "The entire criminal justice system is being digitised, in partnership with the Crown Prosecution Service and police, with investment of £270 million agreed in 2015 and due to be completed in 2019."[15]
>
> Transforming our justice system - By the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals – September 2016
>
> "By the year 2022, most civil disputes in England and Wales will be resolved through an online court."[16]
>
> Joshua Rozenberg QC, *Online Courts Will IT Work?* (2017)

The striking nature of these predictions underlines the historic nature of the changes to the justice system that the Government and Her Majesty's Court and Tribunal Service (HMCTS) are currently undertaking through the HMCTS Reform Programme. The Government and HMCTS have sought to emphasise that this is not 'big bang' reform but is instead being rolled out gradually.[17] The intention is for each step is to be phased in and tested before being fully implemented. In the words of Susan Ackland-Hood, the changes will be done "in bite sized chunks with lots of testing".[18]

The majority of the measures in **Parts 2 and 3** of this Bill are designed to change to the law to enable this modernisation of the justice system: by making court procedures more efficient and by integrating technology. The modernisation programme, and this Bill, will lead to extensive changes to a number of the elements of the justice system, including reform of the criminal courts, the civil courts, the family courts and tribunals.

The Lord Chief Justice of England and Wales has described the modernisation programme as "the most radical reform since 1873".[19] The idea of the bulk of civil disputes moving online in 5 years, as

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13 Delegated Powers Memorandum, Prisons and Courts Bill
14 Ibid p4
15 Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals Transforming our justice system, September 2016
16 Joshua Rozenberg, *Online Courts Will It Work?* (2017) p3
17 Susan Ackland-Hood (Chief Executive of HMCTS), The Case for Online Courts, UCL February 2016
18 ibid
19 The Lord Chief Justice's Report (2016) p7

Rozenberg predicts, is remarkable in view of the current justice system's limited use of technology.

The justice system is currently reliant on huge amounts of paper. The former Justice Minister Damian Green MP said in 2013, in relation to the criminal justice system: "every year the courts and the Crown Prosecution Service use roughly 160 million sheets of paper. Stacked up this would be the same as 15 Mount Snowdons – literally mountains of paper".[20]

In June 2015, HMCTS stated in its annual report that "the level of service currently received at a court or tribunal is at best inconsistent and, at worst, frustrating, despite the continuing great efforts of our staff and the judiciary".[21] HMCTS described a lack of digital services and outdated systems—noting that accessing its service often involved filling in paper forms, travelling to its buildings to complete "a simple process" or needing to arrange face-to-face meetings for "basic" guidance. It added that even where it had previously tried to introduce more digital ways of working, it had often relied on "digitised versions of paper-based business processes, layered on top of legacy IT systems, some of which are over 30 years old".[22]

Despite these problems technology has been successfully introduced into parts of the justice system. In the criminal context prison to court video links are used extensively for preliminary hearings.[23] In terms of tribunals, the Traffic Penalty Tribunal makes extensive use of online procedures, including appeals submitted online, an inquisitorial approach using instant messaging; and is accessible through smart phones.[24] Professor Robert Thomas, University of Manchester, and Joe Tomlinson, Lecturer in Public Law, University of Sheffield, note that the online system has succeeded for the Traffic Penalty Tribunal, reducing costs and the duration of appeals.[25]

Thomas and Tomlinson argue, in a report published in 2016 that the expansion of the approach to online systems used in the Traffic Penalty Tribunal into other courts and tribunals raises significant questions about` the nature of the justice system:

> The wider challenge is to re-design and improve the delivery of justice from an established system that was devised on the basis that legal representation would normally be available to one in which such representation is no longer normally available.[26]

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20 Ministry of Justice: 'Digital Courtrooms' to be rolled out nationally 28 June 2013

21 HM Courts and Tribunals Service, Annual Report and Accounts 2014-15, p20

22 Ibid

23 Police: Video Conferencing: Written question - 33154

24 https://www.trafficpenaltytribunal.gov.uk/

25 Robert Thomas and Joe Tomlinson, Current issues in administrative justice: Examining administrative review, better initial decisions, and tribunal reform (2016) p20

26 Ibid p22

Further, there are many practical questions about moving courts and tribunals online, for example:

- Are there some cases that should be not be dealt with online? If not, how will this be decided?
- How will it be possible to know whether an appellant appealing online is the person they say they are?
- How will assisted digital be designed to help those without access to the internet?[27]

The reform programme, and to an extent this Bill, give rise to important questions of both principle and practice.

3.2 Funding

Previous attempts at court reform have suffered from a lack of funding.[28] On 25 November 2015, George Osborne, the Chancellor of the Exchequer, announced a new funding package for the HMCTS programme, of over £700 million for reform of the court and tribunal estate.[29] The Transforming Justice System stated that the Government was committed to investing over "£700 million to modernise courts and tribunals, and over £270 million more in the criminal justice system".[30] The impact statement accompanying this Bill refers to a package of "around £1 billion".[31] The scale of this investment is particularly significant in view of the decrease in the level of funding of both the MoJ and HMCTS.

27 Ibid

28 In the early 2000s Lord Woolf who was then Lord Chief Justice, attempted to introduce information technology in the civil courts as part of a wider programme of civil justice – see Joshua Rozenberg, *The Online Court: Will IT work?* (2017) p4

29 HC Deb 25 November 2015 c137

30 P2 Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals Transforming our justice system, September 2016

31 Prison and Courts Bill, Overarching Impact Assessment MoJ018/2016 p5

Box 1: Funding of the MoJ and HMCTS

In evidence to the Justice Committee in July 2015, the Lord Chancellor and Secretary of State for Justice, said that the 'biggest problem' he faced was that the Ministry of Justice is an 'unprotected' Department (referring to its lack of protection from the Chancellor of Exchequer's spending cuts).[32]

Table 1 Total Managed Expenditure in real terms [(1)], 2011-12 to 2019-20
£ million

	National Statistics									% change
	2011-12 outturn	2012-13 outturn	2013-14 outturn	2014-15 outturn	2015-16 outturn	2016-17 plans	2017-18 plans	2018-19 plans	2019-20 plans	*2011-12 to 2019-20*
Ministry of Justice	9,371	9,724	7,675	7,315	7,526	7,635	7,322	6,648	6,133	*-35%*
Total departmental expenditure [(2)]	651,096	640,292	645,557	620,850	765,275	687,753	683,708	678,521	677,130	*4%*

Notes:
(1) Real terms figures are the cash figures adjusted to 2015-16 price levels using GDP deflators. The deflators are calculated from the data released by the office for National Statistics on 30 June 2016. The forecasts are consistent with the March 2016 Budget.
(2) Total departmental expenditure is given by Resource DEL excluding depreciation plus capital DEL plus resource and capital departmental AME.

Source: HM Treasury, *PESA 2016*, table 1.13 July 2016

The latest edition of Public Expenditure Statistical Analysis (PESA) shows that Total Managed Expenditure (TME) for the MoJ fell by 20% in real terms between 2011/12 and 2015/16 and is expected to fall by 35% over the period 2011/12 to 2019/20. By comparison, total TME across all departments rose by 18% in real terms between 2011/12 and 2015/16 and is expected to rise by 4% over the period 2011/12 to 2019/20.

Expenditure and workforce statistics for Her Majesty's Courts and Tribunals Service (HMCTS) were summarised in a House of Lords Library Note: *Resourcing and Staffing of the Courts* published 11 July 2016:

> In 2015/16, HMCTS employed approximately 16,000 full-time equivalent (FTE) staff and worked with 1,800 full-time judiciary, 7,500 fee-paid judiciary and about 19,500 magistrates out of 471 buildings.6 The average number of staff permanently employed by HMCTS reduced by 953 FTEs from 2014/15 to 2015/16, with associated staff costs that have decreased from £509 million in 2014/15 to £501 million in 2015/16. (These figures do not include the judiciary).7 In 2014/15, HMCTS employed 17,033 staff in total—16,162 permanently employed staff and 871 agency and contract staff. HMCTS employed 17,829 staff in 2013/14 compared to 19,704 in 2011/12. (footnotes omitted)[33]

3.3 Leadership

According to Joshua Rozenberg QC, a prominent commentator on the courts and the judiciary, another reason for previous reforms' failures was the judiciary's lack of involvement in the governance of the courts.[34] The creation of Her Majesty's Court Service in 2005 and the Judicial Office in 2006, with the Lord Chief Justice as the head of the judiciary, has changed this. As Rozenberg notes, judges now have a leadership role in the administrative structures within which they work.[35]

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32 Justice Committee, The Work of the Secretary of State for Justice, 17 July 2015, HC 335, p2

33 HL Library Note: *Resourcing and Staffing of the Courts* published 11 July 2016 p2

34 Joshua Rozenberg, *The Online Court: Will IT work?* (2017) p4-5

35 Ibid; **Part 4** of the Prison and Courts Bill contains measures on judicial leadership - for more Section 4 on this brief

For Rozenberg, the new structure is essential for the planned reforms' success.[36] Judges are now involved in designing the procedures, structures and facilities of the justice system. This enables judges to ensure that the values and principles central to an effective justice system, such as judicial independence, the rule of law and open justice, are reflected in the reforms proposed.

Box 2: Her Majesty's Court and Tribunal Service

HMCTS is an agency of the Ministry of Justice and was created on the 1st April 2011. It operates on the basis of a partnership between the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals.[37]

- Functions

HM Courts & Tribunals Service provides the system of support, including infrastructure and resources, for the administration of the business of the courts in England and Wales and those tribunals throughout the United Kingdom, for which the Lord Chancellor is responsible. The agency provides the support necessary to enable the judiciary, tribunal members and magistracy to exercise their judicial functions independently.

- Leadership

The HMCTS's Service Framework Document sets out that the Lord Chancellor and Lord Chief Justice[38] will not intervene in the day-to-day operations of the agency and have placed the responsibility for overseeing the leadership and direction of HM Courts & Tribunals Service in the hands of its Board.

The **Chief Executive** is responsible for the day-today operations and administration of the agency. Since 21 November Susan Acland-Hood has been Chief Executive of HMCTS.[39]

The **Board** is responsible for overseeing the leadership and direction of HM Courts & Tribunals Service in delivering the aim and objectives set by the Lord Chancellor and the Lord Chief Justice.

- Staffing

The HMCTS Annual Report for 2015-2016 reported that the agency is comprised of 16,000 full time equivalent staff (excluding judiciary). In 2010-11 the number of staff stood at 20,777. The HMCTS Annual Report for 2015-2016 reported that the agency comprised 16,000 full time equivalent staff (excluding judiciary). In 2010-11 the number of staff stood at 20,777.

- Estate

Since 2010, the court and tribunal estate has changed significantly. Between May 2010 and July 2015, 146 courts were closed. On 11 February 2016, Shailesh Vara MP, the Parliamentary Under-Secretary of State for Justice, announced that 86 courts and tribunals would be closed.[40]

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36 Joshua Rozenberg, *The Online Court: Will IT work?* (2017) p4-5

37 The **Senior President of Tribunals** is at present a separate judicial office with similar, but not identical, responsibilities to the Lord Chief Justice. For as long as the separate statutory office remains, references to the Lord Chief Justice should be taken as including references to the Senior President.

38 The **Lord Chief Justice of England and Wales** is the president of the courts in England and Wales and his statutory responsibilities include judicial deployment, the provision of welfare, training and guidance to the judiciary, and representing the views of the judiciary to the Lord Chancellor and ministers of the Crown.

39 Susan Acland-Hood is on twitter @CEOofHMCTS

40 Shailesh Vara MP, HM Courts and Tribunals Service, 11 February 2016, HCWS536

The cooperation between the judiciary and the Government through the structure of the HMCTS has been prevalent at every stage of the Reform Programme. As Gee, Hazell, Malleson and O'Brien (a group of academics) note in their recent study of judicial independence, courts administration is now run on a "partnership model".[41] They observed that HMCTS has secured "genuine judicial involvement", on both short-term funding decisions and on long-term strategic thinking.[42] In terms of weaknesses they point out that HMCTS is limited by both the Ministry of Justice's centrally negotiated contracts and its lack of control of its own financial resources.[43]

3.4 The launch of the HMCTS Reform Programme

In March 2014, Lord Thomas of Cwmgiedd, the Lord Chief Justice of England and Wales, Chris Grayling MP, then Lord Chancellor and Secretary of State for Justice, and Sir Jeremy Sullivan, Senior President of Tribunals, announced a reform programme for the resourcing and administration of HMCTS. The HMCTS Reform Programme has three main elements:

- Digitisation and use of state of the art IT for all procedures and hearings
- Simplification of processes and procedures in the criminal courts, civil courts, family courts and tribunals
- Modernisation of the court estate

Since this announcement the Reform Programme has developed through a number of reviews, namely Sir Brian Leveson's review of the Criminal Justice System and Lord Justice Briggs' review of the Civil Courts, and Government proposals, consultations and announcements.

3.5 The Leveson Report

In January 2015, Sir Brian Leveson's Review of Efficiency in Criminal Proceedings was published. The Review made a number of recommendations relating to the need to improve the technology available within the courts estate, for example by ensuring that digital evidence can be easily presented in court.[44]

The Review made the case for many of the changes to criminal procedure set out in Part 2 of this Bill. For example, Sir Brian Leveson's report argued that for pre-trial and case management hearings, the

41 Graham Gee, Robert Hazell, Kate Malleson and Patrick O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution* (2015) p70-78
42 Ibid p75
43 Ibid
44 Sir Brian Leveson, Review of Efficiency in Criminal Proceedings (2015) p97

process of always gathering together in the same place was "inefficient and expensive".[45] As a result, Sir Brian Leveson made the case for remote hearings using new technology to enable many, but not all, aspects of criminal cases to be dealt with without requiring all the various parties to be in the same place.[46]

Notably, Sir Brian Leveson set out eight "essential prerequisites for remote hearings".[47] These prerequisites highlight some of the practical challenges of installing and using technology in the criminal courts.

- **Box 3: Sir Brian Leveson's essential prerequisites for remote hearings**

- **High quality equipment**: The equipment must be reliable and the audio and visual quality should be of a high standard;
- **Digital recording and access:** The proceedings must be digitally recorded, with easy access provided to the audio and visual archive;
- **Cases to be "queued"**: There needs to be a sophisticated listing system for audio and video hearings, so that cases are "queued" with the participants waiting online to be called on, in the same way that occurs with cases in court;
- **Involvement of advocates instructed for the substantive hearing:** For Judges conducting remote hearings, sensible arrangements need to be made to ensure that, to the greatest possible extent, the advocates who are instructed in the case are available to assist the Judge;
- **Video facilities in prisons**: The system will be dependent, to a marked extent, on the ability of the prison establishment to provide sufficient video booths so that defendants can be "present" during the hearing without having to travel to court;
- **Showing exhibits**: The system(s) that are used must enable documents and other exhibits to be shown via the video link.
- **Training:** The Judges and court staff must be properly trained in the use of these new technologies.
- **Retention of the gravitas of proceedings**: We must ensure that the presentation of the proceedings if undertaken in virtual form does not detract from the solemnity and gravitas of the court.[48]

3.6 The Briggs Report

Lord Justice Briggs was commissioned in July 2015 to review the civil courts in England and Wales. In July 2016 the final report was published.[49] That report outlined five main weaknesses afflicting the civil courts:

> The **first** is the lack of adequate access to justice for ordinary individuals and small businesses due to the combination of the

45 Ibid
46 Ibid p13
47 Ibid p14-16
48 Ibid
49 Lord Justice Briggs, Civil Courts Structure Review: Final Report (2016)

> excessive costs expenditure and costs risk of civil litigation about moderate sums, and the lawyerish culture and procedure of the civil courts, which makes litigation without lawyers impracticable.
>
> The **second** consists of the inefficiencies arising from the continuing tyranny of paper, coupled with the use of obsolete and inadequate IT facilities in most of the civil courts.
>
> The **third** consists of the unacceptable delays in the Court of Appeal, caused by its excessive workload.
>
> The **fourth** lies in the serious under-investment in provision for civil justice outside London.
>
> The **fifth** consists of the widespread weaknesses in the processes for the enforcement of judgments and orders.[50]

Briggs balanced this by acknowledging that the civil courts provide a "world-class justice service" to those with civil disputes.[51]

To counter the problems, Briggs recommended the creation of an online court. The online court would represent:

> A radically new and different procedural and cultural approach to the resolution of civil disputes which, if successful, may pave the way for fundamental changes in the conduct of civil litigation over much wider ground than is currently contemplated by its first stage ambition, to resolve money claims up to £25,000 subject to substantial exclusions.[52]

Briggs added that such a court could be designed "for the specific purpose of enabling individuals and small businesses to vindicate their civil rights in a range of small and moderate cases".[53] Thus the system could be designed so as to limit the need to have recourse to lawyers.[54] Briggs emphasised that this would be the court's "true distinguishing feature".[55]

How would the online court work?

The first point to emphasise is that it would not be a "court" in the traditional sense. Briggs describes it as an "entity" that would be part of the civil justice system, as a means of assisting litigants without lawyers.[56] As Rozenberg explains, the name "online court" does not necessarily work as not all of the procedure would be conducted online, and in future a number of courts will rely on online procedures.[57] As such, Briggs suggested that the court be called the "Online Solutions Court", and would in time drop the "Online".[58]

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50 Ibid p115
51 Ibid
52 Ibid
53 Ibid
54 Lord Justice Briggs, Civil Courts Structure Review: Interim Report (2015) p75
55 Ibid
56 Ibid
57 Joshua Rozenberg, *The Online Court: Will IT work?* (2017) p22
58 Lord Justice Briggs, Civil Courts Structure Review: Final Report (2016) p120

In terms of the mechanics of the new form of civil justice, Briggs confirmed in his interim report that it should be made up of three main tiers. This follows the structure that was originally proposed by the Civil Justice Council's Online Dispute Resolution Advisory Group's report Online Dispute Resolution For Low Value Civil Claims published in 2015.

Box 4: The Three Tier Service

The Civil Justice Council's Online Dispute Resolution Advisory Group, chaired by Professor Richard Susskind, recommended in 2015 that HMCTS should establish an Internet-based court service, known as HM Online Court (HMOC).[59] The report goes into considerable detail as to how the service, for civil disputes of value less than £25,000, should work. The report recommended that the HMOC should be a three tier service:

- Tier One of HMOC - Online Evaluation: This facility will help users with a grievance to classify and categorize their problem, to be aware of their rights and obligations, and to understand the options and remedies available to them.
- Tier Two - HMOC Online Facilitation: To bring a dispute to a speedy, fair conclusion without the involvement of judges, this service will provide online facilitators. Communicating via the Internet, these individuals will review papers and statements and help parties through mediation and negotiation.
- Tier Three - HMOC Online Judges: full-time and part-time members of the Judiciary who will decide suitable cases or parts of cases on an online basis, largely on the basis of papers submitted to them electronically as part of a structured process of online pleading.[60]

The final Briggs report added that a further two stages should be added to the online court procedure, before the three recommended by the Civil Justice Council and the Interim Report, the first of which would alert users to alternative forms of resolution, sources of free or affordable advice, and basic commoditised legal guidance.[61] The second would ascertain whether there is a dispute between the parties which the court needs to decide, or whether the claim is for enforcement of rights or obligations not in dispute.[62] The final report also made a number of recommendations on how the online court should be taken forward, including:

- The Online Court should eventually be made compulsory as the forum for cases within its jurisdiction, save where otherwise recommended and subject to the power of the court to transfer cases to a higher court on grounds of complexity or public importance;
- £25,000 is an appropriate first steady-state ambition as the ceiling for the Online Court's jurisdiction. But it should be approached in stages by a soft launch of the new court, either by using an initial ceiling of £10,000, or by launching the service of the court by reference to specific case types;

59 The Civil Justice Council's Online Dispute Resolution Advisory Group's report Online Dispute Resolution For Low Value Civil Claims (2015)
60 Ibid p19-20
61 Lord Justice Briggs, Civil Courts Structure Review: Final Report (2016) p 119-120
62 Ibid

- The Online Court's jurisdiction should extend to all money claims up to £25,000, save for specific exclusions, and should include unspecified claims.[63]

Briggs' recommendation that the court be developed incrementally reflects the Government's stated intention that HMCTS's technological modernisation be taken forward gradually.

Briggs noted in his conclusions that the success of the project would depend on careful design, the provision of digital assistance for those who need assistance with accessing computers and on improving legal education.[64]

Criticisms and responses

Briggs's final report noted a number of the criticisms of the proposal for an online court raised since the publication of the Interim report, which included the following:

- That the Online Court will provide second-tier, second class justice to those wrongly viewed as having less important claims, by comparison with the current traditional civil court structure;
- That a large majority of the court users needing to use the Online Court will be denied access to justice by the requirement to go online, due to difficulties of various kinds with computers, unless a parallel paper path to court is preserved long term, or the Online Court itself made voluntary;
- That the exclusion of lawyers (whether by design or by the economic consequences of the chosen costs regime) will be a cause of injustice in the many cases where there will not be a level playing field, and will encourage the growth of paid McKenzie friends and others with an undesirable influence upon vulnerable litigants;[65]
- That the bringing into operation of the Online Court is a rash step in the dark, for which there is no comparable precedent to provide the requisite minimum level of confidence that it will work;

63 Ibid p118-120

64 Ibid p115-116

65 "A McKenzie friend assists a litigant in person in a court of law in England and Wales. They don't need to be legally qualified and tend to be lay advisors who provide moral support for litigants, take notes, help with case papers and give advice on the conduct of a case. McKenzie friends cannot conduct litigation, address the court or sign court documents, their services are usually free, but paid McKenzie Friends are becoming more common", Ministry of Justice, Reforming the Soft Tissue Injury ('whiplash') Claims Process, Cm 9299, November 2016, p30, footnote 21

- That £25,000 is a wrong and unnecessarily high level at which to set the ceiling of the court's jurisdiction;
- That the Online Court will be blighted by government incompetence in IT, or by underfunding during both design and operation.[66]

Briggs responded to these criticisms in the report and concluded that the online court could radically improve access to justice.

Catherine Dixon, the then Chief Executive of the Law Society, commented that it "is vital that ordinary and vulnerable people using the online court are not prejudiced when claiming against large organisations".[67] Dixon also argued that it was important to know which claims would be included as part of the online court.[68] Chairman of the Bar, Chantal-Aimée Doerries QC, expressed similar concerns that the online court for claims up to £25000 would risk "entrenching a system of two-tier justice" whereby individuals without lawyers could find themselves in litigation with organisations which can afford to hire their own legal teams.[69]

3.7 Transforming our Justice System

In September 2016, the Lord Chancellor (Elizabeth Truss MP), the Lord Chief Justice (Lord Thomas) and Senior President of the Tribunals (Sir Ernest Ryder published a joint statement setting out their shared vision for reforming the justice system.

The statement outlines the need for "radical change" to ensure that our justice system continues to "lead the world". The statement set out the need to introduce modern IT and processes to upgrade the system so that it works better for "everyone".[70]

The vision is based on three core principles:

- Just – the judiciary must be supported by modern transparent processes that are consistent
- Proportionate – the costs, speed and complexity should be proportionate to the scale and substance of the case
- Accessible – the system should be intelligible to non-lawyers, and those with disabilities should be not be excluded, nor those uncomfortable with new technology

66 Ibid p36-37

67 Law Society Press Release, Comprehensive review of civil courts structure acknowledges vital role solicitors have to play in IT integration (28 July 2016)

68 Ibid

69 Bar Council response to Lord Justice Briggs' civil courts structure review, Politics Home, 27 July 2016

70 Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals Transforming our justice system, September 2016

Roger Smith, visiting professor at London South Bank University and former director of human rights group Justice, criticised the paper's "narrow" definition of accessibility:

> It includes availability, intelligibility and accommodation to disability. It does not include cost – a somewhat telling omission because the paper on our justice system deals neither with legal aid nor court fees.[71]

The Transforming our Justice statement was accompanied by a further white paper summarising the reforms and consultations proposed.[72] That paper outlined a number of the changes which are included in this Bill.

Access to justice

Increasing access to justice is a central aim of the HMCTS reform programme.

In 2015, the Lord Chief Justice's Annual Report noted that "our system of justice has become unaffordable to most".[73] He added that there had been an increase of litigants in person, which the justice system was struggling to cope with.[74]

The Bach Commission on Access to Justice, supported by the Fabian Society and the Labour peer Lord Willy Bach, in a report published in 2016, argued that access to justice in England and Wales was facing six main challenges:

1. Fewer people can access financial support for a legal case
2. Exceptional case funding has failed to deliver for those in need
3. Public legal education and legal advice are inadequate and disjointed
4. High court and tribunal fees are preventing people pursuing legal claims
5. Bureaucracy in the Legal Aid Agency is costly and time-consuming
6. Out of date technologies keep the justice system wedded to the past[75]

The Government has argued that the constitutional principle of access to justice needs to be reconceptualised for the 21st century. The Government has argued that the principle no longer simply refers to

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71 Roger Smith, Transforming justice – beyond the bombast, Law Gazette, 10 October 2016

72 Transforming our justice system: summary of reforms and consultation (September 2016) Cm 9321

73 The Lord Chief Justice's Report (2015) p5

74 Ibid

75 The Bach Commission on Access to Justice, 'The crisis in the Justice System in England and Wales' Fabian Society (2016) p5

accessibility to a physical court, and will now increasingly refer to the ability to access online services. [76] In evidence to the House of Lords Constitution Committee, the Lord Chancellor Liz Truss confirmed that the Government's aim was to shift away from existing conceptions of access to justice:

> On the specific issue of legal aid, one of the points about the Prisons and Courts Bill is that it will change the way the system works. More things will be done online; there will be a more streamlined process. We will need fewer lawyers to help people navigate through the system, and, I suggest, more and early legal support and legal education, as well as more support in areas like representation, because at the moment a lot of legal effort is being spent navigating through a cumbersome and complex system.[77]

Professor Richard Susskind, the leading expert on technology and the law and Chair of the Online Dispute Resolution Advisory Group of the Civil Justice Council, has argued that online courts will lead to both an "increase in access to justice (a more affordable and user-friendly service) and substantial savings in costs, both for individual litigants as well for the court system".[78]

Susskind has argued that critics of online courts should not compare them "with some ideal and yet simply unaffordable conventional court service".[79] Instead we should compare with the system at present: "a system that is too expensive, takes too long, is barely intelligible to the non-lawyer, and so excludes many potential litigants with credible claims".[80] Central to Susskind's case is that online courts and technology can enable the justice system to reach the unmet legal need that currently exists at proportionate costs.

Critics of the modernisation agenda have challenged the idea that technology can replace face-to-face contact with lawyers. A point noted by a report by the Bach Commission on Access to Justice, published in 2016:

> As many witnesses have pointed out to the Commission, face-to-face contact is irreplaceable. While Professor Susskind suggests as little as 3 per cent of the population are without internet access, research from the Legal Education Foundation found only 50 per cent of those entitled to civil legal aid pre-2013 would be willing

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76 See for example: Shailesh Vara MP, who as Minister of State for Justice, put the case for online courts in the context of a debate on court closures in a debate: HC Deb 16 September 2015 c338WH

77 House of Lords Select Committee on the Constitution, Uncorrected oral evidence: Oral evidence session with the Lord Chancellor and Secretary of State for Justice, Wednesday (1 March 2017)

78 Richard Susskind,' Online Courts And Online Dispute Resolution" Paper for World Bar Conference 2016 (2016)

79 Ibid

80 Ibid

> and able to operate online. People facing the type of legal problems for which legal aid is needed are much less likely to be able to utilise the internet to resolve their problems. As the Legal Education Foundation note, it "certainly cannot be assumed that effective access simply equates with access to the internet."[81]

Concerns over the ability of those who might need assistance to use online court services prompted the Government to consult on the proposed assisted digital services, designed to support those that have difficulty using technology.[82] The consultation response stated that the Government will ensure that the assisted digital support "takes into account the needs of those who are elderly or have disabilities, those with poor literacy or English skills, and those who lack access to technology because of cost or geography".[83] The response also promised to conduct extensive research and testing on the services offered.

81 The Bach Commission on Access to Justice, 'The crisis in the Justice System in England and Wales' Fabian Society (2016) p16

82 Ministry of Justice, Transforming our justice system: assisted digital strategy, automatic online conviction and statutory standard penalty, and panel composition in tribunals Government response (February 2017) Cm 9391

83 Ibid para 70

The criminal courts

3.8 Conducting preliminary proceedings in writing

Clauses 23 to 30 and **Schedule 3** of the Bill are concerned with enabling certain preliminary proceedings to be conducted in writing, rather than in court. The Explanatory Notes to the Bill indicate that these new written procedures will enable a defendant to engage with the criminal courts online using the Criminal Justice System Common Platform Programme.[84]

Box 5: Types of criminal offence

There are three types of criminal offence: **summary**-only, **either-way**, and **indictable**-only. Indictable-only offences are the most serious group of offences, and can only be tried in the Crown Court. Summary-only offences are the least serious group of offences, and can only be tried in magistrates' courts. Either-way offences, as the name suggests, can be heard in either the magistrates' court or the Crown Court depending on the severity and complexity of the particular case and on the defendant's wishes.

All cases – whatever the type of offence – begin in the magistrates' courts. Either-way cases undergo an "allocation" process to end up in the appropriate court. Either-way cases allocated to the Crown Court, and all indictable-only offences, are then "sent" from the magistrates' court to the Crown Court for trial.

Plea indications

At present, during preliminary proceedings a defendant charged with any of the three types of criminal offence is asked to indicate whether he intends to plead guilty or not guilty. This "indication of plea" must usually be made in court.

There are currently only two ways in which an indication of plea can be made in writing, both of which are only available in respect of summary-only, non-imprisonable cases commenced by way of written charge (rather than by charges brought at a police station).

The first is under the "pleading guilty by post" provisions of s12 of the Magistrates' Courts Act 1980, under which a defendant charged with a summary-only non-imprisonable offence may notify the magistrates' court in writing of an intention to plead guilty. There is a digital option for doing this: the Government's Make a Plea website. The court may

[84] Explanatory Notes, para 30. The Common Platform Programme is an online system that has been designed to integrate the systems of HMCTS and the Crown Prosecution Service. For an overview, please see the Inside HMCTS blog, Introduction to CJS Common Platform Programme, 30 June 2016.

then try the case as if the defendant had pleaded guilty in court, but without the defendant (or the prosecution) having to attend.

The second is under the "single justice procedure" set out in s16A of the 1980 Act.[85] This works in the following way:

> It will be for prosecutors to identify cases which might be suitable for the single justice procedure. These will be commenced by a written charge and a new type of document called a 'single justice procedure notice'.
>
> The single justice procedure notice will be sent to the defendant explaining the offence which has given rise to the proceedings, the options available to the defendant, and the consequences of not responding to the notice. It will be accompanied by the evidence upon which the prosecutor will be relying to prove the case.
>
> The notice will give the defendant a date to respond in writing to the allegation rather than a date to attend court. However the defendant will have the right to request a traditional hearing in open court at this point or indeed at any point before his case is considered by the single justice. If he wishes to plead not guilty, or otherwise wants to have a hearing in a traditional courtroom, the defendant can indicate these wishes in the response to the single justice procedure notice. In such circumstances the case will be referred to a traditional court and their case will be managed in the normal way.
>
> In cases where a defendant pleads guilty and indicates that he would like to have the matter dealt with in his absence, or fails to respond to the notice at all, a single magistrate will be able to consider the case on the basis of the evidence submitted in writing by the prosecutor, and any written mitigation from the defendant. The single magistrate can convict and sentence, or dismiss the charge as appropriate.[86]

The Bill would extend the current provisions enabling plea indications to be given in writing.

Clause 23 would require the Criminal Procedure Rules to make provision for a new "written information procedure", which would allow persons "charged with offences" to choose to give specified information to the court in writing. The detail of the procedure will be set out in the Rules, but some key points to note from the face of the Bill are as follows:

- the courts would only be able to use information given under the procedure for the purposes of case management;

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85 As inserted by s48 of the Criminal Justice and Courts Act 2015. See section 12 of Library Briefing Paper 14/8 Criminal Justice and Courts Bill and section 4.1 of Library Briefing Paper SN/HA/6882 Criminal Justice and Courts Bill: Commons Stages for further background.

86 Ministry of Justice, Criminal Justice and Courts Act 2015: Circular 2015/01, paras 144-147

- the procedure may (in particular) allow a person charged with an offence to choose to give an indication of how he intends to plead, but may not allow a person to actually give such a plea;
- the person charged would have to be given certain information about the new procedure – including how it works, the consequences of following it, and information about legal advice and representation – before deciding whether to engage with the written procedure or whether to proceed in court;
- "charged with offences" would cover people against whom proceedings have been commenced by summons or by written charge, or who have been charged at a police station; and
- "giving information" would include making admissions, other than admissions of guilt.

In relation to the last bullet, the Explanatory Notes comment that excluding admissions of guilt from the written information procedure would mean

> …in the event that a defendant, for whatever reason, later changed his or her indicated guilty plea to a plea of not guilty, then the fact that a guilty plea had previously been indicated could not be admitted as evidence in the subsequent criminal proceedings.[87]

Clause 24 of the Bill would extend the existing "pleading guilty by post" scheme in s12 of the Magistrates' Courts Act 1980, by enabling it to apply to defendants who have been charged with a summary offence at a police station.

The combined effect of clauses 24 and 25 is that defendants would be able to give an indication of plea in writing in all offences, rather than just in summary-only non-imprisonable offences (as is the case at the moment). [88]

Allocation and sending proceedings

Clauses 25 to 29 of the Bill deal with allocation and sending proceedings, and would enable such proceedings to take place in writing. Clause 46 would give the Crown Court a new general power to send summary or either-way cases back to the magistrates' court (including the youth court) for trial or sentencing.

Allocation proceedings are the process for deciding whether an either-way offence should be tried in a magistrates' court or the Crown Court. They consist of two parts: "plea before venue" and "mode of trial". Sending is the process by which either-way offences allocated to the Crown Court or an indictable-only offence is sent from a magistrates' court to the Crown Court for trial.

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87 Explanatory Notes, para 194

88 Ministry of Justice, *Prisons and Courts Bill: Changes to Criminal Court Case Management – Allocation and Sending Procedures*, February 2017

The framework governing allocation proceedings is currently set out in the Magistrates' Courts Act 1980, with the detailed procedural requirements set out in Part 9 of the Criminal Procedure Rules.

At present, a defendant charged with an either-way offence is required to appear in a magistrates' court for a "plea before venue" hearing, at which he will indicate whether he intends to plead guilty or not guilty.[89]

If the defendant indicates that he intends to plead guilty, then the court may convict him without hearing any evidence and then proceed to sentencing.

If the defendant indicates that he intends to plead not guilty, or fails to indicate how he would plead, then the magistrates' court will proceed to make a "mode of trial" decision.[90] Again, this currently requires the defendant's presence in court.[91]

Box 6: Mode of trial decisions in either-way cases

When making a "mode of trial" decision, the magistrates' court will go through the following steps:

- The court will decide whether the offence appears more suitable for summary trial or for trial on indictment. In reaching this decision, the court should consider:
  - whether the sentencing powers of the magistrates' court would be sufficient to deal with the defendant if convicted;
  - any representations made by the prosecution or the defendant;
  - the Sentencing Council's Allocation Guideline.
- If the court decides that the case is more suitable for summary trial, it shall explain this to the defendant in ordinary language. It shall also explain to the defendant that he is entitled to choose whether to consent to a summary trial, or whether to elect for trial on indictment in the Crown Court.
- The defendant may then request an indication of whether a custodial or non-custodial sentence would be more likely to be imposed if he were to choose summary trial and to plead guilty. The court may, but need not, give such an indication.
- If the court does give an indication of sentence, it shall ask the defendant whether he wishes to reconsider the indication of plea he gave at the plea before venue hearing. If the defendant wishes to change his indication of plea to guilty, then the court shall proceed as if the defendant had pleaded guilty at a summary trial. It may then proceed to conviction and sentencing.
- In all other cases (i.e. if the court does not give an indication of sentence, or if the defendant does not wish to change his indication of plea to guilty), then the court shall proceed to ask the accused whether he consents to be tried summarily.
- If he does consent, the court shall proceed to summary trial.

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89 s17A *Magistrates' Courts Act 1980*. Under s17B there is an exception to the general rule that the defendant must appear in court for this hearing, which applies where a defendant has legal representation and the court considers that by reason of the defendant's disorderly behaviour it is not practicable for the proceedings to be conducted in his presence. In such circumstances the legal representative may act on the defendant's behalf.

90 Under sections 18 to 23 of the *Magistrates' Courts Act 1980*

91 This is subject to a similar exception as under s17A

- If he does not consent, the court shall send the case to the Crown Court for trial under s51 of the Crime and Disorder Act 1998. This requires the defendant to have been brought before a magistrates' court.

Indictable-only offences can only be tried in the Crown Court, and so do not undergo the plea before venue and mode of trial procedures described above. However, at present defendants charged with such offences must still be brought before a magistrates' court in order to be sent to the Crown Court.[92]

Clauses 25 to 28 of the Bill would introduce various new written procedures for plea before venue and mode of trial proceedings. In each case it would be the defendant's choice as to whether to make use of the new written procedure, or whether to proceed in court. The defendant would also need to be provided with specified explanatory material setting out (for example) details of what the written procedure involves.

Clause 25 would enable a defendant charged with an either-way offence to engage with the plea before venue process in writing, rather than in court.

If the defendant chose not to give a written indication of plea, or failed to give any written indication at all, then the allocation proceedings would proceed using existing court-based procedures.

If the defendant chose to give a written indication of a guilty plea, then the offence would be treated as a summary offence. The defendant would then appear before a magistrates' court to confirm his plea and to be convicted and sentenced (or committed to the Crown Court for sentence, if necessary).

If the defendant chose to give a written indication of a not guilty plea, the court would then proceed to the mode of trial procedure outlined in Box 6 above. Clause 26 would enable the defendant to choose for this to take place in writing, rather than in court.[93]

If the defendant chose to engage with the written mode of trial procedure, then the various steps outlined in Box 6 above would still take place but with various modifications to permit the use of writing. For example, the prosecution and defendant would need to make representations in writing, and communications regarding indications of sentence would also be conducted in writing.

If the defendant chose not to engage with the written mode of trial procedure, then the mode of trial procedure would take place in court.

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92 s51 of the *Crime and Disorder Act 1998*

93 The clause 26 written procedure for mode of trial would only be available to defendants who had also elected to use clause 25 written procedure for plea before venue

Clause 27 would introduce a new provision enabling a magistrates' court to decide mode of trial for an either-way offence in the absence of a defendant in the following circumstances:

- where the defendant failed to give a written indication of plea under clause 25 **and** also then failed to appear at the court hearing at which plea before venue and mode of trial were to be dealt with instead; or
- where the defendant indicated a not guilty plea in writing under clause 25 but chose not to have mode of trial dealt with in writing under clause 26, **and** also then failed to appear at the court hearing at which mode of trial was to be dealt with instead.

The court must also be satisfied that the defendant had been served with all relevant documents on the written procedure, and that he had been made aware of the date of the allocation hearing.

In such cases the court would be able to proceed with mode of trial as outlined in Box 6 above in the absence of the defendant.[94]

The defendant would be taken to have indicated that he would plead not guilty if the offence were to proceed to trial. If the court considered that the case was suitable to be tried summarily, the defendant would also be taken to have consented to summary trial. However, if (before the start of the summary trial) the defendant indicated that he wished to be tried on indictment, then the court must proceed to send the case to the Crown Court. This provision is intended to preserve a defendant's right to elect jury trial.[95]

Clause 28 relates to allocation proceedings for the offence of "low-value shoplifting".[96] Under the Magistrates' Courts Act 1980, low-value shoplifting is to be treated as a summary-only offence, unless the defendant appears before court before the summary trial begins and instead elects to be tried on indictment in the Crown Court. Clause 28 would enable this election procedure to be carried out in writing.

Clause 29 relates to the procedure for a magistrates' court to "send" either-way offences allocated to the Crown Court and indictable-only offences to the Crown Court for trial. The current procedure requires the defendant to appear before a magistrates' court before being sent to the Crown Court.[97] Clause 29 would enable such cases to be sent without the need for a court hearing.

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94 As an alternative, the court would still have its existing power to adjourn the proceedings to deal with allocation in the presence of the defendant

95 Explanatory Notes, para 221

96 s22A of the Magistrates' Courts Act 1980 defines "low-value shoplifting" as an offence under s1 of the Theft Act 1968 where the value of the goods does not exceed £200.

97 s51 of the Crime and Disorder Act 1998

Clause 30 and Schedule 3 would introduce similar written procedures for young defendants aged under 18. Although young defendants would usually be tried in the youth court (a specially constituted type of magistrates' court), in some circumstances it will be necessary to try them in the Crown Court.[98] Schedule 3 would introduce a new written procedure for young defendants to give an indication of plea (similar to clause 25 for adults). It would also introduce a power for the court to proceed with allocation proceedings in the defendant's absence (similar to clause 27 for adults). The court would also be able to send appropriate cases to the Crown Court without the need for a hearing (similar to clause 29 for adults).

In the case of young defendants, there would be an additional requirement for the court to ascertain whether the defendant's parent or guardian was aware that written proceedings were taking place, and to provide information about written proceedings to that person if he or she was not aware of them.

Clause 46 would introduce a new general power for the Crown Court to send summary or either-way cases back to the magistrates' court (including the youth court) for trial or sentencing. If the Crown Court proposes to send an either-way case back to the magistrates' court for trial and the defendant is 18 or over, it must first obtain the defendant's consent. This is intended to preserve the defendant's current right to elect for jury trial.

Commentary

The Government says that the use of written procedures will "streamline criminal procedures by reducing the need for physical appearances in court and by eliminating unnecessary hearings".[99]

The Magistrates Association has commented that

> …people must not be disadvantaged by how they interact with the justice system. There must be consistency of advice, support and outcomes, whichever channel people use. For example, choosing to interact digitally must not result in a preferable outcome. The MA would suggest there should be systemic scrutiny of any agency or individual who provides support or advice to ensure they are held to account. There must also be a process by which someone who is provided with wrong or inaccurate advice can challenge a resulting outcome.[100]

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98 For example, young defendants charged with homicide or certain firearms offences must be sent to the Crown Court for trial. In cases involving an adult co-defendant who is being sent to the Crown Court, or cases involving a serious offence for which the youth court's sentencing powers may not be sufficient, the court will need to consider whether to allocate the case to the youth court or the Crown Court.

99 Ministry of Justice, Prisons and Courts Bill: Changes to Criminal Court Case Management – Allocation and Sending Procedures, February 2017

100 Magistrate: Essential Reading for Magistrates, Feb/March 2017, p18

3.9 Conduct of certain proceedings on the papers

Proceedings are conducted "on the papers" when decisions are made on the basis of documents before the court, without the need for a hearing. At present, the criminal courts have inherent jurisdiction to determine matters without a hearing, unless this would be contrary to law (for example existing legislation or the European Convention on Human Rights). Detailed procedural guidance on how this inherent jurisdiction should be exercised in certain cases is set out in the *Criminal Procedure Rules*: see for example rule 18.23 on applications for live link directions, and rule 20.3 on the introduction of hearsay evidence.

Clause 31 would create a power for the Lord Chancellor to make regulations "to enable or facilitate the making of preliminary decisions or enforcement decisions" on the papers. Preliminary decisions are defined as decisions in the course of proceedings for a criminal offence to be made before the start of the trial, excluding acceptance by the court of a guilty plea. Enforcement decisions are defined as decisions relating to the collection, discharge, satisfaction or enforcement of financial penalties to be paid on conviction.

Regulations made under clause 31 would require the consent of the Lord Chief Justice, and would not be able to remove from the court the option of holding a hearing.

Regulations made under clause 31 would be capable of amending, repealing or revoking primary legislation, and would be subject to the affirmative resolution procedure. In the Bill's Delegated Powers Memorandum, the Government acknowledges that clause 31 is a "Henry VIII" power which enables primary legislation to be amended by secondary. It argues that this approach is justified on the following grounds:

> Given the wider court reform proposed in this Bill, the Government believes that the merits of removing legislative requirements for a hearing will be best assessed once these reforms have come into force and have "bedded in". Making changes through a power will also enable, if deemed to be appropriate, a multi-phased and "future-proof" approach to be taken.[101]

The Government also draws attention to the various safeguards in clause 31 which it says "will ensure that the power is not exercised in a way which could be said to jeopardise fair trial rights". These safeguards are the restriction of the power to preliminary and enforcement proceedings; the restriction on removing from the court

[101] Ministry of Justice, Delegated Powers Memorandum: Prisons and Courts Bill, February 2017, para 75

the option to hold a hearing; and the requirement for the Lord Chancellor to agree to any regulations.

3.10Live links and virtual hearings

The current law

Primary legislation currently provides for live links to be used in various situations. The main examples are as follows:

- to allow adult defendants who are either in custody or at a police station to attend certain preliminary, sentencing and enforcement proceedings by live link.[102]
- to allow certain young or otherwise vulnerable defendants to give evidence during trial by live link.[103]
- to allow convicted individuals being held in custody to attend appeal proceedings by way of live link.[104]
- as part of "special measures" to allow intimidated or vulnerable witnesses to give evidence away from the courtroom (either from elsewhere in the courthouse or from an entirely separate location).[105] Vulnerable witnesses are defined as all child witnesses, and any witness whose quality of evidence is likely to be diminished due to mental disorder, significant impairment of intelligence and social functioning, or physical disability or disorder. Intimidated witnesses are defined as those suffering from fear or distress in relation to testifying in the case.[106]
- to allow witnesses (other than the defendant) who do not qualify for special measures to give evidence in certain criminal proceedings via live link.[107] The Crown Prosecution Service suggests that this will be "particularly helpful" for witnesses with limited availability, such as professional witnesses or police officers, or those with mobility issues who do not qualify to give live-link evidence under special measures.[108]

In each of these situations, a live link is defined as requiring the person to be able to see and hear, and to be seen and heard by, the court.

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102 Part IIIA of the Crime and Disorder Act 1998
103 s33A of the Youth Justice and Criminal Evidence Act 1999
104 ss22 and 23 of the Criminal Appeal Act 1968
105 Part II of the Youth Justice and Criminal Evidence Act 1999
106 Complainants in sexual offences cases automatically fall into this category unless they wish to opt out, as do witnesses to certain offences involving weapons.
107 s51 of the Criminal Justice Act 2003
108 CPS website, Special Measures: Annex A: Evidence by live link under s51 Criminal Justice Act 2003 [accessed 9 March 2017]

The courts may also make use of technology – including live links and telephone facilities – through exercise of their own inherent jurisdiction to regulate their proceedings.

The *Criminal Procedure Rules* set out various measures that the courts must follow when making use of technology, including under the statutory measures outlined above. All criminal courts are subject to an overriding objective to deal with cases "justly", which includes (among other things) dealing with cases "efficiently and expeditiously".[109] The courts must "actively manage the case", which includes making use of technology.[110]

In January 2017, the *Criminal Practice Directions* (which provide additional operational guidance to supplement the *Criminal Procedure Rules*) were updated to include a new section on the use of live link and telephone facilities. The new section opens with a statement that:

> Where it is lawful and in the interests of justice to do so, courts should exercise their statutory and other powers to conduct hearings by live link or telephone. This is consistent with the Criminal Procedure Rules and with the recommendations of the President of the Queen's Bench Division's Review of Efficiency in Criminal Proceedings published in January 2015.[111]

The Bill

Clause 32 and **Schedule 4** would expand section 51 of the *Criminal Justice Act 2003*, which currently provides that the court may direct for witnesses other than the defendant to give evidence by way of live link in certain types of criminal proceeding. Subsections (1) and (2) of section 51 currently state:

> (1) A witness (other than the defendant) may, if the court so directs, give evidence through a live link in the following criminal proceedings.
>
> (2) They are—
>
> (a) a summary trial,
>
> (b) an appeal to the Crown Court arising out of such a trial,
>
> (c) a trial on indictment,
>
> (d) an appeal to the criminal division of the Court of Appeal,
>
> (e) the hearing of a reference under section 9 or 11 of the Criminal Appeal Act 1995 (c. 35),

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109 Rule 1.1 of the Criminal Procedure Rules

110 Rule 3.2 of the Criminal Procedure Rules

111 Criminal Practice Directions 2015, Division I: General matters – Part 3N. See section 3.2 of this Briefing (The Leveson Report) for further details of the Review of Efficiency.

> (f) a hearing before a magistrates' court or the Crown Court which is held after the defendant has entered a plea of guilty, and
>
> (g) a hearing before the Court of Appeal under section 80 of this Act.

Schedule 4 would expand subsections (1) and (2) in the following ways:

- by extending it to any "person" (including the defendant), but with a specific exception for juries (who would therefore still have to attend court hearings in person);
- by enabling the use of live audio links as well as live video links; and
- by extending the list of eligible criminal proceedings in respect of which the courts could make a live link direction.[112]

Section 51 currently prevents the court from making a live link direction unless it "is satisfied that it is in the interests of the efficient or effective administration of justice for the person concerned to give evidence in the proceedings through a live link". Schedule 4 would replace this with a new test, which would prevent the courts from making a direction unless:

- the court is satisfied that it is in the interests of justice for the person concerned to take part via live link;
- the parties to the proceedings have been given the opportunities to make representations; and
- for young defendants, the relevant youth offending team has been given the opportunity to make representations.

Schedule 4 would also add a new Schedule 3A to the 2003 Act, which would place specific prohibitions and limitations on the use of live audio and video links.[113] Proceedings conducted wholly via audio or video link would be limited to certain types of hearing (e.g. certain post-conviction bail hearings, and certain appeal hearings). There would also be limitations on defendants and other witnesses giving evidence via audio link.

Clause 33 and **Schedule 5** would expand Part IIIA of the *Crime and Disorder Act 1998*, which currently provides for adult defendants who are either in custody or at a police station to attend preliminary and sentencing proceedings by live link.

Schedule 5 would expand Part IIIA in the following ways:

- by extending it to any person taking part in certain preliminary, sentencing and enforcement proceedings, not just to defendants in custody or at a police station; and

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112 See paragraph 398 of the Explanatory Notes for a full list of the additional proceedings that would be covered

113 See paragraphs 412-416 of the Explanatory Notes for full details

- by enabling the use of live audio links as well as live video links.

Schedule 5 would introduce the same test as that introduced by Schedule 4, requiring the live link to be in the interests of justice and for the parties (and the relevant youth offending team if appropriate) to have been given the opportunity to make representations.

Schedule 5, again in the same way as Schedule 4, would also introduce specific prohibitions and limitations on the use of live audio and video links (e.g. live audio links would not be available for contested bail hearings, or for accepting a guilty plea by a defendant, or for imposing imprisonment or detention in default of payment of a sum at an enforcement hearing).

Commentary

The Bill's proposals on live links are the latest in a series of moves towards greater use of technology in the criminal courts. The use of live links for defendants in custody to attend straightforward hearings has long been praised for their efficiency benefits.

For example, in 2012, the Coalition Government made the following comments in a white paper:

> Video technology has an important role to play in improving the productivity and accessibility of the criminal justice system. When this technology is used properly it can bring significant benefits:
>
> - enabling proceedings, particularly preliminary hearings, to take place more quickly;
> - avoiding the need for certain of the parties to travel to court, saving time and in the case of police witnesses it means that they can return quickly to duty;
> - reducing the cost of transporting prisoners, and the risk of escapes;
> - helping to avoid some of the practical difficulties that can interfere with the smooth running of business, for example, if one of the parties is delayed; and
> - providing convenience and security for victims and witnesses, particularly if they live some distance from the court in which proceedings are taking place, and helping to achieve better evidence for vulnerable victims and witnesses.[114]

The Law Society's response to the white paper was favourable regarding live links for simple hearings:

> We support the use of video technology in the criminal justice system, where appropriate, and can see the clear benefits from more widespread use of court-to prison video links, not only for

[114] Ministry of Justice, *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System*, July 2012, para 142

> the conduct of simple court hearings, but also for allowing solicitors to communicate with their clients in custody.[115]

In 2015, the then Justice Secretary Michael Gove argued that online solutions, as well as telephone and video hearings, could make access to justice easier, and could reduce the need for journeys to court. He also noted that "dependence on an ageing and ailing court estate which costs around one third of the entire courts and tribunals budget" could be reduced.[116]

However, concerns have been raised that the efficiency savings of live link technology might come at the expense of justice for defendants. The Law Society's response to the 2012 white paper commented:

> …we do not believe that defendants should give their evidence in a trial by video-link, because they have a right to be present in the courtroom and need to provide instructions to their solicitor during the course of a trial. The defendant's physical presence during their trial is essential. Indeed, the defendant should always be physically present at their first appearance in the Magistrates' court, as well as in the Crown Court at the Plea and Case Management Hearing, as they need to be present to provide instructions, or to reconsider their plea if discussions with the CPS have resolved a dispute.[117]

The Law Society was also critical of the use of so-called "virtual courts", which involve the first magistrates' court hearing taking place with the defendant appearing via video link from the police station:

> This concern is based on considerations relating to the quality of justice that is possible where the defendant is physically away from the court and, usually, from their solicitor, at the first hearing. It is invariably an extremely important point in the proceedings when the decisions made, particularly in relation to bail, will significantly affect the defendant, and how the case subsequently proceeds. The use of the video-link inhibits communication, either between the defendant and their solicitor, or between the defence solicitor and the prosecutor and court.[118]

Richard Atkinson, the then chair of the Law Society's Criminal Law Committee, raised similar concerns about virtual courts:

> Here, defendants do not attend court in person but appear via a video link to the court where the magistrates are sitting. Also present in the court room are usually the prosecution and the defendant's lawyer. Though the latter have the option to attend the police station where their client is being detained, they

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115 Law Society, *Response of the Law Society of England and Wales to 'Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System'*, October 2012, p12

116 Ministry of Justice, Speech: What Does a One Nation Justice Policy Look Like?, 23 June 2015

117 Ibid

118 Ibid, p13

> generally find that they can best communicate with the prosecution, defence witnesses and potential sureties in the courtroom. This frequently means that defendants don't meet their lawyer before the court decides upon their case. Some defendants are sent to prison without ever having seen their lawyer in person.[119]

He highlighted the need for face-to-face contact:

> Video conferencing may be commonplace in business and politics these days, but you'll rarely find businessmen or politicians prepared to undertake vital discussions with someone they have never met before over a video link. Face-to-face contact is essential to build trust and develop relationships. Guilt or innocence is not, as many would have it, simply a case of knowing whether you did the act alleged. There are also mental elements to consider, such as the perpetrator's intention. Defences such as duress or reasonable excuse may require the defendant to reveal delicate or personal information – they may not feel comfortable doing so to a stranger over a video link, while sitting in a cramped room in a police station.[120]

Other commentators have drawn attention to the need for the available technology to be fit for purpose. In his 2015 Review of Efficiency in Criminal Proceedings Sir Brian Leveson set out eight "essential prerequisites for remote hearings". These included reliable high quality equipment, capacity for digital recording, and sufficient video booth facilities in prisons.[121] Sir James Munby, president of the High Court Family Division, has raised concerns about the quality of video links available in the family courts and the need for sufficient resources:

> The video links in too many family courts are a disgrace – prone to the link failing and with desperately poor sound and picture quality.
>
> On one recent occasion when (…) I used a video link, everyone and everything appeared on screen in such a bright blue shade as to remind me of *Avatar*. On another recent occasion everything on screen appeared bathed in that green translucent glow one associates with underwater photography.
>
> This might be amusing if it is not so serious. These were directions hearings which could properly proceed despite the appalling quality of the link. It would have been a very different matter if we had been trying to hear evidence over the link.
>
> The problem, of course, is one of resources, and responsibility lies, as I have said, with HMCTS and, ultimately with ministers. More, much more, needs to be done to bring the family courts up

119 "Virtual courts: more speed, less justice?", Guardian, 18 July 2012
120 Ibid
121 See Box 3 above for full details

> to an acceptable standard, indeed to match the facilities and "kit" available in the Crown Court.[122]

Although his comments were made in the context of the family courts, similar concerns could equally apply to the criminal courts. Penelope Gibbs, of the charity Transform Justice, wrote of her experience in a magistrates' court:

> I visited a magistrates' court the other day and was dismayed by the inferior quality of virtual hearings, particularly the barriers it set up between the lawyer (who may never have met the client) and the defendant. But all psychological learning would also indicate a bigger problem – that if you place someone in a custodial or prison setting, all those involved are going to be influenced by that setting. Judges will dispute that this would affect their decision, but unconscious bias and environmental cues are strong.[123]

[122] Sir James Munby, View from the President's Chambers: Children and vulnerable witnesses – where are we?, 19 January 2017

[123] Transform Justice blog, Unintended but costly consequences, 17 February 2017

3.11 Public participation in court and tribunal proceedings

Clause 34 and Schedule 6 of the Bill would amend the *Courts Act 2003* to make provision for public participation in court proceedings to be conducted wholly by video or audio. There would be no physical court room in such "fully virtual" cases, so the public would not be able to attend proceedings in person as is the case at present.

Paragraph 1 of Schedule 6 would give "the court" power to direct that proceedings to be conducted wholly by video or audio should be:

- broadcast for the purpose of enabling the public to see and/or hear the proceedings; and
- recorded for the purpose of enabling the court to keep a record of the proceedings.

"The court" is defined as the Court of Appeal, the High Court, the Crown Court, the county court, the family court and a magistrates' court. The provisions therefore cover criminal, civil and family proceedings.

Paragraph 1 of Schedule 6 would also introduce two offences relating to public participation in virtual proceedings. It would be an offence for a person to make, or attempt to make, an unauthorised recording or transmission of:

- an image or sound broadcast in accordance with a court direction on public participation, or a person observing such a broadcast;
- an image or sound which is being transmitted through a live audio or video link, or a person's participation in court proceedings through a live link (including the person's own participation).

These offences are intended to replicate the existing prohibitions on photography and sound recording in physical courts.[124]

Equivalent provision on court directions and offences would also be made for the First-tier and Upper Tribunals, and for employment tribunals and the Employment Appeal Tribunal.

The Government has indicated that it is "developing solutions to enable members of the public to view virtual hearings using a screen located in a court building". It has also said that court staff will be stationed in the area of the court where viewing terminals are located, "partly to facilitate access, but also to ensure compliance with recording restrictions".[125]

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[124] s41 of the Criminal Justice Act 1925 prohibits photography in courts (other than the Supreme Court), and s9 of the Contempt of Court Act 1981 prohibits the making of unauthorised sound recordings

[125] Ministry of Justice, Prisons and Courts Bill: Open Justice, February 2017

Commentary

Legal commentator Joshua Rozenberg has raised the following questions about the proposals:

> This raises all sorts of questions. Will these viewing booths be available only in one, "local" court? Or will any number of people be able to visit any court in the country and demand to watch a particularly interesting case taking place miles away? Is the aim to protect the participants or increase transparency?[126]

3.12 Automatic online conviction and standard statutory penalty

Clauses 35 and 36 and Schedule 7 would introduce a new statutory procedure for certain criminal cases to be dealt with via an automated online process. This would build on – and provide an alternative to – the existing "single justice on the papers" process set out in s16A of the *Magistrates' Courts Act 1980*.[127] In very basic terms, this process involves a single justice disposing of uncontested low level cases in writing, without any traditional court hearings. The defendant must consent to the use of this process; he or she retains the right to opt for a hearing in a traditional court setting.

In its consultation document setting out plans for the new online process, the Government explained how the single justice process had been used to date:

> Many of the low-level cases that magistrates' courts deal with are relatively simple and straightforward, and should be dealt with in a more proportionate way. Around 890,000 cases a year are summary-only, non-imprisonable offences. Since April 2015, we have been implementing a new way of dealing with some of these cases, starting at Lavender Hill Magistrates' Court. In appropriate cases, the Single Justice Procedure allows one magistrate to consider a defendant's plea and the evidence, including any mitigating circumstances, "on the papers", alone and outside a physical courtroom. The magistrate can convict the defendant and impose a penalty without the need for a court hearing. Neither the defendant nor the prosecution are inconvenienced by having to attend court for these proceedings (for some offences the defendant can even enter their plea online) and the case is dealt with quickly and efficiently, allowing magistrates to focus their valuable time on more complex and contested cases. By the end of 2016 we will complete the roll-out of this procedure across England and Wales.
>
> We have plans to digitise this process. Prosecutors will be able to enter details of the charge via an online portal. Defendants will view the charge and evidence against them, enter a plea and any

[126] Joshua Rozenberg, *The Online Court: will IT work?*, March 2017, p31

[127] See Section

> mitigating circumstances or means information and (following consideration of the case by a magistrate) be informed of the magistrate's decisions – all online.[128]

It went on to explain how it proposed to move this process entirely online, in appropriate cases:

> We want to simplify the process even further for some of the most routine and least serious cases. In future, we propose that some defendants in appropriate cases will be able to resolve their cases entirely online. Defendants will be able to log onto an online system and view the evidence against them before entering their plea. Under this proposal, defendants who plead guilty in these cases will be offered the option to accept a pre-determined penalty (plus any appropriate compensation and costs), be convicted and pay the resulting penalty immediately, without a magistrate's involvement. This allows defendants to conclude their case faster and with greater certainty, and means magistrates can spend their time and the courts can focus their resources where they are most needed. We expect to implement this process from 2018.[129]

The consultation listed a number of safeguards that would be built into the process. In particular:

- it would only be available in respect of specified summary-only, non-imprisonable offences, where there is no identifiable victim, the matter is relatively straightforward, and a fixed penalty may be appropriate;[130]
- the defendant would have to actively opt in to the process by pleading guilty and agreeing to have his case dealt with online;
- cases would only be eligible for the process if selected by prosecutors as being suitable;
- defendants would be given all the relevant evidence against them and the potential consequences, such as the disclosure regime for the conviction and the prospective penalty;
- defendants would be able to seek help to engage with the process through "assisted digital" channels (i.e though telephone, webchat, face-to-face and paper-based support); and
- the court would have the power to reverse and retry cases dealt with online, in the event that the defendant did not understand the consequences of their decision to accept the conviction and sentence.

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128 Ministry of Justice, Transforming our justice system: summary of reforms and consultation, September 2016, paras 7.2.1 to 7.2.2

129 Ibid, para 7.2.3

130 The consultation indicated that the Government would test the proposals using the offences of railway fare evasion, tram fare evasion, and possession of an unlicensed rod and line

Clause 35 would introduce automatic online convictions as an alternative to the single justice procedure, and would give prosecutors responsibility for selecting appropriate cases.[131]

Clause 36 would add various new provisions to the *Magistrates' Courts Act 1980* setting out the procedure for automatic online convictions (to be supplemented by additional guidance set out in the *Criminal Procedure Rules*). The key points to note are as follows:

- the Bill would limit automatic online convictions to summary-only non-imprisonable offences, with the specific offences eligible for the process to be set out in secondary legislation (subject to the affirmative procedure);
- the process would be limited to defendants aged 18 or over;
- in order to accept an automatic online conviction, the defendant would need to give electronic notification that they pleaded guilty and agreed to be convicted and penalised under the new provisions;
- penalties (which would cover fines, penalty points, compensation and surcharges) will be specified in secondary legislation (subject to the negative procedure), and may reflect different offences and the different circumstances in which a particular offence is committed;
- payment of financial penalties would be due within 28 days of the day on which the conviction took effect (the procedure for determining this is to be set out in the *Criminal Procedure Rules*);
- a magistrates' court may set aside an automatic online conviction or any penalty imposed following such a conviction if it appears to the court that the conviction or penalty is "unjust", either of its own motion or on an application by the defendant or the prosecutor.

In relation to the Secretary of State's power to specify which offences should be eligible for the procedure, the Bill's Delegated Powers Memorandum states:

> 82. The intention is that the following types of offences will be appropriate for prosecution by this procedure:
>
> a) Offences where there is no identifiable individual victim
>
> b) Offences which are simple to prove
>
> c) Offences in relation to which there is a high degree of consistency in sentencing
>
> d) Offences in relation to which there is little likelihood of the court utilising a problem-solving approach and/or making complex ancillary orders

[131] The Government has published a flowchart to explain how the new procedure will fit in alongside the single justice procedure and traditional court hearings

> e) Offences in relation to which there is enough sentencing data available to enable an appropriate standard penalty to be set
>
> 83. The alternative approach would be for the Bill itself to specify the offences to which the procedure might apply. The Government has decided not to adopt this approach because at this stage it is not possible to set out all the offences to which the procedure may ultimately apply. It is intended that initially the procedure will be tested by applying it to a limited range of offences and that it will thereafter be expanded to other offences as appropriate. For example, new section 16J(2) MCA 1980 makes provision for the endorsement of the person's driving record with penalty points, but the Government does not envisage driving offences being specified initially. This approach will be made possible by way of the flexibility of a delegated power to specify applicable offences, which can then be amended as the system is tested. The offences initially intended for inclusion in the regulations are failure to produce a ticket for travel on a train; failure to produce a ticket for travel on a tram; and fishing with an unlicensed rod and line.[132]

Commentary

In its consultation on automatic online convictions, the Government asked respondents whether they agreed with the scheme in principle. It received a total of 280 responses, of which 59% agreed with the principle and 20% disagreed.[133]

Positive responses highlighted the opportunities for "increased efficiency both for HMCTS and for court users, stating that it had potential to be a sensible way of streamlining the process for certain, straightforward cases".[134]

Some of those who opposed the principle had concerns about the lack of judicial involvement in the procedure, and queried whether it might be in contravention of Article 6 of the *European Convention on Human Rights* (the right to a fair trial).[135]

A major concern expressed by some respondents was that vulnerable users, "in particular those with learning difficulties, mental health issues or poor language skills", might not understand the long term implications of accepting an automatic online conviction and the standard penalty. Others questioned whether some defendants might feel "pressured" to plead guilty and follow the process, even if they

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132 Ministry of Justice, Prisons and Courts Bill: Delegated Powers Memorandum, paras 82-83

133 Ministry of Justice, Transforming our justice system: assisted digital strategy, automatic online conviction and statutory standard penalty, and panel composition in tribunals: Government response, February 2017, para 18

134 Ibid, para 19

135 Ibid, para 21

were innocent or had mitigating circumstances, or might choose to plead guilty purely to get the matter out of the way.[136]

The Government considers that the various safeguards set out in the Bill – for example the optional nature of the process, the low level of the proposed offences to be covered, and the requirement to provide the defendant with adequate information – will mitigate against these concerns. It sought respondents' views on this as part of the consultation; 261 responses were received, of which 40% agreed that the proposed safeguards were adequate and 23% disagreed.[137]

Of those who disagreed, access to legal advice was a key concern:

> Of those who didn't agree with this question, one of the more frequently raised issues was around legal advice, and the concern that this process will remove necessary opportunities to access legal representation. A couple of respondents suggested that those who wish to opt in should be required to seek legal advice and prove they have understood the implications of pleading guilty.[138]

The Government considered that mandating the receipt of legal advice was unnecessary. Defendants would have 21 days in which to decide whether to opt in to the automatic online conviction procedure, in which they would be able to seek their own legal advice. It commented that many defendants in cases likely to be eligible for the procedure already proceed without legal representation.

Legal commentator Joshua Rozenberg has suggested that there should be a "cooling off" period for anyone who decides to accept an automatic online conviction:

> In general, I welcome this reform. I can't imagine that people volunteer as magistrates so they can sit in a room and rubber-stamp guilty pleas. But I do think the new procedure should provide a cooling-off period, short but unconditional, along the lines of consumer credit agreements. It will be all too easy for people to plead guilty when they get home in the evening, tired and perhaps even emotional, without taking in the consequences to them of a criminal conviction.
>
> True, the bill will allow magistrates to set aside online convictions – but only if these appear 'unjust'. That would apply, I suppose, in cases where the defendant had failed to mention a valid defence. But I can't see that it would apply to people who have second thoughts and prefer to take their chances on getting off.[139]

The Law Society has expressed concern that the scope of the scheme is unclear, and described the Government's position as "woolly":

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136 Ibid, paras 23 and 26
137 Ibid, para 28
138 Ibid, para 29
139 "Virtual realities", *Law Society Gazette*, 6 March 2017

> Law Society president Robert Bourns said: 'The Law Society has no objection in principle to the concept of online convictions - it is a natural extension of the current process of pleading guilty by post to certain offences.
>
> 'However, we believe that the offences recommended for an online conviction pilot programme will be few in number and not provide an adequate test for the system's robustness.
>
> 'It would be inappropriate for more serious cases to be dealt with automatically in this way - imagine pleading guilty to a motoring offence because it seems like the easy thing to do and then finding you can't get car insurance or that you face trouble getting a job.
>
> 'If you'd spoken to a solicitor you would have been made aware of the knock-on consequences of the plea and of having a record.'
>
> He added: 'While there are some positive indications in parts of the MoJ's response to the consultation there simply isn't enough information and as always, the devil is in the detail.'[140]

Concerns have also been raised about the transparency of the process, and the public's ability to access records of automatic online convictions. For example, the Magistrates Association has commented:

> The MA would welcome greater clarity on what measures are being taken to ensure the public continues to have access to court decisions. A statement that this is in hand is in principle welcome, but the MA is not aware what measures are planned. This is a continuing concern with the single justice procedure, too. A more detailed exposition of the Government's plans would be very welcome, including an appropriate balance between the need for transparency and proportionality. The MA would note that publishing outcomes online for less serious cases (but not more serious ones) would make it effectively easier for the public to access records for the less serious cases, with potentially serious and disproportionate consequences for offenders.[141]

Penelope Gibbs, of charity Transform Justice, has made similar points:

> How to translate open justice principles in the online sphere is a conundrum. So far my understanding is that the proceedings of the online traffic offence system are not open at all. But if online justice is extended what then? The government has said it will give the public access to listings and outcomes "where appropriate". So the easiest option would be to publish everything online. This would align England and Wales with USA, where information about criminal convictions (except in the case of children) is freely available, but distance it from nearly all

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140 "Online court 'entirely voluntary', government insists", *Law Society Gazette*, 9 February 2017

141 Magistrate: Essential Reading for Magistrates, Feb/March 2017, p18

> European countries which forbid publication of criminal convictions.[142]

She went on to outline five particular concerns about proposals to publish convictions online:

> 1) All research on rehabilitation says stigma and labelling are some of the biggest barriers to people moving on in their lives. And there is no evidence that the prospect of being "named and shamed" is an effective deterrent to crime. (…)
>
> 2) Safeguards on ongoing publication of information will be impossible to enforce. Under the rehabilitation of offenders act, information about any conviction that is "spent" (ie the legal rehabilitation period has expired), should not be published – unless there is a very good public interest reason. So any government published information about convictions will need to be time limited. But social media and newspapers websites are already littered with information about very old convictions. Most people with convictions probably don't even know this labelling is (in most cases) illegal, and the media are hardly ever sued for it. But if information on convictions is freely available online, people will be able to screenshot it, or simply photograph it, and keep it for ever. This is likely to lead to information about thousands more convictions being available online. Abuse of the information after the rehabilitation period is likely to be rife, and the law will be both unenforced and unenforceable.
>
> 3) If personal information including address and birth date of those with convictions is published, this could compromise the safety of individuals, particularly from fraud.
>
> 4) What about equity? If those who pleaded guilty online have all their details published online, but those who go to court and are found guilty in person do not, is that fair? This is not an argument for publishing more convictions online, but an observation that this may discriminate against those using the online system.
>
> 5) Open justice can be achieved in an online world without open online publication of convictions. I understand the argument that the public should have the opportunity to "observe" criminal cases, but this could be achieved through making listings and outcomes data available on a computer terminal in the magistrates' court on the day the guilty plea is entered and the day the case is resolved. This would enable anyone who goes to the court to get the relevant information.

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[142] Transform Justice blog, How can justice be "seen to be done" in an online system?, 10 February 2017

4. The online procedure – the civil courts, family courts and tribunals

Clauses 37-45 provide the legal foundations for some of the most innovative elements of the Government's proposals: the introduction of new online procedures and online dispute resolution (ODR) for the civil courts, family courts and tribunals. The clauses enable the creation of a new online court that could deal with low value money claims below £25,000, as was recommended by Lord Justice Briggs' Civil Courts Structure Review.[143] The clauses would allow new online procedures to apply to existing civil courts, family courts and tribunals. Some courts and tribunals may be able to conduct significant elements of their procedure online. The Government's Transforming our justice system paper indicates that the Social Security and Child Support Tribunal is going to be one of the first "to be moved entirely online, with an end-to-end digital process that will be faster and easier to use for people that use it".[144]

Clause 37 provides that there are to be online procedures rules (OPR) that can authorise and in some cases require parties to certain civil, family and tribunal proceedings to use an online procedure. The clause should be read with **Clause 38**, which provides a power to the Lord Chancellor to decide to which proceedings the online procedure will apply.

Clause 37(1)(b) enables the OPR to apply to an entire court process from beginning to end, or to just part of proceedings. **Clause 37(7)** provides that the OPR can determine when certain proceedings are not covered by the OPR, or when proceedings can exit the online process and join the relevant normal process, for example the Civil Procedure Rules. **Clause 37(9)** enables proceedings that would currently be heard in separate courts or tribunals to be taken together through online proceedings.

Clause 38(1) allows the Lord Chancellor to determine to which proceedings the OPR will apply by reference to:

- the legal or factual basis of the proceedings,
- the value of the matter in issue and, in civil and family proceedings,
- the court in which the proceedings would be brought.

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143 Lord Justice Briggs, Civil Courts Structure Review: Final Report (2016) p

144 Transforming our justice system: summary of reforms and consultation (September 2016) Cm 9321 p10

Clause 38(2) enables the Lord Chancellor to determine, by regulation, when the online procedure can be: opted into 38(2)(a); required to be used 38(2)(b); used in circumstances when it would otherwise be excluded 38(2)(c).

The Clause introduces a number of safeguards to accompany the power, including: Clause 37(5) provides that the power is to be exercised "with a view to" certain norms, including that rules and procedures are " accessible", "simple" and enable "innovative methods of resolving disputes". Clause 38 provides that the Lord Chancellor must consult the Lord Chief Justice for civil and family proceedings Clause 38(4), and the Senior President of the Tribunals in relation to tribunals Clause 38(5).

The Government has indicated, in the Delegated Powers Memorandum accompanying the Bill, that in line with the Briggs Review and the Civil Justice Council's Online Dispute Resolution report, the initial intention is for the online procedure to apply to money claims up to the value of £25,000.[145] The memorandum adds that the ambition is for the online procedure to extend much further:

> However, over time the Government wishes to be able to widen its scope, not least in respect of family and tribunal proceedings, and may also wish to stagger implementation to cover different stages of specified proceedings.[146]

Clause 39 provides for the membership of the Online Procedure Rule Committee and its powers. A notable feature is that the Committee is required to include a member with experience of the lay advice sector 39(2)(d)(i), and another with expertise in IT and understanding of how users interact with internet portals 39(2)(d)(ii).[147] The Online Procedure Rule Committee will have the same powers as the equivalent rules committee for the relevant procedure; for example, in relation to civil proceedings, the Committee will have the powers of the Civil Procedure Rule Committee 39(9).

Clause 41 sets out the process for making online procedure rules. Rules drafted by the Committee must be signed by at least three members before being submitted to the Lord Chancellor, who may allow or disallow rules made by the Committee. Where a rule is disallowed the Lord Chancellor must give the Committee written reasons. Rules come into force on such a date as the Lord Chancellor decides and are set out in a statutory instrument subject to the negative resolution procedure.

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145 Ministry of Justice, Delegated Powers Memorandum: Prisons and Courts Bill, February 2017, para 104

146 Ibid

147 Clause 40 enables the Lord Chancellor to change by order the membership of the Committee so it can widen the expertise of its membership as the reach of the online procedure extends.

Clause 42 provides the Lord Chancellor with a power to require the Committee to make a rule for a particular purpose.

Clause 43 enables the Lord Chancellor to change any provision of primary legislation for the purpose of making online procedure rules in accordance with the provisions in this Bill. This power is, as the Delegated Powers Memorandum points out, a Henry VIII power and as such is subject to the affirmative procedure.[148] The Memorandum justifies the breadth of the power on the basis of the "anticipated development, over time, of the online procedure and the widening of its scope".[149] **Clause 44** gives effect to **Schedule 9**, which changes a number of Acts so that the normal procedural rules do not apply to those proceedings where the OPR apply.

4.1 Commentary

Taken together **Clauses 37-45** provide the legal foundations for what will eventually amount to radical changes to the way that the civil courts, family courts and tribunals operate. Arguably the most important of these is the creation of the Online Solutions Court, as outlined in the Briggs' Review of Civil Court Structures.[150] It is anticipated that the Online Solutions Court, whatever shape it takes, will involve a mix of technology, conciliation and judicial resolution. As Susan Ackland-Hood has noted, the creation of the Online Court is more than just streamlining administration, and involves "thinking differently about the delivery of justice itself".[151]

The words of the clauses do not provide an indication of the form that any online court or any other new online procedures will take. As the Government indicate, this is not unusual for the development of court procedures, which need to be delegated to independent bodies with judicial expertise.[152] To understand the more dramatic changes that are planned, the clauses need to be read in the context of the recommendations of the Briggs' Review of Civil Court Structures and the Government's Transforming our justice system, which sets out a number of planned reforms.

The ambitious nature of the proposals is reflected in the potential expansion of online procedure enabled by the powers granted to the Lord Chancellor. Viewed in this context, these provisions represent an opportunity for Parliament to consider the future trajectory as outlined by the Government for the use of online procedure in the justice

148 Ministry of Justice, Delegated Powers Memorandum: Prisons and Courts Bill, February 2017, para 116-117;
149 Ibid para 116
150 Lord Justice Briggs, Civil Courts Structure Review: Final Report (2016) p120
151 Susan Ackland-Hood (Chief Executive of HMCTS), The Case for Online Courts, UCL February 2016
152 Ministry of Justice, Delegated Powers Memorandum: Prisons and Courts Bill, February 2017

system. For some, such the former Chief Executive of the Law Society, Catherine Dixon, the uncertainty over how the online court might develop is problematic.[153]

To implement the Briggs proposals, Rozenberg suggests, will be "a huge undertaking" that will take a number of years to develop.[154] He cites money claims online as an example which may "involve 11 stages of development", each of which will be need to be tested in turn. Rozenberg also indicates that full implementation of the Briggs proposals may require further primary legislation.[155]

Even if the most ambitious proposals for an online court are not taken forward, these provisions and in particular the creation the Online Procedure Rule Committee, as Rozenberg notes, provide the basis for "rationalising unnecessary divisions in the current structures", and for integrating technology at different stages of court proceedings.[156] As the Lord Chief Justice indicated in evidence to the Justice Committee, a single set of online procedures would enable a radical simplification of the justice system.[157] Such a system requires a single IT system that matches up with "a single set of basic procedural rules that are common across the system".[158] Sir Ernest Ryder, the senior tribunals judge, outlined that such a simplification might enable the creation of "a single point of entry to the justice system".[159]

Rozenberg notes that this presents a huge challenge for the Online Procedure Rules Committee:

> Combining three rule books and rewriting them in plain English is a huge job for the Online Procedure Rules Committee. But what it could lead to is an entirely new jurisdiction — in effect, a new court, bringing together parts of the existing courts and tribunals.[160]

153 Law Society Press Release, Comprehensive review of civil courts structure acknowledges vital role solicitors have to play in IT integration (28 July 2016)
154 Joshua Rozenberg, *The Online Court: Will IT work?* (2017) p19
155 Ibid
156 Ibid p26
157 Justice Committee Oral evidence: The Lord Chief Justice's Annual Report 2016, HC 801 Tuesday 22 November 2016
158 Ibid
159 The Rt. Hon. Sir Ernest Ryder, Senior President of Tribunals, 'The Modernisation of Access to Justice in Times of Austerity' 3 March 2016 paragraphs 34, 53.
160 Joshua Rozenberg, *The Online Court: Will IT work?* (2017) p33

5. Vulnerable witnesses in family cases

The *Youth Justice and Criminal Evidence Act 1999* provides some protection for vulnerable witnesses in criminal cases:

- section 34 prohibits an alleged perpetrator charged with a sexual offence from examining the alleged victim in person;
- section 35 extends this to prevent the cross examination of child witnesses;
- section 36 gives the courts discretion under section 36 to prevent cross-examination by litigants in person in other cases.

However, there is no equivalent provision in primary legislation to prevent such cross examination by alleged perpetrators in family proceedings.

Clause 47 is intended to deal with the problem of abusers being able to cross examine their victims in the family courts.

There have been concerns about this for some time. Currently, family courts have a general power to control evidence by giving directions about the issues on which they require evidence and the way in which that evidence is to be placed before the court. The court can also limit cross-examination.[161] Following a campaign[162] and a review[163] there have been some recent changes to one specific Practice Direction which concerns child contact orders in cases involving domestic violence. The revised Practice Direction notes that judges can conduct questioning on behalf of the other party:

> Victims of violence are likely to find direct cross-examination by their alleged abuser frightening and intimidating, and thus it may be particularly appropriate for the judge or lay justices to conduct the questioning on behalf of the other party in these circumstances, in order to ensure both parties are able to give their best evidence. [164]

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161 Rule 22.1, Family Procedure Rules 2010

162 See Library Debate Pack 2016-168, Domestic abuse victims in family law courts, 14 September 2016

163 Mr Justice Cobb, Review of Practice Direction 12J FPR 2010: Child Arrangement and Contact Orders: Domestic Violence and Harm: Report to the President of the Family Division, January 2017

164 Practice Direction 12J FPR 2010 Child Arrangement and Contact Orders: Domestic Violence and Harm, 30 January 2017

5.1 Pressure for change

There have been press reports of cases where abusers have cross examined their victims in the family courts.[165] In 2014, the President of the Family Division set up a working group, one of the aims of which was to address the "issue of vulnerable people giving evidence in family proceedings, something in which the family justice system lags woefully behind the criminal justice system".[166]

Women's Aid has been campaigning on this issue, and in April 2016, the All Party Parliamentary Group on Domestic Violence (for which Women's Aid is the secretariat) published a report which called for "an immediate end to survivors of domestic abuse being cross-examined by, or having to cross-examine, their abusers in the family court."[167]

5.2 Legal aid cuts

One reason why this issue has been growing in importance is the increase in litigants in person following cuts to legal aid.[168] Part 1 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO) was intended substantially to reduce the civil legal aid budget by removing whole areas of law from scope and changing the financial eligibility criteria. The Act took most private law, children and family proceedings out of scope for legal aid, but made provision for legal aid to continue to be available for victims of domestic abuse.[169] These special provisions did not extend availability of legal aid to alleged perpetrators.

The Ministry of Justice published research in January 2017 which acknowledged the role these cuts have played:

> The family judiciary has an existing range of case management practices to deal with these cases, such as relaying the questions to the vulnerable witness on behalf of the litigant in person so that direct cross-examination is not necessary, as well as using screens or video links. The President of the Family Division and others have, however, raised concerns about the current protections available for vulnerable witnesses in the family court. This issue has been further highlighted since legal aid reforms introduced in April 2013 removed most private law cases from the

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165 See for example, "Revealed: how family courts allow abusers to torment their victims", Guardian, 22 December 2016

166 Interim Report of the Children and Vulnerable Witnesses Working Group, July 2014, p1

167 All Party Parliamentary Group on Domestic Violence/ Women's Aid, Domestic Abuse, Child Contact and the Family Courts, Parliamentary Briefing, April 2016

168 See Library Briefing Paper 7113, Litigants in person: the rise of the self-represented litigant in civil and family cases in England and Wales

169 Schedule 1, paragraph 12

> scope of legal aid and increased the proportion of litigants in person in the family court. [170]

The research explored how judges managed these issues in practice. A variety of approaches were taken, from facilitating direct cross-examination by the litigant in person, to judges putting questions themselves, although judges reported "some concerns" about judicial impartiality in these cases. Other third parties, such as McKenzie friends, could be used as an alternative.[171] Judges expressed a need for training and clear guidance on the subject.[172]

5.3 The provisions in detail

Clause 47 would amend the *Matrimonial and Family Proceedings Act 1984* to prohibit any person with an unspent conviction for, or who is charged with, a "specified offence" from cross examining the victim of that offence during the course of family proceedings. "Specified offences" will be set out in regulations.

The provisions are structured in a very similar way to the protective provisions in the *Youth Justice and Criminal Evidence Act 1999* outlined above. New section 31R covers cross examination of the victim. New section 31S would prevent parties who have had an "on-notice protective injunction" taken out against them from cross examining a witness in person. It would also prevent the party protected by the injunction from doing this. "On-notice" means that there has been a hearing at which the subject of the injunction either had notice of it, or had the opportunity to ask for it to be set aside or varied. The relevant injunctions will be set out in regulations.

New section 31T would go wider, and allow the court to give a direction prohibiting a party to the proceedings from cross examining a witness in person in certain circumstances. The court could do this if it was satisfied either that the quality of the witness's evidence would be diminished, or that the cross examination would be likely to cause significant distress. This distress would have to be greater than it would be if they had been cross examined by someone else. A party could apply for such a direction, or the court could raise the issue itself.

New sections 331V would allow the court to invite the party to the proceedings to invite a qualified legal representative (with rights of audience in family proceedings) to act for them for the purposes of cross-examining the witness. If no such representative seemed to have been appointed, the court could appoint one itself if necessary in the interests of justice. If the court appointed the representative, then that

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170 MoJ, Alleged perpetrators of abuse as litigants in person in private family law The cross-examination of vulnerable and intimidated witnesses, January 2017

171 Someone who assists a litigant in person; they do not have to be legally qualified

172 MoJ, Alleged perpetrators of abuse as litigants in person in private family law The cross-examination of vulnerable and intimidated witnesses, January 2017,p43

representative would not be responsible to the party. This provision seems to be modelled on section 38 of the *Youth Justice and Criminal Evidence Act 1999*.

Under section 31W, regulations could provide for the costs of the legal representative to be met by central funds.

New draft family procedure rules on children and vulnerable persons participating in proceedings and giving evidence are being prepared. The Ministry of Justice is consulting until 17 March 2017 on a new Draft Practice Direction to support these rules.[173] This would make it clear that courts should consider various types of abuse, including domestic, financial, physical and emotional abuse, when considering the vulnerability of parties or witnesses.

5.4 Reactions

Women's Aid has welcomed the provisions in the Bill as a "breakthrough", saying the organisation is "incredibly grateful for the speed at which Liz Truss has acted":[174]

> The courageous survivors who have spoken out for the campaign put this at the top of their list of demands. It will make Family Court safer as they can put the children's needs back at the centre of their decision-making.
>
> It is critical this legislation is followed by clear and firm guidance for judges, and we look forward to working with government and the President of the Family Division on this."

Resolution (formerly the Solicitors Family Law Association) also welcomed the provisions, calling them "long overdue", although it said there was work to be done on delivery. However, it is concerned that the provisions have been based too heavily on criminal procedures:

> The provisions contained in the Prisons and Courts Bill regarding vulnerable witness mirror criminal procedures, but Resolution is concerned that these haven't been adapted for the particular circumstances in the family court.
>
> Chair of Resolution's Domestic Abuse Committee Philip Scott, said that the proposals need to work in family case whilst ensuring a fair trial takes place:
>
> "These are sensitive and important cases, often involving children's futures. Just having a court-appointed advocate to cross-examine an abuser may be too simplistic.
>
> The impact of LASPO has led to an increase in litigants in person, meaning we've seen a rise in the number of defendants cross-

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173 MoJ, Draft VW Practice Direction Practice Direction 3A Vulnerable persons: participation in proceedings and giving evidence, February 2017

174 Polly Neate, Chief Executive of Women's Aid, Women's Aid statement on new Prison and Courts Bill to reform Family Court, 23 February 2017

> examining those they have abused. It has also led to more victims having to face court proceedings without legal support. One immediate "quick win" for the government to support victims of domestic abuse would be to widen the gateway to private family legal aid so that fewer parties are left unrepresented. [175]

An article in Public Law Week raises a question about the provisions on court appointed lawyers:

> If such a lawyer is appointed, they are chosen by the court and are not responsible to the party. This is probably intended to prevent a lawyer from being asked to act upon instructions to put certain questions to a witness which are in truth intended merely to cause upset rather than elicit genuinely relevant evidence. However, it also appears to provide a statutory exception to the common-law duty of care to the party which would otherwise exist.
>
> In summary, it appears that significant steps are now being taken to bring about reform. Special measures can of course be put in place under the present system, but even video links are inadequate to prevent the nastiest scenarios where ongoing intimidation and control is the true intent. Justice should not have to be trial by mental ordeal in such circumstances.
>
> Yet whilst there will always be extreme situations, the end of legal aid in private law cases for all but the victim has brought about a situation where the perpetrator must either pay privately or represent themselves. Frustration with their situation no doubt adds to the tension in the courtroom. There is a danger that the very fact that a "dock brief" is appointed solely for cross-examination but not for the provision of other representation will perhaps fuel feelings of injustice. These proposals plug a gap, but they do not solve the underlying problem. [176]

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[175] Resolution Press Release, Resolution welcomes MoJ's proposals to improve protection of vulnerable witnesses, 23 February 2017

[176], "Reforms to cross-examination by alleged abusers in the Prisons and Courts Bill", Family Law Week, 7 March 2017

6. Employment tribunals

Employment tribunals are administered by HM Courts and Tribunals Service although they sit outside the unified tribunals structure. The employment tribunals provisions of the Bill would make a series of amendments that, while retaining the distinction between employment tribunals and the unified tribunals, are designed to bring the two systems more closely into line.

The amendments would have the same territorial extent as the legislation they would amend. As such, **clause 48** and **53** would apply to the entire UK; **clause 49, Schedule 10** and **clause 52** would apply to England and Wales, and Scotland.[177]

The proposed amendments are within the scope of the powers that may be conferred on the Scottish Parliament under section 39 of the *Scotland Act 2016*. That section would devolve to the Scottish Parliament competence for tribunal administration and procedure, including that which affects employment tribunals. To come into effect, section 39 requires an Order in Council specifying the functions that may be devolved, followed by the Scottish Parliament giving effect to the transfer. A draft Order has been consulted on but has not yet become law.[178] As such, the employment tribunals provisions of the Bill would affect Scotland, but may in future be amended by the Scottish Parliament.

6.1 Tribunal rules

At present, the employment tribunals and Employment Appeal Tribunal Rules of Procedure are made by the Secretary of State for Business, Energy and Industrial Strategy (for employment tribunals) and the Lord Chancellor (for the Employment Appeal Tribunal) under powers conferred by the Employment Tribunals Act 1996. The current Rules are set out in Schedule 1 to Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 2013/1237).

Clauses 48 and **49** and **Schedule 10** would change this such that Rules of Procedure would in future be made by the judicial-led Tribunal Procedure Committee, which is already responsible for making rules in the First-tier Tribunal and Upper Tribunal. The effect of this would be to bring the mechanism for making employment tribunal and Employment Appeal Tribunal rules more closely into line with the existing means of promulgating procedural rules in the unified tribunal system.

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177 See clause 70(3)

178 Scottish Government, *The Scotland Bill – Consultation on Draft Order in Council for The Transfer of Specified Functions of the Employment Tribunal to the First-tier Tribunal for Scotland*, January 2016

Background

The historical rationale for empowering the Secretary of State for Business to make employment tribunal Rules of Procedure is that this connects procedure to substantive employment law policy set by the business department. This connection was seen as helping maintain the employment tribunals' distinct character as an accessible system which has, since its inception in 1964,[179] been intended as a relatively informal process of dispute resolution between private parties. In that sense, employment tribunals are distinct from other tribunals in the unified tribunal system, which are in the main concerned with hearing appeals against decisions of public bodies.

Although responsibility for procedural and substantive employment law currently lies with the Department for Business, Energy and Industrial Strategy (BEIS), administrative responsibility for employment tribunals and the Employment Appeal Tribunal now lies with Her Majesty's Courts and Tribunals Service. Following a review of the whole tribunal system, including the employment tribunals, by Sir Andrew Leggatt in 2000-2001,[180] and the creation of a unified tribunal system by the Tribunals, Courts and Enforcement Act 2007, administrative responsibility for employment tribunals was passed from the business department (then the Department of Trade and Industry) to the Ministry of Justice, with the department retaining responsibility for making procedural rules.

The Government argues that, while the employment tribunals have a unique party-to-party role within the wider tribunal system and thus will continue to exist outside the unified tribunal system, the difference in the mechanism for setting and revising procedural rules has led to a divergence between the employment tribunals and the unified tribunals. In addition, the Government contends that the means of revising employment tribunal Rules of Procedure – ad hoc judge-led reviews of the rules factoring in the views of stakeholders[181] – inhibits step-by-step reform. The Government set out its position in a consultation document published in December 2016:

> Uniquely amongst the tribunals managed by HM Courts and Tribunals Service, the Secretary of State for Business, Energy and Industrial Strategy has remained responsible for policy and legislation on procedural matters in Employment Tribunals. Over time, this has led to the development of differences in the way that these tribunals operate compared to other tribunals and the wider justice system.
>
> There has been change in Employment Tribunals designed to help individuals, such as the simplification of the Employment Tribunal rules in 2013. However, overall Employment Tribunals

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179 Known then as industrial tribunals, until this was changed in 1998

180 Report of the Review of Tribunals by Sir Andrew Leggatt: *Tribunals for Users - One System, One Service,* 16 August 2001

181 See, for example, Mr Justice Underhill, Fundamental review of employment tribunal rules: employment tribunal rules of procedure, 2012

> and the Employment Appeals Tribunal have not kept pace with the drive towards simpler justice seen in other tribunals. We do want to change this and it can be done in a way that recognises the differences between Employment Tribunals and the Employment Appeal Tribunal and the rest of the tribunal system.
>
> …
>
> the powers to make provisions setting out procedures and processes contained in the Employment Tribunals Act 1996 should be updated and brought into line with those applicable to the wider tribunals system. It will keep the separate nature of Employment Tribunals and the Employment Appeal Tribunal under review and consider if more substantive benefits could flow from further change.
>
> Under this approach, Employment Tribunals and the Employment Appeal Tribunal would continue to retain separate rules from the unified system but the power to make rules would be transferred to the independent Tribunal Procedure Committee (rather than a Minister in the Department for Business, Energy and Industrial Strategy or the Lord Chancellor as is currently the case). When making procedural rules, the Tribunal Procedure Committee is required to appropriately address the specific user requirements of the individual tribunal and has the power to bring in external expertise to support the development of rules where necessary. The Government proposes to revise the membership of the Tribunal Procedure Committee to reflect its wider remit. Appropriate representatives from the employment sector such as an employment judge and a suitably experienced practitioner should be appointed to the committee for this purpose. This will enable the rules to be kept under review and provide a statutory underpinning to the sector's participation in the process.[182]

The consultation document asked how best to give effect to this transfer of responsibility, rather than about the merits of the transfer itself. Nonetheless, stakeholders commented on the transfer in their responses, as recorded in the Government's consultation response document:

> Although not an area that was consulted upon, some respondents, including those from the trades union sector and the Confederation of British Industry, disagreed that the Tribunal Procedure Committee should carry out the proposed function. They wanted to maintain a close link between the Employment Tribunals system and the management of employment law policy and were concerned that the Tribunal Procedure Committee would not have the necessary expertise to perform the proposed role effectively. Instead they proposed that the Department for Business, Energy and Industrial Strategy should continue to be

[182] Department for Business, Energy and Industrial Strategy, Reforming The Employment Tribunal System - Taking forward the principles of wider court and tribunal reform in Employment Tribunals and the Employment Appeal Tribunal, December 2016, p10, 16

> responsible for procedural matters with any consideration of new rules being undertaken by a judiciary-led review involving all stakeholders, such as the one undertaken by Sir Nicholas Underhill which led to the introduction of the current Employment Tribunal rules in 2013.[183]

The Bill

Clause 48 would amend Schedule 5 to the *Tribunals, Courts and Enforcement Act 2007*. **Clause 48(3)** would provide for the Tribunal Procedure Committee to include additional members, appointed by the Lord Chancellor and the Lord Chief Justice. The Lord Chancellor's appointee must have practical or advisory experience in relation to employment tribunal and Employment Appeal Tribunal proceedings. The Lord Chief Justice's appointee must be a judge or other member the Employment Appeal Tribunal or a member of a panel of members of the employment tribunals.

Clause 49 gives effect to **Schedule 10** to the Bill, which would make the detailed changes to the mechanism for setting procedural rules, conferring powers on the Tribunal Procedure Committee. Schedule 10 would make a series of amendments to the *Employment Tribunals Act 1996*, most of which are explained on pages 71-73 of the Explanatory Notes to the Bill.

The amendments contain a number of Henry VIII powers to amend primary legislation by way of regulations subject to affirmative resolution.[184] The Henry VIII powers reflect existing similar powers under the *Tribunals, Courts and Enforcement Act 2007* and the *Civil Procedure Act 1997* and are intended to ensure that changes to tribunal system can be implemented without conflicting with other legislation.

Schedule 10, paragraph 5 would insert a new Schedule A1 into the Employment Tribunals Act 1996 which would, among other things, contain the overriding objectives of the power to make Procedure Rules:

> Power to make Procedure Rules is to be exercised with a view to securing—
>
> (a) that, in proceedings before the relevant tribunal, justice is done,
>
> (b) that the tribunal system is accessible and fair,
>
> (c) that proceedings before the relevant tribunal are handled quickly and efficiently,
>
> (d) that Procedure Rules are both simple and simply expressed, and

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183 Department for Business, Energy and Industrial Strategy, Reforming the Employment Tribunal System – Government response, February 2017, p20

184 See, for example, new section 7AZA which would be inserted by Schedule 10, Part 1, paragraph 2

> (e) that Procedure Rules, where appropriate, confer responsibility on members of the relevant tribunal for ensuring that proceedings are handled quickly and efficiently.

Comment

The proposals have attracted a mixed response. The Equality and Diversity Forum welcomed the proposed transfer of responsibility to the Tribunal Procedure Committee, stating that the new employment members of the Committee should have at least 10 years' practice experience across most major types of claim.[185]

The Employment Lawyers Association said of the proposals:

> this does seem to us, to mark a significant shift in terms of responsibility, away from BEIS. If that is going to take place, it is all the more important to ensure those who will be charged with exercising those powers, and exercising the relevant discretions, really do understand the unique characteristics of the Employment Tribunals. We would also point to the high regard in which the current rules are held, and request that if changes are necessary as a result of these reforms, a similar approach is taken this time to their review and drafting. The approach taken by Underhill LJ, with the involvement of the Presidents of the ET's of England, Wales and Scotland along with a wider group (including ELA) worked extremely well in our view, and we hope that a similar approach is taken next time the Rules fall to be reviewed.[186]

Trade unions have responded more critically. For example, Unite's response to the BEIS consultation stated:

> This is also a proposal that Unite is certain should be dropped. One employment practitioner member sitting on a Tribunal Procedure Committee (TPC) cannot work. The opinion or intervention by other members of the committee would be often pointless and sometimes damaging. Responsibility for ET rules and procedures should remain within BEIS, in consultation, including with the employment judges.
>
> …
>
> The procedure followed by the 2012 Underhill review, led by members of the senior judiciary, provided an appropriate process for review and revising ET rules and procedures. It also followed engagement with leading practitioners and key stakeholders, including the unions and employers organisations.[187]

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185 EDF response to the Department for Business, Energy and Industrial Strategy and Ministry of Justice consultation on Reforming the Employment Tribunal System, p3

186 Consultation: Reforming the Employment Tribunal System Response from the Employment Lawyers Association, 20 January 2017, pp4-5

187 Unite the Union response to consultation Reforming the Employment Tribunal System, January 2017, pp9-10

6.2 Composition of employment tribunals and the Employment Appeal Tribunal

At present employment tribunal and Employment Appeal Tribunal hearings take place before a panel comprising either a judge alone or a judge with non-legal members (often referred to as "wing members" or the "industrial jury").

Primary and secondary legislation specifies which types of claims must be heard by a panel of judicial and non-legal members, or judges sitting alone. Clauses 52 and 53 would change this, such that the Lord Chancellor would have the power to determine panel composition, which would in practice be delegated to the Senior President of Tribunals. Thus, the determination of panel composition would become a judicial, rather than a ministerial function.

Background

In the employment tribunals, proceedings are typically heard by an Employment Judge sitting with two non-legal members,[188] although a growing variety of proceedings are now heard by an Employment Judge alone, including unfair dismissal claims.[189] If the Employment Judge is accompanied by non-legal members, one will be an employee representative and one an employer representative (e.g. a trade union representative and a human resources manager).[190]

Until 2013 the Employment Appeal Tribunal operated along similar lines, with proceedings generally heard by a judicial member and two non-legal members. Since June 2013, proceedings must be heard by a judge alone, although a judge may direct that it is heard by a judge and two or four appointed members, representing a balance of employee and employer representatives (or a judge accompanied by one or three non-legal members, with consent of the parties).[191]

The arrangements for panel composition in the employment tribunals are set out in primary and secondary legislation. Section 4(4) of the *Employment Tribunals Act 1996* provides that the Secretary of State for BEIS together with the Lord Chancellor may by order amend the list of proceedings that may be heard by an Employment Judge alone, with the default position being an Employment Judge and two non-legal members. Section 28(5) of the 1996 Act provides an equivalent power for the Lord Chancellor alone in respect of the Employment Appeal Tribunal.

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188 Employment Tribunals Act 1996, section 4(1)

189 Employment Tribunals Act 1996, section 4(3); Employment Tribunals Act 1996 (Tribunal Composition) Order 2012 (SI 2012/988),

190 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 2013/1237), regulation 8

191 Employment Tribunals Act 1996, section 28, as amended by Enterprise and Regulatory Reform Act 2013, section 12

As with the proposals relating to tribunal rules, the Government believes that there is a case for changing the current arrangements to bring them more closely into line with practice in the unified tribunals. The Government's position on tribunal panel composition was set out in a December 2016 BEIS consultation on reforming the employment tribunals and Employment Appeal Tribunal:

> The Government believes that an approach where non-legal members are called upon as a matter of course without considering the needs of the case is no longer appropriate or sustainable. We believe that the right approach is one where non-legal members are deployed where circumstances require it, and their expertise is relevant to the outcome of the case and this includes through online means if that is most appropriate.
>
> …
>
> The Government proposes, therefore, to bring the practice in Employment Tribunals and the Employment Appeal Tribunal in line with the practice elsewhere in the justice system, specifically the unified tribunals system (incorporating any reforms following the Transforming our justice system consultation), and provide for decisions on panel composition to be a judicial function that can be exercised by the Senior President of Tribunals. This will make sure that these decisions are taken by those who are best placed to understand the needs of the users and the operation of the system and that the same safeguards will apply. It will allow the better and more proportionate use of the expertise of non-legal members in industry specific or discrimination issues for example.[192]

This followed the earlier Ministry of Justice consultation document, Transforming our justice system: summary of reforms and consultation, which had discussed amendments to panel composition in the unified tribunals:

> Another factor in taking a balanced, tailored approach to tribunal cases is making sure the panels that make decisions in tribunals are designed to best suit the circumstances of the case. Most tribunals currently reflect historic arrangements that may be out of date and do not tailor the expertise of the panel according to the case. We propose to revise the current arrangements for setting panel composition to make sure that that appropriate expertise is focussed on those cases that need it.[193]

The proposal to amend the law on employment tribunal and Employment Appeal Tribunal panel composition should be viewed within this context of wider reforms to panel composition in the unified

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192 Department for Business, Energy and Industrial Strategy, Reforming The Employment Tribunal System - Taking forward the principles of wider court and tribunal reform in Employment Tribunals and the Employment Appeal Tribunal, December 2016, pp14-15

193 MoJ, Transforming our justice system: summary of reforms and consultation, Cm 9321, September 2016, p10

tribunals, and the Government's desire to allow for the incorporation of those reforms in the employment context.

The BEIS consultation invited views on whether there are

> specific issues relating to Employment Tribunals and the Employment Appeal Tribunal that need to be taken into consideration in relation to making changes to the law regarding panel composition[194]

The BEIS response document noted that, although a number of respondents had expressed support for the increased flexibility that could be afforded by judicial determination of panel composition, there was some concern that this would lead to a reduction in the use of non-legal members:

> Overall, many respondents described the important function and added value of non-legal members, and in particular the benefit to the Employment Tribunals system. It was generally felt that non-legal members are able to provide knowledge and experience of the workplace that is not necessarily available to the judge and that, as a result, users may consider the decisions reached more credible. Some also considered there to be a need for a balanced panel, with one employer and one employee panel member.
>
> Some respondents expressed concern that there would be a reduction in the use of non-legal members and that this would result in specific expertise not being sought in cases where it is needed. Others were of the view that all determinative hearings in employment tribunals should require a three member panel. Conversely, the majority of respondents thought that it was appropriate for panel composition to be determined either on a case-by-case basis or according to case type, as it is currently. Many respondents held the view that the current panel arrangements are already appropriate, with non-legal members automatically providing their expertise in cases that require it. Some respondents reported that they would like to see judges using their discretion to involve non-legal members more frequently.
>
> Respondents pointed out that the panel arrangements in the Employment Appeal Tribunal are somewhat different from those in the Employment Tribunals, as there is a default position of a single judge with judicial discretion to ensure that additional expertise, where it is needed, can be included on the panel. These respondents felt that these arrangements are already proportionate and flexible and that they would like to see a continuation of this system in the Employment Appeal Tribunal.[195]

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194 Department for Business, Energy and Industrial Strategy, Reforming The Employment Tribunal System - Taking forward the principles of wider court and tribunal reform in Employment Tribunals and the Employment Appeal Tribunal, December 2016, p15

195 Department for Business, Energy and Industrial Strategy, Reforming the Employment Tribunal System – Government response, February 2017, p17

The Government clarified that

> It is not our intention to remove the use of non-legal members from cases where their workplace experience is needed to help determine the case. They will continue to be involved in proceedings where they are needed. However, we consider that responsibility for making sure that this is done in the most effective and proportionate way in employment tribunals and the Employment Appeal Tribunal should rest with the senior judiciary, not Ministers.
>
> The Senior President of Tribunals determines the composition arrangements for tribunals in the unified system on the basis of discussions with the senior tribunal judiciary and consultation with stakeholders. We consider that this, in conjunction with the Senior President of Tribunal's existing statutory obligations when exercising his functions, are an effective safeguard to ensure that non-legal members will continue to be provided in employment tribunals and the Employment Appeal Tribunal where they are needed. We therefore intend to proceed with providing for the Senior President of Tribunals to be able to have responsibility for determining panel composition in Employment Tribunals and the Employment Appeal Tribunal in the same way as he does for the unified system.[196]

The Bill

Clause 52 would amend the Employment Tribunals Act 1996. Clause 52(2) would replace section 4 of the Act with a new section 4. The new section would make changes in respect of panel composition decisions in the employment tribunals.

New section 4(1) would provide that where a matter is to be decided by an employment tribunal, the member or members are to be chosen by the Senior President of Tribunals in accordance with provisions made under the section. New section 4(2) would provide:

> The Lord Chancellor must by regulations make provision, in relation to every matter that may fall to be decided by an employment tribunal, for determining the number of members who are to decide the matter.

Before making such regulations, the Lord Chancellor must consult the Senior President of Tribunals (new section 4(9)). Under new section 4(5), the Lord Chancellor may discharge this duty by delegating decision-making to the Senior President of Tribunals or the President of Employment Tribunals.

New section 4(7) would provide that where a tribunal matter is to be decided by more than one member, the matter may nonetheless be decided by one member, provided the parties to the case agree and that member is an Employment Judge.

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196 Ibid., p18

Clause 52(3) would replace section 28 of the 1996 Act with a new section 28, providing for changes in respect of panel composition in the Employment Appeal Tribunal. The new section 28 would be broadly the same as the new section 4. The Lord Chancellor would be required to determine the composition of panels in the Employment Appeal Tribunal in respect of every matter that may fall to be decided by the Tribunal. As with the power accorded by new section 4, the duty may be discharged by delegating decision-making to the Senior President of Tribunals or the President of the Appeal Tribunal. The Senior President of Tribunals would, under **clause 53**, be able to delegate any of his judicial functions in relation to the employment tribunals or Employment Appeal Tribunal.

Comment

As noted in the above discussion of responses to the BEIS consultation on tribunal reform, there has been some concern about changes to the determination of panel composition. The concern is less about the changes *per se* – the change of practical responsibility for determining panel composition from ministers to the judiciary – but rather, that the proposals might herald reduced use of non-legal members in the employment tribunals and Employment Appeal Tribunal. For example, the Employment Lawyers Association's response to the consultation noted:

> As to who should decide the composition of a tribunal, our preference would be to keep this in the hands of experienced tribunal judges, irrespective of whether the rules are set by the Senior President of Tribunals or Ministers. What matters more than this, is that the rules themselves favour a full panel. We do not know whether the Senior President will have different access to advice than a government minister.
>
> We are not convinced by the proposition (made in the Paper) that the proposed change 'will allow the better and more proportionate use of the expertise of non-legal members in industry specific or discrimination issues'. This assertion is not supported by evidence. In addition there should also be provision to ensure the Senior President takes into account the primary need of the parties to have confidence in the tribunal, and to have familiarity with general workplace practices.[197]

Trade unions have made similar points. For example, Unite stated that it was opposed to reducing the use of non-legal members, and that:

> Drawing on their knowledge of workplace issues, lay members help to ensure that decisions reflect more the world of work and employment relations practice.[198]

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197 Consultation: Reforming the Employment Tribunal System Response from the Employment Lawyers Association, 20 January 2017, p37

198 Unite the Union response to consultation Reforming the Employment Tribunal System, January 2017, p9

7. The functions of court and tribunal staff

Clause 50 and **Schedule 11** enable court and tribunal staff to be authorised to exercise the functions of a court or a judge of a court. One of the themes of this Bill is to improve the efficiency of the court system. The Transforming our Justice System paper, published in September 2016, outlined that court staff should take on more responsibility, and thus enable judicial time to be better deployed.[199]

The provisions should be read with **Part 4** of the Bill which seeks to expand the leadership opportunities in the judiciary. These provisions might, by divesting judges of some routine tasks, free up more time for judges to take up leadership opportunities. Further, empowering more staff with responsibilities will, as Briggs notes,[200] requires judges to supervise more staff, enabling judges to build up experience relevant to leadership positions.

At present, a range of legislation permits staff working in courts and tribunals to carry out certain functions of a court or tribunal. For example, at present the *Civil Procedure Act 1997* enables the Civil Procedures Rules to provide for staff to exercise certain functions of the civil courts, and the *Courts Act 2003* sets the functions of justices' clerks in the magistrates' court. Justices' clerks are the most senior lawyers currently employed by HMCTS. The existing framework, the Government explains, is inconsistent, and there are gaps in the way which staff are authorised and supervised.[201]

Clause 50 and Schedule 11 amend these statutory provisions, including the *Courts Act 2003*, so as to create a new framework that both standardises and extends the ability of court and tribunal staff to be allocated functions of a court or tribunal. These provisions will enable court and tribunal staff to be authorised to exercise jurisdiction in **all** courts and tribunals administered by HMCTS.[202] This means for the first time, staff of the Crown Court will be able to exercise the functions of that Court.

The provisions enable the Lord Chief Justice, or someone nominated by the Lord Chief Justice, to nominate persons to provide legal advice to magistrates (**paragraph 22 of Schedule 11**) and exercise judicial functions of any court (**paragraph 28 of Schedule 11**) or tribunal (**paragraph 35 of Schedule 11**). The Government has indicated that the

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199 Transforming our justice system: summary of reforms and consultation (September 2016) Cm 9321 p4

200 Lord Justice Briggs, Civil Courts Structure Review: Final Report (2016) p65-66

201 Prisons and Courts Bill, Fact sheet: Court and Tribunal Staff: legal advice and judicial functions (2017)

202 Ibid

relevant Jurisdictional Rule Committee, for example the Civil Procedure Rule Committee, will be responsible for deciding which particular powers court and tribunal staff can be authorised to exercise.[203]

The new statutory framework introduces a range of safeguards designed to guarantee the independence of those staff allocated functions. For example, by providing that only the Lord Chief Justice or his nominee can instruct them in how to exercise their functions (**paragraph 28 of Schedule 11**). The new provisions introduced in **Schedule 11** also require that certain staff that provide legal advice must have the qualifications prescribed in regulations by the Lord Chancellor.[204] **Schedule 11** removes the role, but not the function, of Justices' Clerk from the *Courts Act 2003*, so that it fits within the new statutory framework for court staff.

7.1 Comment

Expanding the role of court staff is one of the aims of the HMCTS reform programme.[205] The aim is to release judges with large workloads, particularly District Judges, from routine processes that could be done more economically.

The Civil Courts Structure Review explored how granting more functions to court staff could fit within the programme of reforming the civil courts, and particularly the creation of the Online Solutions Court. The Briggs' Interim report made the case for an increased role for HMCTS staff, who would be called Case Officers, who could perform a number of functions currently performed by judges that are not inherently "judicial functions".[206] Briggs' report emphasised that Case Officers would not be judges, but rather civil servants.[207] As such they would not be determining disputes about substantive rights and duties.[208] The interim report put forward a number of points about the role of Case Officers, in particular: whether they should be involved in stage 2 of the Online Court, whether they should be involved in case management; and what qualifications Case Officers should hold. [209] The Government has indicated that staff will be allocated a range of functions, including "case management and some mediation roles".[210]

The Bar Council was critical of some of the proposed functions for Case Officers. Their response to the Briggs interim report argued that Case Officers should not be involved in stage 2 of the online court, as it

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203 Ibid

204 The Lord Chancellor must secure the agreement of the Lord Chief Justice in setting the requisite qualifications

205 Lord Justice Briggs, Civil Courts Structure Review: Final Report (2016) p65-72

206 Lord Justice Briggs, Civil Courts Structure Review: Interim Report (2015) p88-89

207 Ibid

208 Ibid

209 Ibid

210 Prison and Courts Bill, Fact sheet: legal advice and judicial functions (2017)

would involve "a review of the merits of a case".[211] The response noted that it would be difficult to isolate functions that were "non-judicial"; and that as a result Case Officers would likely be granted some judicial function, which in turn could lead to the role representing an entry point to a judicial career.[212] This they said could lead to a "very different model of judiciary in the future". They also noted that if Case Officers need to be legally trained, whether this would actually result in the promised efficiencies; as such HMCTS would effectively be employing lawyers to run "lawyerless" courts. [213]

Briggs recommended in his final report that all Case Officers should "be actively supervised by judges in the performance of their duties".[214] In relation to the boundary of case management decisions that should or should not be taken by Case Officers, Briggs concluded that there needed to be "a working relationship under which Case Officers could, on a case by case basis, seek the guidance of their supervising judge where less than straightforward decisions, or decisions outside that Case Officer's experience, had to be made".[215] Briggs also put forward that there should be a senior body of Case Officers called Case Lawyers that undertake the conciliation stage (stage 2) of the proposed online court process.[216]

211 Bar Council response Civil Courts Structure Review: Interim Report (2016) p11
212 Ibid p4
213 Ibid p11-12
214 Lord Justice Briggs, Civil Courts Structure Review: Final Report (2016) p65
215 Ibid p66
216 Lord Justice Briggs, Civil Courts Structure Review: Final Report (2016) p120

8. Abolition of local justice areas

Clause 51 abolishes local justice areas, and **Schedule 12** makes the necessary adjustments to the statute book.

Local justice areas are geographical boundaries, required by section 8 of the *Courts Act 2003* that serve to organise magistrates' court business. They do so in three main ways:

- Initiating and listing cases
- Payment and enforcement of fines
- Leadership and management of the magistracy

Clause 51 and Schedule 12 will remove the requirement for the Lord Chancellor to create local justice areas and any restrictions on where magistrates can be assigned, and this will mean that magistrates will be appointed "on a national basis across England and Wales".[217]

The changes in **Schedule 12** also enable magistrates' courts to work more flexibly and make greater use of technology, in particular through the use of remote hearings for defendants. For example, the *Magistrates' Courts Act 1980* is amended to enable civil and criminal proceedings to be transferred from one magistrate court to another without requiring the defendant to physically attend the original court.[218]

Further, the *Courts Act 2003* is amended to remove the requirement for cases to be heard in particular local justice areas. The explanatory notes outline the aim:

> These amendments create more flexible arrangements which would mean that, irrespective of where a case is initiated, a case could be listed to be heard, for example, either at the court closest to where the victims and witnesses live or at a less busy neighbouring court to ensure that it is heard at the earliest opportunity.[219]

Paragraph 42 removes the Lord Chancellor's duty to have regard to the need for the accessibility of a court building to persons in a particular local justice area when exercising directions as to where magistrates' courts may sit. Instead the Lord Chancellor will need to have regard to accessibility to "the public". The Lord Chancellor will retain the duty in section 30(5) of the 2003 Act to have to regard to particular locations, when issuing directions as to where magistrates' courts will sit. The section will require directions to have regard to the following:

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217 Explanatory Notes to the Prisons and Courts Bill 145-EN 56/2 p16
218 Paragraphs 2 and 4 of Schedule 12
219 Explanatory Notes to the Prisons and Courts Bill 145-EN 56/2 p79

> (a) the places in England and Wales at which magistrates' courts may sit, having regard to the need to ensure that court-houses are accessible to the public;
>
> (b) the distribution of the general business of magistrates' courts, having regard to:
>
> - where the offence is alleged to have been committed;
> - where the person charged with the offence resides;
> - where the witnesses, or a majority of the witnesses, reside;
> - where cases raising similar issues are being dealt with; and
>
> (c) the days and times at which magistrates' court may sit.

8.1 Comment

These reflect the core aims of the HMCTS reform programme, in particular in terms of making efficient use of court time, by removing the need for some hearings, using the court estate more flexibly, and enabling greater use of technology. Using technology to reduce the burden on important public servants' time by making the courts' procedures more effective is a central element of both the Transforming our justice system joint statement, and the Leveson Report on the efficiency of criminal proceedings. The Government's fact sheet on the change provides the following example of how the efficiency of magistrates' courts might benefit from the change:

> Thames Magistrates' Court serves Stoke Newington Police Station in the East London local justice area. Highbury Corner Magistrates' Court is closer to the police station but it is located in another (the North London) local justice area. If Thames Magistrates' Court is very busy and unable to schedule a first hearing for several weeks, but there is capacity at Highbury Corner to hear cases sooner, these changes will remove the current restrictions which can prevent the Justices' Clerk from making temporary arrangements at Highbury Corner to minimise delays.[220]

The abolition of local justice areas may generate discussion on the potential impact on the role of magistrates and the principle of local justice. As magistrates will be appointed on a national basis across England and Wales, magistrates could be assigned to courts outside the areas where they live. Penelope Gibbs, director of Transform Justice, has argued that the reduction of the size of the court estate has meant that magistrates now often have to travel longer distances.[221] The abolition of local justice areas will not necessarily mean longer travel times, as the increase in flexibility could enable magistrates to be deployed to courts

[220] Prisons and Courts Bill: Fact sheet: Abolition of local justice areas (2017)
[221] Transform Justice, The role of the magistrate? (2016) p14

that are close to where they live but that presently are outside their local justice area.[222] The Government has given an example of some courts users, including magistrates, who will have shorter travel times:

> Court users in Glossop, for example, will no longer have to travel twice as far to their local justice area court in Chesterfield and can, instead, attend nearby Manchester court. Similarly, residents in the northern fringes of North Yorkshire will be able to attend Middlesbrough court which is significantly more convenient than a journey to their own local justice area courts in Northallerton or Scarborough.[223]

A connected concern identified by Gibbs would be the changes' potential weakening of the relationship between magistrates and their own community.[224] The principle of 'local justice' is central to magistrates, as the Justice Committee's report on the role of the magistracy pointed out:

> Traditionally, the linked principles of 'local justice' and 'justice by one's peers' have underpinned the role of the magistracy. For many magistrates, these principles remain crucially important today. For example, Corby Magistrates' Bench told us: "We believe in local justice, for local people, delivered in the heart of the community. Of course, it needs bringing up to date, but the principle is sound and has worked for hundreds of years. Why change it?" Susan Furnival JP commented: "Magistrates should provide the link between the community and the judiciary … maintaining the concept of judgement by our peers."[225]

Gibbs, in evidence to the Justice Committee, drew attention to the fact that court closures decreased the chance that a magistrate with local knowledge would sit on a case where that knowledge can be used.[226] The abolition of local justice areas does not necessarily make this less likely as judges may still be allocated to cases where they can use local knowledge. The Government has explained that the aim is to increase the "flexibility" of the way in which magistrates are organised so that "the size and makeup of benches can be adapted to meet local needs".[227]

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222 Justice Committee, The role of the magistracy, 11 October 2016, Sixth Report of Session (2016–17 HC 165) p19

223 Prisons and Courts Bill: Fact sheet: Abolition of local justice areas (2017)

224 Transform Justice, The role of the magistrate? (2016) p14

225 Justice Committee, The role of the magistracy, 11 October 2016, Sixth Report of Session (2016–17 HC 165) p5

226 Ibid p37

227 Prisons and Courts Bill: Fact sheet: Abolition of local justice areas (2017)

9. Traffic and air quality offences: use of statements of truth

Section 54 and Schedule 13 change the procedure, for certain traffic and air quality offences, for applying for an order for payment of an unpaid penalty charge notice to be set aside. Schedule 13 amends earlier legislation which required a statutory declaration to be used, so that a witness statement can be used instead.

Statutory declarations need to be witnessed by a county court officer. A witness statement can be undertaken by a court user and can be digitised.[228]

These provisions, the Government explain in the Transforming our justice system paper, will enable a "modern digital approach" and would remove a procedure which is inconvenient for users and resource-intensive to administer.[229]

[228] Prisons and Courts Bill, Fact sheet: Traffic Offences - Witness statements and statements of truth (2017)

[229] Transforming our justice system: summary of reforms and consultation (September 2016) Cm 9321 p8

10. Attachment of Earnings Orders in the High Court

10.1 Background

An Attachment of Earnings Order (AEO) is a popular method of civil debt enforcement which must be commenced in the County Court.[230] It is a very useful method of enforcing a debt in circumstances where the judgment debtor does not have any other substantial assets but is in paid employment. **Clause 55** and **Schedule 14** of the Bill would extend the powers of the High Court to make AEOs, the aim being to create a fairer, simpler, and more consistent approach to enforcement of money judgments

In outline, an AEO requires an employer to make regular payments out of the judgment debtor's wages (or other sums associated with employment) into court. The court then releases payments to the judgment creditor in satisfaction of the debt.

Under the Attachment of Earnings Act 1971 ("the AEA 1971"), an application for an AEO to recover payment of a civil debt can only be made in the county court. This means that if a judgment creditor in the High Court wants to enforce a debt of £50 or more[231] by way of an AEO, the matter must first be transferred to the county court.[232] For the judgment creditor, this adds stages to the enforcement process which, in turn, can result in delay.

There is another reason why the current process is thought to be inefficient. The rate of repayment of the judgment debt is calculated by considering the debtor's income and necessary outgoings. This financial information is usually obtained from a "statement of means" completed by the debtor.[233] In effect, county court administrative staff calculate, on a case-by-case basis, the level of deductions required by the debtor in order to repay the debt at a manageable rate.

10.2 The Bill

Clause 55 and **Schedule 14** of the Bill would amend the AEA to enable the High Court to make AEOs for the recovery of monies due under a judgment debt, on the same basis (as far as possible) as the County Court (see below), and using the fixed deductions scheme.

Under the fixed deductions scheme, employers are simply instructed to deduct an amount prescribed in a deduction table. However, the court

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230 Since 6 April 2016, an application to the County Court for an AEO must be made to the County Court Money Claims Centre (CCMCC), pursuant to CPR 89.3

231 Section 1(2), AEA 1971 and CPR 89.7(14)

232 The procedure for obtaining an AEO is contained in CPR 89 and the AEA 1971

233 Court form N56

would have the authority to suspend an order based on the fixed deductions scheme if it thought that the rate or frequency of deductions would be inappropriate in any given case.

It is important to note two points:

- First, the extension powers provided by **Clause 55** (and **Schedule 14**) would be in addition to the High Court's current powers to make AEOs to secure payments under a High Court maintenance order.
- Second, **Clause 55 (2)** would allow the High Court to make AEOs for the recovery of money due under a judgment debt where the judgment pre-dates the coming into force of this provision to extend the High Court powers.[234]

[234] This provision effectively mirrors Section 1(5) of the AEA 1971

11. The Judiciary and the Judicial Appointments Commission

11.1 Overview of Part 4 of the Bill

Part 4 of the Bill deals with judicial leadership, judicial deployment, remuneration of employment tribunals, and the Judicial Appointments Commission.

Principally, Part 4 will:

- Allow the statutory judicial leadership offices which cannot currently be offered on a fixed term basis to be offered on such a basis. The Bill does not set out how long that fixed term would be (Clause 56, Schedule 15);
- In the case of senior leadership judges, provide for those judges to be automatically given the position of an ordinary judge of the Court of Appeal, in order to allow them to have a role to return to at the end of their fixed term. This does not apply where the judge is already a judge of the Court of Appeal or a judge of the Supreme Court (Clause 56, Schedule 15);
- Make minor changes to judicial deployment rules, allowing further flexibility (Clause 57);
- Make a minor change to rules on the remuneration of employment tribunals, transferring responsibility from the Secretary of State for Business, Energy and Industrial Strategy to the Lord Chancellor (Clause 58);
- Allow the Judicial Appointments Commission to provide advice to a wider range of employments, and to develop a charging model for that advice (Clause 59).

11.2 Background

Reasons for proposing fixed term judicial appointments

Judicial leadership positions

Leadership judges hold additional responsibilities over and above the judicial duties of a judicial office holder. The Ministry of Justice factsheet on judicial leadership says:

> This could include carrying out appraisals, managing the court centres caseload, mentoring or providing pastoral support to judges in their centre. The current system of leadership judges across all levels and throughout jurisdictions is varied in terms of

> tenure, pay, responsibilities and duties. This has led to a number of inconsistent practices.[235]

At present, some leadership roles are held on a fixed term basis whereas others are not. Many leadership judge positions are non-statutory, such as the nine Queen's Bench Division masters below the Senior Master, and the five bankruptcy registrars below the Chief Bankruptcy Registrar, and all deputy masters and registrars below them. These can already be offered on a fixed-term basis and so are not affected by this Bill.

The statutory judicial leadership positions that are affected by the provisions of Clause 56 of the Bill are:

- The senior leadership judges, consisting of the offices of:[236]

  Lord Chief Justice; Master of the Rolls; President of the Queen's Bench Division; President of the Family Division or Chancellor of the High Court;

- The senior masters and registrars of the High Court, consisting of:[237]

  Senior Master of the Queen's Bench Division; Chief Chancery Master; Chief Taxing Master; Chief Bankrupty Registrar;

- Senior District Judges of the Family Division;[238]
- Chamber Presidents;[239] and
- Deputy Chamber Presidents.[240]

Other statutory leadership judge positions, such as Senior President of Tribunals, were recently created by statute and it is already possible to offer these positions on a fixed term basis.

General issues in recruitment to the judiciary

The House of Lords Constitution Committee holds annual evidence sessions with the Judicial Appointments Committee. The Chair, Lord Kakkar, told the Committee that there is a "worrying trend" in the Commission's inability to fill "important vacancies".

> The reality is that in the 2015 High Court exercise we were unable to fill one vacancy. In the 2016 exercise, we were unable to fill six vacancies. At the moment, we are in the process of running a competition to fill 25 High Court positions. If one looks at the

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235 Ministry of Justice, "Prison and Courts Bill: Leadership Judges", www.gov.uk, accessed 2 February 2017
236 Senior Courts Act 1981, s10
237 Ibid. s89
238 Ibid.
239 Tribunals, Courts and Enforcement Act 2000, Sch 4, para 3
240 Ibid., para 5

> trend in the two previous years, there could be a serious shortfall in our ability to nominate candidates to fill those positions. [241]

While a number of reasons for the shortfall were considered, including "pay and rations", meaning that judicial roles are not attractive to senior practitioners, the other issues highlighted in the Judicial Attitude Survey contributed to the problem.

The Lord Chief Justice wrote in his 2016 report on the severity of the problem:

> Recent campaigns have raised serious concerns about recruitment to the judiciary, in particular the ability to attract well-qualified candidates for positions in the higher levels of the judiciary.
>
> The issues have been highlighted on a number of occasions, as the impact on the administration of justice and the position of the UK in international business litigation is potentially so serious.
>
> These dangers have been acknowledged. The judiciary has been working with the Judicial Appointments Commission, the Lord Chancellor and the Government to address these. The matter is now extremely urgent.[242]

Career progression in the judiciary

Career progression in the judiciary has been repeatedly raised as a concern by surveys of judicial attitudes. The Government has cited the creation of a clear career path as a rationale for changes in this Bill.

In their 2012 Report, the Constitution Committee recommended that "there should be a greater emphasis within the judiciary on judicial careers, making it easier to move between different courts and tribunals and to seek promotions".[243]

The 2016 Judicial Attitude Survey found that 61% of responding judges said that opportunities for career progression were important but that the same amount thought support for this progression was either non-existent or poor.[244]

The same survey also provided a breakdown of which areas of the judiciary considered career progression most important. It found that a majority of all judges apart from those sitting in the Court of Appeal (who have reached the highest judicial office in England and Wales, the Supreme Court being a UK court) considered career progression to be important, but a majority of judges below those sitting in the High

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241 Select Committee on the Constitution, Oral evidence session with the Chairman of the Judicial Appointments Commission, Session 2016-17, Q2

242 Judiciary of England and Wales, The Lord Chief Justice's Report 2016, p 9

243 Select Committee on the Constitution, Judicial Appointments, 25th Report of Session 2010-12, p 56

244 UCL Judicial Institute, 2016 UK Judicial Attitude Survey, 7 February 2017

Court considered the availability of career progression poor or non-existent.[245]

Diversity in the judiciary

Box 7: Diversity in the judiciary of England and Wales[246]

The Lord Chief Justice has a statutory responsibility to promote diversity in the judiciary of England and Wales. The 2016 Judicial Diversity Statistics release showed that in April 2016:

- 8 out of 39 Court of Appeal judges were women (21 per cent)
- 22 out of 106 High Court judges were women (21 per cent)
- Overall, 28% of judges in the courts were women, compared to 45% in tribunals.
- A third of court judges and two thirds of tribunal judges were from non-barrister backgrounds, with judges in the lower courts more likely to come from non-barrister backgrounds.
- Around 2% of High Court Judges were from non-barrister backgrounds. No judges in the Court of Appeal and no Heads of Division were from non-barrister backgrounds.
- Of those judges who declared their ethnicity, 6% in courts identified as Black, Asian and Minority Ethnic, and in tribunals 10%.
- No judges in the Court of Appeal and no Heads of Division declared themselves to be BAME.

The Ministry of Justice state that one aim of introducing fixed-term leadership positions is to help to enhance judicial career prospects with more office holders having the opportunity to apply for leadership roles. In this way, diversity of leadership judges will be improved.

In 2010, the Report of the Advisory Panel on Judicial Diversity recommended that "Judicial terms and conditions should reflect the needs of a modern diverse judiciary", though limited its recommendations on how this might be achieved to flexible working, reasonable adjustments, and access to support, advice and guidance.[247] The Lord Chief Justice said in his 2016 report that the statistics released in 2016 (Box 7) "show an improvement but there is much more still to be done".[248]

According to statistics from the Bar Standards Board and the Solicitors Regulatory Authority, diversity is poorer among barristers than among solicitors. 35% of practicing barristers as a whole are women, compared to 48% of solicitors. 12% of barristers declared as BAME and 14.5% of solicitors who gave a response declared a non-white ethnicity.[249]

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245 UCL Judicial Institute, 2016 UK Judicial Attitude Survey, 7 February 2017, p 55

246 Courts and Tribunals Judiciary, Judicial Diversity Statistics 2016, July 2016

247 Advisory Panel on Judicial Diversity, The Report of the Advisory Panel on Judicial Diversity 2010, p 51

248 Judiciary of England and Wales, The Lord Chief Justice's Report 2016, p 7

249 Solicitors Regulatory Authority, Raw firm diversity data as at 31 October 2015, accessed 9th March 2017; Bar Standards Board, Practising barrister statistics, accessed 9th March 2017

As shown in the statistics outlined in Box 7, there is a severe lack of senior judges from non-barrister backgrounds, despite solicitors being able to qualify if they have practiced with rights of audience to the higher courts. Lord Justice-Burnett told the Constitution Committee in March 2017 that attitudes from law firms themselves were the "major reason" in limiting solicitor applicants. [250] The Committee reported in 2012 that "There needs to be a greater commitment on the part of the Government, the judiciary and the legal professions"[251] to recruiting from lawyers who are not barristers.

Comments on a "career judiciary"

The UK recruits its judges from the legal profession, primarily from the Bar. It is not considered a separate career judiciary in the same fashion as exists in some other European nations. The Government has explicitly stated that the reforms proposed in this Bill are designed to create a clearer career path for the judiciary.

Lord Neuberger, president of the Supreme Court, wrote on the UKSC blog in 2014 about the possible advantages of a career judiciary with modernised terms and conditions:

> A career judiciary where there is a potential fast-track could be an option: such an individual could enter it at, say, the age of thirty-five as a junior tribunal member or possibly a district judge and work their way up.[252].

The response from the Bar Council has, however, been cool. In response to the Briggs Review, the Bar Council said that proposals to introduce case officers were "potentially the beginning of a shift to a career judiciary of a very different character to that which presently commands public confidence."

> The experience of continental Europe makes clear that the move to a career judiciary would have considerable associated costs, having regard to the number of judges required. There is also a reputational risk for the judiciary, and the jurisdiction, flowing from the reduced status and independence of the judiciary.[253]

The Bar Council also expressed concern in the same document about there being "no career path from the Bar".

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[250] Select Committee on the Constitution, Oral evidence session with the Chairman of the Judicial Appointments Commission, 1 March 2017, Q3

[251] Select Committee on the Constitution, Judicial Appointments, 25th Report of Session 2010-12, p 56

[252] UKSC Blog, "UKSC Blog interviews Lord Neuberger", 16 Sep 2014

[253] Bar Council, Bar Council response to the Civil Courts Structure Review: Interim Report, January 2016

Judicial Terms and Conditions consultation

The Provision of Judges Steering Group was established in 2013 by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals. It existed to consider "the terms and conditions of salaries and fee-paid judicial office holders, the promotion of diversity and the deployment of the judiciary within the modernised courts and tribunals."[254]

Following this, and following the joint statement made in September 2016 by the Lord Chancellor, Lord Chief Justice and Senior President of Tribunals setting out a "shared vision for reformed courts and tribunals",[255] the Government launched a consultation on a number of changes to the judicial system that are made in this Bill.

Not all of the proposals in the consultation are being taken forward. In light of the responses to the consultation, the following proposals are not being taken forward at this time:

- Introducing a single non-renewable fixed term for fee-paid judges;
- Removing the entitlement for fee-paid office holders to claim allowances for travel to their primary sitting location.
- Introducing a requirement to give notice for office holders who planned to retire.

The following proposals in the consultation, however, will be being taken forward:

- Introducing fixed terms and temporary allowances for leadership judges;
- Introducing an expectation – rather than guarantee – of the number of days existing fee-paid court judges are required to sir;

It is the first of these proposals that is put forward in this Bill.

Responses to the consultation questions on judicial leadership appointments

Respondents were asked whether they thought judges should be appointed to leadership positions for a fixed term. 22% of respondents to the consultation supported the proposal while 19% opposed it. 25% were unsure, and the remainder did not answer.[256] Below is a selection of the responses from prominent groups.

The Bar Council rejected the proposal, saying:

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254 Minister of Justice, Modernising Judicial Terms and Conditions: Government Response, 8 February 2017

255 Judiciary of England and Wales, Transforming Our Justice System, September 2016

256 Ministry of Justice, Modernising Judicial Terms and Conditions: Government Response, 8 February 2017, p 15

> Neither the consultation paper nor the Impact Assessment sets out a proper case for introducing such a change. The current system works well. In the absence of a case for change we can see no benefit in the proposal.[257]

The Law Society (the professional body for solicitors in England and Wales) said that:

> Although good governance would be to refresh leadership from time to time, there would be little benefit in removing an effective leader from their position at a time when new reforms may still be bedding in and for which a consistent officeholder would be a great advantage.[258]

The law advocacy organisation JUSTICE supported the proposals, saying:

> A de facto career path to the senior judiciary already exists. Senior barristers become either Recorders or Deputy High Court Judges before ascending to the High Court bench. This talent pool is both narrow and homogenous, so renewal of the pool through fixed terms would be welcome.[259]

The Judicial Appointments Commission supported the proposal, saying:

> [The proposals] may help to open up such roles and make them more attractive to a broader range of candidates. This may have a positive resultant impact on the diversity of those who are able to apply for leadership roles that are within the JAC's remit.[260]

The JAC also added that JAC selection exercises for leadership roles "have the least diverse outcomes, with low numbers of female and BAME individuals applying, and being recommended".[261]

The JAC did, however, state that the increased turnover in leadership roles will have resourcing implications for the JAC, and that these impacts were not identified in the impact assessment.

Some of the other objections raised to the proposal were:

- Concerns about the rationale behind a term ending where there has not been any poor performance, and
- That fixed term leadership positions could be a threat to security of tenure.

The Government decided that, where it is a matter for the Lord Chancellor, leadership positions should be appointed on a fixed term basis. The Government's stated intention is for there to be a clear career

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257 Bar Council, Bar Council response to the MOJ's consultation: Modernising judicial terms and conditions, December 2016, p 8

258 Law Society, Ministry of Justice consultation: Modernising Judicial Terms and Conditions: The Law Society Response, December 2016, p 15

259 JUSTICE, Modernising Judicial Terms and Conditions: JUSTICE consultation response, November 2016, p 5

260 Judicial Appointments Commission, Ministry of Justice consultation on Modernising Terms and Conditions: JAC response, November 2016, p 5

261 Ibid. p 5

path in the judiciary, which will also serve to increase diversity in the senior judiciary.

The consultation response does not set out how long the fixed terms will be, and this is not addressed in the Bill. The consultation response says that fixed terms will be set by the Lord Chancellor following consultation with the judiciary.

The Judicial Appointments Commission

The Judicial Appointments Commission was set up by the 2005 Act to select candidates for Judicial Office in England and Wales (and for certain tribunals whose jurisdiction extends UK-wide).

The JAC's current remit is to make recommendations for appointments to: the offices listed in Schedule 14 of the 2005 Act. These appointments are then made by the Lord Chancellor, Lord Chief Justice or Her Majesty. There are limited circumstances in which the Lord Chancellor or Lord Chief Justice can reject the recommendations.

Triennial review of the JAC

In 2015, the Government published its triennial report into the operation of the Judicial Appointments Commission. Among other things, this review addressed the "additional functions" performed by the JAC beyond its central remit.

These included the provision of advice on judicial appointments to other countries, due to the "world leading model" of the JAC. In addition, the JAC has been approached by non-government regulatory or adjudicatory bodies "such as the General Medical Council and Solicitors Regulatory Authority" to conduct or support selection exercises for posts.[262]

> Consideration should be given as to whether the JAC should have the authority to conduct and charge for such exercises, focusing particularly on: the scope of the activity and whether it should be confined to regulatory or adjudicatory posts, the propriety of such activity, the maintenance of the JAC's independence under such arrangements, the need to protect and prioritise the JAC's public functions and the continued delivery of public value for money.
>
> The JAC, MoJ and the judiciary should explore options to clarify and expand the JAC's functions in terms of senior appointments.[263]

The Lord Chancellor is formally given the power to instruct the JAC to take part in these additional functions in Clause 60 of the Bill, which also

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[262] Ministry of Justice, Triennial Review: Judicial Appointments Commission, January 2015, p 15

[263] Ministry of Justice, Triennial Review: Judicial Appointments Commission, January 2015, p 15

allows a charging model to be set up to recoup costs for these activities.

11.3 The Bill

Clause 56 and Schedule 15

Clause 56 puts in effect Schedule 15 of the Bill, which implements the Government's proposed changes to judges with leadership roles.

Fixed term senior judicial leadership appointments

The Schedule allows for fixed-term appointments of judges to senior leadership roles[264] in the senior courts, by amending the Senior Courts Act 1981.

It also amends the Act to mean that a person appointed to any of those most senior roles must also be appointed as an ordinary judge of the Court of Appeal,[265] an appointment that will also end when the fixed-term for the principal role ends. This appointment does not count towards the maximum number of judges of the Court of Appeal.

Other judicial leadership appointments

The Schedule also amends Section 89 of the 1981 Act to provide that certain other leadership judges[266] can be appointed for a fixed term.

Schedule 4 of the Tribunal, Courts and Enforcement Act 2007 is amended to make provision for appointments to the Chamber Presidents and Deputy Chamber Presidents. These offices can already be held for a fixed term, but the amendments remove the possibility of the appointment being extended, which was previously provided for.[267]

Other provisions of Clause 56

The Schedule amends the 2007 Act to mean that a person appointed as Senior President of Tribunals for a fixed term must be appointed an ordinary judge of the Court of Appeal, unless they are already such a judge, or as a judge of the Supreme Court. This does not apply if the person has not fulfilled the 7-year judicial-appointment eligibility condition.

The Constitutional Reform Act 2005 is amended to provide that a judge of the Supreme Court will not receive a salary as a Supreme Court judge for any period in which they also hold a fixed-term appointment as a senior leadership judge or as the Senior President of Tribunals.

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264 The offices of Lord Chief Justice; Master of the Rolls; President of the Queen's Bench Division; President of the Family Division and Chancellor of the High Court. Senior Courts Act 1981, s10(2)

265 Unless the judge being appointed to a senior leadership role is a judge of the Supreme Court.

266 The offices of Senior Master of the Queen's Bench Division; Chief Chancery Master; Chief Taxing Master; Chief Bankrupty Registrar; Senior Judge of the Family Division

267 *Tribunals, Courts and Enforcement Act 2007*, Schedule 5, para 5A

The 2005 Act is also amended to provide that any such judge does not count towards the maximum number of Supreme Court judges if they also hold one of those appointments.

In the same fashion, the Senior Courts Act 1981 is amended to provide that an ordinary judge of the Court of Appeal will not receive a salary as a judge of the Court of Appeal for any period in which they also hold a fixed-term appointment as a senior leadership judge or as the Senior President of Tribunals.

The 1981 Act is also amended to provide that any such judge does not count towards the maximum number of Court of Appeal judges if they also hold one of those appointments.

Clause 57 – Deployment of judges

Clause 57 amends the Constitutional Reform Act 2005, Tribunal, Courts and Enforcement Act 2007 and the Arbitration Act 1996 to allow for more flexible deployment of judges.

The amendments mean that:

- A temporary Deputy High Court Judge can sit in any court or tribunal a permanent Deputy High Court Judge can sit;
- A Recorder can sit in the Upper Tribunal; and
- High Court Judges, and people acting as High Court Judges under section 9(1) of the Senior Courts Act 1981,[268] can sit as judge-arbitrators.

Clause 58 – the Employment Appeal Tribunal

Clause 58 amends the Employment Tribunals Act 1996 in order to add the President of the Employment Tribunals (England and Wales) and the President of the Employment Tribunals (Scotland) to the list of judges who are members of the Employment Appeal Tribunal.

This mirrors provisions in the Tribunal, Courts and Enforcement Act 2007, which allow Presidents or Deputy Presidents of Chambers of the First-Tier Tribunal to sit in the Upper Tribunal.[269]

Clause 59 – Remuneration of members of employment tribunals

Clause 59 amends the Employment Tribunals Act 1996 to change the responsibility for remunerating members of the Employment Tribunals and the Employment Appeal Tribunal.

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[268] Under Section 9(1) the 1981 Act, the following may act as High Court Judges at the request of the appropriate authority: A judge of the Court of Appeal; a person who has been a judge of the Court of Appeal; a person who has been a judge of the High Court; A Circuit Judge; A Recorder.

[269] *Tribunal, Courts and Enforcement Act 2007*, Section 5(1)

At the moment, the Secretary of State for Business, Energy and Industrial Strategy has responsibility for remuneration of members of the Employment Tribunals and the Employment Appeal Tribunals. The amendment transfers this responsibility to the Lord Chancellor.

Clause 60 – JAC advice on appointments

Clause 60 amends the Constitutional Reform Act 2005 to allow the Lord Chancellor to request that the Judicial Appointments Commission provide advice on an appointment, whether or not that appointment is made by a Minister of the Crown, the Lord Chancellor, or any other person. The appointment need not be judicial in nature.

The Bill provides tests for the Lord Chancellor to be able to make a request that the JAC provide advice to a third party:

- The ability of the JAC to carry out its core functions must not be adversely affected;
- It must be appropriate for the JAC to provide advice, either because of the nature of the appointment or the experience that the Commission has acquired.

The Bill also allows the Judicial Appointments Commission to create a charging structure for this advice, to recoup costs. These costs are paid to the Lord Chancellor, not the Consolidated Fund.

The assistance rendered may involve making members of the Commission's staff available to the other person, or making any of the Commission's property or other resources available to the other person temporarily or permanently.

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