



**BRIEFING PAPER**

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# Courts and Tribunals (Online Procedure) Bill 2017-19 [HL]

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## Summary

The [Courts and Tribunals \(Online Procedure\) Bill](#) (the *Online Procedure Bill*) was introduced by the Government in the House of Lords on 1 May 2019. It received its Lords Third Reading on 2 July 2019 and was introduced into the House of Commons on 3 July 2019. The debate on its Second Reading in the Commons is expected to take place on 16 July 2019.

The Bill reintroduces proposals that initially formed part of Part 2 of the [Prison and Courts Bill](#) in the 2016-17 Parliamentary session. The passage of that Bill was prevented by the dissolution of the last Parliament for an early general election in 2017.<sup>1</sup>

- Some of the proposals in that Bill have been revived and legislated for by other means during the current Parliamentary session. Examples of this include the [Civil Liability Act 2018](#) and the [Courts and Tribunals \(Judiciary and Functions of Staff\) Act 2018](#).

The proposals to make greater use of technology and online proceedings emerged from the Briggs Review, which reported in 2015 and 2016 into reform of civil court structure. This Bill's provisions provide significant flexibility to provide electronic alternatives to both in-person and on-papers civil and family court and tribunal proceedings. They would also enable electronic proceedings to become the default, or even the only, option in most cases for proceedings should regulations and procedure rules so-specify.

The Bill itself has three main practical effects.

- Firstly, it confers regulation-making powers on Ministers, subject to the affirmative procedure. Appropriate ministers can designate certain types of court or tribunal proceedings as ones which may or must be conducted by electronic means, subject to the Online Procedure Rules.
- Secondly, it establishes the Online Procedure Rule Committee (OPRC) and defines that body's powers to make Online Procedure Rules (OPRs).
- Thirdly, the Bill determines the membership rules and appointments process for the OPRC.

Several Government amendments were made during the Lords Report and Third Reading stages. Three issues received particularly close attention:

- the role of the Lord Chief Justice/Senior President of Tribunals when Ministers proposed to make regulations or issue directions;
- the extent to which individuals would be compelled to use electronic means and the level of support they would receive to do so; and
- the composition of the Online Procedure Rule Committee.

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<sup>1</sup> Commons Library Briefing Paper, [The Prisons and Courts Bill](#), 17/7907, 16 March 2017

# 1. Background

## 1.1 Briggs Review

Between December 2015 and July 2016, then Lord Justice Briggs published an [Interim Report](#)<sup>2</sup> and [Final Report](#)<sup>3</sup> into civil court structure in England and Wales.

One of the key conclusions of his review was that there should be an “Online Court” set up to relieve some of the burden of physical courts, especially in the context of lower-value money claims:

I consider that there is a clear and pressing need to use the opportunity presented by the digitising of the civil courts to create for the first time a court (the OC) for litigants to be enabled to have effective access to justice without lawyers. I regard a general value ceiling of £25,000 as a sensible first steady-state ambition for the OC, even if it is necessary to build up to it in stages, and by no means ruling out the possibility of increased jurisdiction if the concept proves to be a success. That value ceiling will need to have the built-in flexibility to move cases from it into a more traditional court where complexity or other relevant considerations make that appropriate on a case by case basis.<sup>4</sup>

The Briggs Review was sympathetic to a move towards making online procedures compulsory or presumptively compulsory for certain types of cases. However, it also recognised that:

it would be entirely unsatisfactory, and possibly unlawful, to make recourse to the [Online Court] compulsory until a proven structure of assistance for those who need it was designed, tested and put into full operation.<sup>5</sup>

## 1.2 Transforming Our Justice System

In September 2016, the Ministry of Justice and Her Majesty’s Courts and Tribunals Service (HMCTS) issued a joint “vision statement”:

[Transforming Our Justice System](#).<sup>6</sup> It set out the Government’s plans for reform of the courts and tribunals system, including proposals to make greater use of technology and electronic or online proceedings. It formed part of a £1 billion “modernisation” programme across HMCTS.

### Civil courts

In the context of the civil courts, the vision statement said the following on the use of online proceedings:

Our reforms will promote the full range of methods of settling disputes more swiftly, at less cost and with greater choice... Depending on the complexity of a case – and the needs of all involved – it might be online, paper-based or face-to-face.<sup>7</sup>

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<sup>2</sup> Lord Briggs, [Civil Courts Structure Review: Interim Report](#), December 2015

<sup>3</sup> Lord Briggs, [Civil Courts Structure Review: Final Report](#), July 2016

<sup>4</sup> Briggs Review, [Interim Report](#), para 12.6

<sup>5</sup> Briggs Review, [Interim Report](#), para 6.50

<sup>6</sup> Ministry of Justice and HMCTS, [Transforming Our Justice System](#), September 2016

<sup>7</sup> Ministry of Justice and HMCTS, [Transforming Our Justice System](#), September 2016, p. 11

Specifically, in the context of money claims, it said:

We want to build on simpler consumer-focused models. In the civil courts, we will automate and digitise the entire process of civil money claims by 2020. These account for more than four fifths of the 1.6 million claims issued in the county courts and the High Court each year – with the vast majority (83%) of which are uncontested. We will speed up resolution as we replace paper and post with digital working: currently, a ‘fast track’ claim with a value between £10,000-£25,000 takes 11 months to be resolved. Under our new digital model, cases will be handled faster and in a more convenient way, improving the experience for everyone making and defending claims in the civil courts.<sup>8</sup>

Although money claims with a value below £10,000 could already be made online through [the Money Claim Service](#) the Government’s intention was to make a similar service available to a much broader range of civil claims. As the Briggs Report (see above) indicated, this was the main impetus for online procedures and, consequently, the initiative for an Online Procedure Rule Committee.

## Family courts

In the context of the family courts, the vision statement focused on two areas: divorce applications and probate proceedings.

For those people who decide to divorce, the process will be simpler. The majority of these cases involve a very straightforward court process. Only around 2% of cases are contested. Yet the rules and forms are long and complex and have changed little since the 1970s. We will simplify the process and put as much as possible of it online.

These same principles of simplification will be applied to probate. Dealing with probate affairs can be difficult and complicated at a time when people may be coping with bereavement. The probate system will be digitised so that in uncontested cases, most of the application process will be done online, making it much simpler for people to use.<sup>9</sup>

Since the publication of the vision statement, online proceedings have been made available in both of those areas. In May 2018 the Government announced the full roll-out of an online divorce application process. This followed an earlier testing phase.<sup>10</sup> From August 2017 an online probate application service was rolled-out, initially to personal applicants and then to some solicitors.<sup>11</sup>

## Tribunals

In the context of the tribunals system, [Transforming Our Justice System](#) was even more explicit about the shift towards online procedures:

Tribunals will be digital by default, with easy to use and intuitive online processes put in place to help people lodge a claim more easily, but with the right levels of help in place for anyone who

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<sup>8</sup> Ibid.

<sup>9</sup> Ministry of Justice and HMCTS, [Transforming Our Justice System](#), September 2016, p. 13

<sup>10</sup> Ministry of Justice and HMCTS, [Fully digital divorce application launched to the public](#), 6 May 2018

<sup>11</sup> HMCTS, [Personal applicants can now apply for probate online](#), 30 May 2018

needs it, making sure that nobody is denied justice. Once a claim is made, automatic sharing of digital documents with relevant government departments will mean that the tribunals and the parties will have all the right information to allow them to deal with claims promptly and effectively, saving time for both tribunal panels and claimants. Those who use tribunals will have access to specialist judicial expertise using tools and technology that they use routinely in other parts of their lives. This will allow the nub of a case to be identified quickly, wrong decisions resolved, and hopeless causes weeded out - improving justice for everyone involved.<sup>12</sup>

### 1.3 Prison and Courts Bill

The proposals in this Bill are not new. Prior to the 2017 General Election, the then (majority) government had introduced a much wider-ranging justice reform Bill. The provisions in the current Bill are very similar to some of those found in Part 2 of that Bill.<sup>13</sup> In the event, the [Prison and Courts Bill](#) did not pass before Parliament was dissolved.

Since then, the Government has sought to introduce the different parts of that Bill in a series of smaller bills. In this session, two Acts have been passed partially implementing different elements of that Bill: the [Civil Liability Act 2018](#) and the [Courts and Tribunals \(Judiciary and Functions of Staff\) Act 2018](#).

### 1.4 Recent scrutiny

#### Satisfaction levels with online justice services

[In a recent answer to a written Parliamentary question](#) Lucy Frazer, Parliamentary Under Secretary of State at the Ministry of Justice, gave an update on the four main areas where the Government has introduced online proceedings in HMCTS.<sup>14</sup> She said:

More than 150,000 people used online justice services in 2018, taking the total number to over 300,000 in the past four years. Public feedback has been extremely positive with 82% user satisfaction rates for the online divorce service, 87% for civil money claims, 93% for make a plea and 92% for probate.<sup>15</sup>

#### Public Accounts Committee – pace of reforms

The Commons Public Accounts Committee (PAC) expressed concerns about the scale and pace of the changes being undertaken as part of HMCTS' modernisation programme. Its report in July 2018 concluded that:

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<sup>12</sup> Ministry of Justice and HMCTS, [Transforming Our Justice System](#), September 2016, p. 15

<sup>13</sup> Commons Library Briefing Paper, [The Prisons and Courts Bill](#), 17/7907, 16 March 2017

<sup>14</sup> In addition to divorce applications, probate proceedings and civil money claims, HMCTS also enables those charged with road traffic offences to "make a plea" without attending court. See: HMCTS, [Online plea service for traffic offences](#), 7 December 2016

<sup>15</sup> HCWQ245829, [Courts: Modernisation](#), 30 April 2019

- It had little confidence HMCTS could successfully deliver this “hugely ambitious programme to bring the court system into the modern age”.
- HMCTS had failed to articulate what the new system would look like.
- The intended pace of the reforms did not allow for meaningful consultations or evaluation, and could lead to unintended results.
- HMCTS had not adequately considered how the reforms will impact access to the justice system for “the people using it, many of whom are vulnerable”.<sup>16</sup>

Its report emphasised the wider context in which increased use of online procedures is taking place, and the uncertainties as to its long-term impact. It drew particular attention to the relationship between digital service delivery and the closure of physical court buildings:

We are concerned that the reforms are being pursued at the possible expense of people’s access to fair justice. HMCTS has already closed 258 courts between 2010–11 and December 2017. These courts have been closed before moving services online, meaning that many people are having to travel further to access justice. This can cause many people severe difficulties, particularly for those who rely on public transport or have caring responsibilities.

More closures are underway, yet HMCTS has undertaken limited work to review the impact of the closures on users or how demand for court time has been affected. HMCTS has not properly tested the use of new technology in accessing justice. Although HMCTS assured us that it is testing digital services, like online forms, with users, this does not amount to a proper evaluation of the wider impacts of the changes in the real world. We are concerned that HMCTS told us a great deal about processes and products and not enough about how the changes might affect people. Moving services online without assessing the impact could have serious implications for users of the justice system.<sup>17</sup>

The PAC suggested there was a lot of uncertainty about what the justice system would look like in the long-term and how the effectiveness of reforms would be assessed. It warned against conflating user satisfaction ratings with evaluations of access to justice and equity:

[The departments] were not able to be more concrete about how they would measure this or determine whether the programme had been a success. HMCTS cited examples of user satisfaction scores from digital services but not how it would measure how the reforms affected access to justice or the fairness with which it is administered.<sup>18</sup>

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<sup>16</sup> Public Accounts Committee, [Transforming Courts and Tribunals](#), HC 976, 20 July 2018, pp. 5-6

<sup>17</sup> Ibid. p. 6

<sup>18</sup> Ibid. p. 11

## 1.5 Procedure Rules

The courts and tribunals in England and Wales (and where relevant, on a Great Britain or UK-wide basis) are governed by legislation, procedure rules and practice directions. The procedure rules that apply to proceedings depend upon what type of court they take place in, and what type of proceedings they are. For example, the [Civil Procedure Rules 1998](#) are made under the [Civil Procedure Act 1997](#) and apply to most civil proceedings.

Equivalent arrangements exist in the [Family Procedure Rules 2010](#), made under [section 75](#) of the [Courts Act 2003](#). The unified tribunals (Upper and First-tier) are governed by the *Tribunal Procedure Rules* under the [Tribunal, Courts and Enforcement Act 2007](#) (TCEA 2007). The employment tribunals and Employment Appeal Tribunal are governed by a combination of the [Employment Tribunals \(Constitution and Rules of Procedure\) Regulations](#) and by the [Employment Appeal Tribunal Rules 1993](#).

As things stand, there are no bespoke rules governing the use of online proceedings in either the courts in England and Wales, the unified tribunals across the UK, or in employment or Employment Appeal tribunals across Great Britain.

In theory, rules of that kind could be made as part of the existing jurisdiction procedure rules, but the Government wishes for these rules to be created on a standalone basis, co-opting, adapting or overriding the rules of the other PRCs where necessary or expedient.

## 2. This Bill

The current Bill was introduced into the House of Lords on 1 May 2019, completing its passage through the upper House on 2 July 2019. It received its First Reading in the House of Commons on 3 July 2019 and the Second Reading debate is expected on 16 July 2019.

The overview below reflects the content of the Bill [as introduced in the House of Commons](#). For an overview of the original Bill as introduced in the Lords, see the Lord Library briefing:

- [Courts and Tribunals \(Online Procedure\) Bill \[HL\]](#), LLN-2019-0055, 9 May 2019.<sup>19</sup>

### 2.1 Clause 1 – Online Procedure Rules

#### Purpose of the Procedure Rules

**Clause 1** requires there to be Online Procedure Rules. These rules serve three primary functions:

- **to require** certain court or tribunal proceedings to be initiated by electronic means;
- **to allow or require** certain court or tribunal proceedings to be carried on and/or disposed of by electronic means; and
- **to allow or require** parties to participate in certain types of court or tribunal hearings by electronic means.

The “Online Procedure Rules” (OPRs) will govern the operation of those specified proceedings, in much the same way as the Civil Procedure Rules, Family Procedure Rules, Tribunal Rules and Criminal Procedure Rules do in their respective jurisdictions in the courts and tribunals system.

**Subsections 3 and 4** set out high-level objectives for the rules and for online proceedings generally, with emphasis on accessibility, fairness, simplicity, speed, efficiency and support for innovative methods of dispute resolution.

**Subsection 5** clarifies that the rules can differ for different kinds of proceeding: there is no intention for a “one-size-fits-all” approach to online proceedings, even of a similar type.

#### Option to initiate in hard-copy

**Subsection 6** requires individuals to be given the choice between participating by electronic means or by non-electronic means in certain circumstances. This provision was added at Lords Report stage and then strengthened at Third Reading after concerns raised by several Peers during the passage of the Bill through the upper house.

In the [Explanatory Notes for the Bill](#) as introduced to the Commons, the Government explains what this might mean in practice:

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<sup>19</sup> Lord Library Briefing Paper, [Courts and Tribunals \(Online Procedure\) Bill \[HL\]](#), LLN-2019-0055, 9 May 2019

Subsection (6) enables a person who uses the online procedure to choose whether to do so using digital services or by "non-electronic means", so enabling them, for example, to send papers to the appropriate court or tribunal, to be scanned and uploaded to the electronic system.

## 2.2 Clause 2 – Specified proceedings

**Clause 2** is a regulation-making power vested in the "appropriate minister".<sup>20</sup> Regulations may specify which kinds of proceedings are to fall within the scope of the Online Procedure Rules. These are potentially any of the following proceedings:

- civil proceedings;
- family proceedings;
- proceedings in the Upper and First-tier Tribunals; and
- proceedings in the employment tribunals or Employment Appeal Tribunals.

This notably does not include criminal proceedings.

When deciding whether to "specify" a type of proceeding, the Minister making the regulation must take into account:

- the legal basis of the proceedings;
- the factual basis of the proceedings;
- the value of the matter in issue in the proceedings; and
- the court or tribunal in which the proceedings are to be brought or continued.

Regulations made by the Minister are subject to two safeguards.

- **Subsection 3** requires the Lord Chief Justice and/or Senior President of Tribunals to "concur" with the regulations. This was originally only a requirement to "consult" those judicial heads but was strengthened at Report Stage in the Lords.
- **Subsection 4** requires regulations to be made under the [affirmative resolution procedure](#). This means both Houses of Parliament must vote for a draft of the regulations before the Minister can bring them into force.

## 2.3 Clause 3 – Power to make regulations

Whereas **clause 2** regulations bring certain court and tribunal proceedings under the Online Procedure Rules, **clause 3** regulations create **exceptions** to that default position. **Clause 3** regulations can specify, for example, that the parties to a dispute can choose whether to initiate or proceed with a case by electronic means, or they might disapply the Online Procedure Rules completely for a specified class of cases. In those circumstances, they can then specify (for instance) that the normal procedure rules for the relevant jurisdiction should apply

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<sup>20</sup> In practice the "appropriate minister" here will be the Lord Chancellor (or other Minister in the Ministry of Justice) or the Secretary of State for Business, Energy and Industrial Strategy (in the context of employment tribunals).

instead. They may also specify that certain types of excluded proceedings should, in any case, be covered by the rules.

**Clause 3** interacts closely with other provisions in **clause 1**. The Online Procedure Rules themselves can themselves specify “excluded proceedings” and can specify circumstances where excluded proceedings are to be subject to the Online Procedure Rules in any case. They can also specify that proceedings are to take place in a different court than the one they would be heard in if the OPRs had not applied. However, the powers of the OPRC in **clause 1** are to be read **subject to** any regulations made by Ministers in **clause 3** (i.e. the Minister’s regulations can override the Procedure Rules on this point).

As with **clause 2**, regulations made under **clause 3** are subject to both the concurrence of the Lord Chief Justice and/or Senior President of Tribunals and the affirmative resolution procedure.

## 2.4 Clause 4 – Support for digitally excluded people

**Clause 4** was inserted at Lords Report Stage when the Government accepted Lord Marks’ manuscript amendment.<sup>21</sup> It explicitly requires the Lord Chancellor to assess what the “appropriate and proportionate” level of support should be for those who need assistance to access electronic proceedings, and then to provide that support.

## 2.5 Clause 5 – The Procedure Rule Committee

**Clause 5** establishes the Online Procedure Rule Committee (OPRC). It sets the rules for its membership.

The Committee is to consist of a combination of Lord Chancellor appointees and Lord Chief Justice Appointees. The Lord Chancellor is to appoint:

- one person who is either a barrister in England and Wales, a solicitor of the Senior Courts of England and Wales, or a legal executive (**subsection (2)(c)**);
- one person with experience in and knowledge of the lay advice sector (**subsection (2)(d)(i)**); and
- one person with IT experience and knowledge relating to end-users’ experiences of internet portals (**subsection (2)(d)(ii)**).

The Lord Chief Justice by contrast is to appoint:

- one person who is a senior judge of the Senior Courts of England and Wales (**subsection (2)(a)**);
- two persons, each of whom is either a judge of the Senior Courts of England and Wales, a Circuit judge or a district judge, **or** a judge of the First-tier or Upper Tribunal, an Employment Judge or a judge of the Employment Appeal Tribunal (**subsection (2)(b)**).<sup>22</sup>

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<sup>21</sup> [HL Deb 24 June 2019 Vol 798 c967](#)

<sup>22</sup> The original bill only provided for one appointee under subsection (2)(b) but the Government amended this provision on Lords Report.

In each case the appointing party must **consult** the other and the Senior President of Tribunals. The Lord Chief Justice must also consult the Secretary of State (responsible for employment tribunals) and secure the **agreement** of the Senior President before appointing any person under **subsection (2)(b)**.

The Lord Chief Justice is to choose (from those appointed by the LCJ) an individual to chair the Procedure Rule Committee. If the Lord Chief Justice wishes, he may delegate his functions under this section to another “judicial office holder” as defined by [s. 109\(4\) Constitutional Reform Act 2005](#).

## 2.6 Clause 6 and Schedule 1 – Powers of the Committee

**Clause 6** provides that the Online Procedure Rule Committee has broadly the same rule-making powers as the existing Procedure Rule Committees for the relevant proceedings that may become subject to it.

It therefore has the same powers as the Civil Procedure Rule Committee for civil proceedings, the same as the Family Procedure Rule Committee for family proceedings, the same powers as the Tribunal Procedure Committee for tribunal proceedings and the same power as Ministers do in relation to employment tribunal rules and Employment Appeal Tribunal proceedings.

The one difference of note is that the power to make Practice Directions is dealt with slightly differently. **Schedule 1** of the Bill enables practice directions to be made specifically for online proceedings in their own right, and subject to its own set of rules and constraints. Practice directions are those “given by judges on matters of court practice and procedure” and supplement procedure rules made by the relevant Procedure Rule Committee.<sup>23</sup>

## 2.7 Clause 7 – Changes to the Committee

The Lord Chancellor can, by regulations, change the composition of the Online Procedure Rule Committee. This can be done with the concurrence of:

- the Secretary of State (for Business, Energy and Industrial Strategy);
- the Lord Chief Justice; and
- the Senior President of Tribunals.

The Lord Chancellor additionally must consult:

- the Head of Civil Justice
- the Deputy Head of Civil Justice (where relevant)
- the President of the Family Division.

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<sup>23</sup> Inner Temple Library, [Glossary of Legal Terms and Phrases](#), accessed 3 July 2019

Unlike most other parts of the Bill, these regulations can be made under the [negative resolution procedure](#) (i.e. subject only to annulment by either House, rather than requiring prior Parliamentary approval).

## 2.8 Clause 8 – Procedure for making rules

Online Procedure Rules are to be made by the Online Procedure Committee. **Clause 8** sets out the process for making those rules. At first instance, the Rule Committee must engage in a process of consultation with relevant individuals, and (unless inexpedient to do so) they must then hold a meeting of the Rule Committee.<sup>24</sup> Any proposed rules must be signed by either a majority of members or, if the vote is tied, by half of them including the chair of the Committee.<sup>25</sup>

Once the Committee has approved new rules, the Lord Chancellor (or in the context of employment tribunals, the Secretary of State for Business, Energy and Industrial Strategy) must then decide whether to allow or disallow the rules. When deciding whether to allow the rules, the appropriate minister must take into account the needs of those who require support to access the affected proceedings by electronic means.<sup>26</sup>

In the event that the Minister disallows the rules, he must provide the Committee with a statement of reasons.<sup>27</sup>

Once rules have been approved by the Minister, they must then make the rules in the form of a statutory instrument. The Minister determines when the rules are to come into effect, and the statutory instrument may be annulled by a resolution of either House of Parliament.<sup>28</sup>

## 2.9 Clause 9 – Minister to direct rule-making

In certain circumstances, the appropriate Minister may direct the Online Procedure Rule Committee to make a set of Online Procedure Rules for a specified purpose. If a Minister so directs **clause 9** requires the Committee to make any rules it considers necessary to achieve the specified purpose within a reasonable period of time.

As a result of an amendment moved by Lord Judge and made against the Government's wishes, the appropriate Minister can (as the Bill stands) only issue a direction with the concurrence of the Lord Chief Justice.<sup>29</sup> When originally introduced into the Lords, the Bill included no such requirement, nor even did it require the Lord Chancellor to consult the Lord Chief Justice.

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<sup>24</sup> clause 8(1)

<sup>25</sup> clause 8(2)

<sup>26</sup> clauses 8(3-4)

<sup>27</sup> clause 8(5)

<sup>28</sup> clause 8(6-7)

<sup>29</sup> [HL Deb 24 June 2019 Vol 798 c977](#)

## 2.10 Clause 10 – Power to amend primary legislation

In connection with **clauses 8 and 9** the Lord Chancellor would have a '[Henry VIII power](#)'. **Clause 10** allows the Lord Chancellor to amend, repeal or revoke delegated and primary legislation, using regulations.

Amendment, revocation or repeal is permitted to the extent it is considered "necessary or desirable" either because of the Online Procedure Rules already adopted, or to facilitate the making of them.<sup>30</sup>

Regulations of this kind can only be made subject to the affirmative resolution procedure (i.e. both Houses of Parliament must actively approve a draft statutory instrument).

As with **clause 9**, the Lords amended the Bill against the wishes of the Government. This means that, as introduced in the Commons, the Bill only allows this power to be used with the concurrence of the Lord Chief Justice.<sup>31</sup> Additionally, the Lord Chancellor must consult the Senior President of Tribunals.<sup>32</sup>

## 2.11 Clauses 11-15 and Schedule 2

The remaining clauses of the Bill are general or consequential in nature.

**Clause 11** allows consequential and transitional provision to be made in connection with the bringing into force of the Act.

**Clause 12 and Schedule 2** make consequential amendments to related primary legislation to reflect the fact that the Online Procedure Rules and the OPRC have been created.

**Clause 13** clarifies how regulations are made under the Act, setting out whether the concurrence procedure applies to the Lord Chief Justice, the Senior President of Tribunals, or both. It also clarifies whether the Lord Chancellor or the Secretary of State for Business, Energy and Industrial Strategy is the "appropriate minister" for any given context.

**Clause 14**, the interpretation section, clarifies the meaning of terms in the main body of the Act. It clarifies, for example, what is meant by "civil proceedings" or references to different existing procedure rules.

**Clause 15** is a standard short-title, commencement and extent section. It makes clear that the Lord Chancellor has discretion as to when the main provisions of the Bill come into effect. The clause also clarifies that the territorial extent of the Bill varies depending on the context.

- For the purposes of civil and family proceedings, it extends only to England and Wales.
- For employment and Employment Appeal Tribunal proceedings, it extends to the whole of Great Britain.

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<sup>30</sup> clauses 10(1-2)

<sup>31</sup> clause 10(3)

<sup>32</sup> clause 10(4)

- For First-tier and Upper Tribunal proceedings, it extends to the whole of the United Kingdom.

This broadly reflects the extent to which the court and tribunal systems in Scotland and Northern Ireland are separately administered and not under the institutional arrangements of HM Courts and Tribunals Service.

## 3. Comment on the Bill

### 3.1 Safeguards on the powers of the Lord Chancellor

When the Bill was first introduced, the Government's proposal was that significant decisions would be taken through regulations made by Ministers and (in certain cases) Ministerial directions to the Online Procedure Rule Committee. Key decisions of this type included:

- specifying which proceedings would be covered by the Online Procedure Rules (**clause 2**);
- designating exceptions or circumstances where individuals could choose between online and normal court proceedings (**clause 3**);
- requiring the OPRC to make rules in certain circumstances (**clause 9**)<sup>33</sup>; and
- amending or revoking OPRs by regulations (**clause 10**)<sup>34</sup>.

In aggregate, these powers would have allowed, among other things, for the Lord Chancellor (i.e. a government minister) to restrict the availability of oral or paper hearings across a potentially very broad range of proceedings (effectively forcing litigants to use online proceedings if the OPRs required it).

There were two safeguards against abuse of these powers: relevant regulations made by a Minister had to undergo the affirmative resolution procedure (i.e. receive approval from both Houses of Parliament before they could be made) and the Lord Chancellor was obliged first to "consult" the Lord Chief Justice (for the courts) and/or the Senior President of Tribunals (for the tribunals) before making those regulations.

### Consultation v Concurrence

The Lords Constitution Committee was critical of the second requirement, regarding **mere consultation** of the senior judiciary as inadequate. The Committee said [in its Report on the Bill](#):

We are concerned that the Bill confers broad powers on ministers to limit oral hearings in a much wider range of cases than is currently envisaged. One way to secure appropriate control over this power would be to require not just consultation with the Lord Chief Justice, or the Senior President of Tribunals where appropriate, but their concurrence.

We are not persuaded that to require concurrence with the Lord Chief Justice or Senior President of Tribunals in this context would involve them inappropriately in political decision-making. This is a matter of the fair and efficient administration of the justice system for which they are responsible.<sup>35</sup>

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<sup>33</sup> In the original bill as introduced in the Lords, this was clause 8

<sup>34</sup> In the original bill as introduced in the Lords, this was clause 9

<sup>35</sup> Lords Constitution Committee, [Courts and Tribunals \(Online Procedure\) Bill](#), HL Paper 373, 7 June 2019, paras 12-13

Joe Tomlinson, Lecturer in Public Law at King's College London, raised similar concerns in [a paper on the Bill](#):

The power distribution within the OPRC is also a cause for serious concern. The crux of the issue is that the Lord Chancellor has a veto power, a Henry VIII power, and the Lord Chief Justice only needs to be consulted when Rules are made. It is the combination of these elements of Bill which vest an unhealthy amount of power in a Cabinet Minister, especially in view of what is meant to, quite plainly, be a Committee system.<sup>36</sup>

### Changes made to the Bill

At Lords Report Stage, the Government brought forward amendments to replace the aforementioned "consultation" requirement with a "concurrence" requirement for regulations made under **clauses 2 and 3**. This is reflected in the Bill as introduced in the Commons.

Lord Judge moved amendments to replace "consultation" with "concurrence" for the purposes of (what are now) **clauses 9 and 10** of the Bill. He considered the matter to be the same in principle as for **clauses 2 and 3**, in respect of which the Government had brought forward amendments. He said:

Taken together, Clauses [9] and [10] unbalance the relationship [between the Lord Chancellor and the Lord Chief Justice]. The Lord Chief Justice falls out of Clause [9] altogether—he does not get a mention. He is reduced or left to the consultation process in Clause [10], which is entirely inconsistent with the provisions in the Bill that the Government amended to allow for concurrence rather than consultation. Under Clause [9], the Minister has power to direct that the rule committee shall include provisions to achieve the Minister's purposes and that, when such a direction is given, the committee has no option but to comply within a reasonable time. It is that stark; the power is vested directly in the Minister.

It is one thing—and perfectly sensible—to protect the Lord Chancellor from some wild or absurd rule committee proposal. It is, with great respect, quite another for him to have an unconstrained power to give it directions: in effect, to tell it what to do. The Minister may, by Clause [10](2), also don the tarnished crown of King Henry VIII... On closer examination, if you put these two clauses together, this arguably means that the Minister may overrule the very rules which were made with the concurrence of the Lord Chief Justice or his predecessor.<sup>37</sup>

The Government opposed Lord Judge's amendments. Lord Keen of Elie argued that the clauses were consistent with legislative approaches taken to other procedure rule committees. He also noted that powers to "direct" a procedure rule committee had rarely been used, let alone objected to by the Lord Chief Justice, in the past. He suggested the appropriate remedy for the Lord Chief Justice, if he disapproved of a

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<sup>36</sup> Joe Tomlinson, [Three Fixable Flaws in The Courts and Tribunals \(Online Procedure\) Bill](#), SSRN, 17 June 2019, p. 8

<sup>37</sup> [HL Deb 24 June 2019 Vol 798 c974](#)

Lord Chancellor's direction to the OPCR, would be to make a report to Parliament under [section 5](#) of the [Constitutional Reform Act 2005](#).<sup>38</sup>

Despite Government opposition Lord Judge's amendments were, nevertheless, approved.<sup>39</sup> Accordingly the Bill introduced into the Commons requires concurrence for the exercise of Ministerial powers under **clauses 9 and 10**.

## 3.2 Composition of the Rule Committee

Another issue raised during debate was the composition of the Online Procedure Rule Committee. Criticisms raised in this context concerned:

- gender diversity;
- geographical representation;
- representation of the different branches of the legal profession;
- IT expertise; and
- the Lord Chancellor's power to change OPRC membership.

### Gender diversity

Lord Beecham questioned the gender balance of the OPRC throughout the Lords stages. At Committee and Report Stage, he tabled an amendment to "promote and ensure gender balance" on the OPRC.<sup>40</sup>

In response, Lord Keen said that appointments to the OPRC would always be guided by the code of practice of the Office of the Commissioner for Public Appointments. This process is monitored by the Commissioner for Public Appointments and is subject to a report published annually.<sup>41</sup> Moreover, the [Equality Act 2010](#) places a "public sector equality duty" on Ministers and the judiciary.<sup>42</sup>

Lord Keen further noted that other procedure rule committees are not bound by a specific statute to relating gender diversity. He saw "no compelling reason" to differentiate the OPRC from them. Lord Beecham did not move the amendments at Committee or Report stage.

### Geographical representation

At Second Reading, Lord Mackay of Clashfern questioned the representation of Scotland. He observed that there is no guarantee that any member of the OPRC would be a Scottish judge or lawyer despite (what is now) **clause 15** stating that the Act will apply to the Scottish employment tribunals and the Employment Appeal Tribunal.<sup>43</sup> Lord Keen responded that the Scottish Government had been consulted on the Bill and said they were "content with the way the present provisions

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<sup>38</sup> [HL Deb 24 June 2019 Vol 798 cc964-965](#)

<sup>39</sup> At Report Stage, [Lords Amendment 22](#) was approved on a Division ([226 Content to 182 Not Content](#)). A division on [Lords Amendment 23](#) was called, but no tellers were appointed for the Not Contents. The amendment was accordingly made.

<sup>40</sup> [HL Deb 10 June Vol 798 cc311-312](#) and [HL Deb 24 June 2019 Vol 798 c969](#)

<sup>41</sup> [HL Deb 10 June Vol 798 c311](#)

<sup>42</sup> [HL Deb 24 June 2019 Vol 798 c970](#)

<sup>43</sup> [HL Deb 14 May 2019 Vol 797 cc1513-1514](#)

[in the Bill] are formulated”.<sup>44</sup> He added that in the longer-term, under the amended [Scotland Act](#), Scottish Government will have responsibility for employment tribunals and employment appeal tribunals.<sup>45</sup>

### Representation of different branches of the legal profession

At Second Reading, Lord Ponsonby<sup>46</sup> and Lord Judge<sup>47</sup> criticised the lack of a requirement in the Bill for representation from the family jurisdiction, magistrates, or for each branch of the practising profession. The Bill only requires one member of the OPRC to be a barrister, solicitor or legal executive. At Committee Stage, Lord Beecham moved amendment 15 to seek to increase the representation by adding the following requirements to the membership of the OPRC:

(c) one of each of the following—(i) a barrister in England and Wales, and(ii) a solicitor of the Senior Courts of England and Wales, and(iii) a legal executive, and(iv) a magistrate of England and Wales appointed to the Committee by the Lord Chancellor.<sup>48</sup>

This amendment was not moved at Committee. However, Lord Beecham re-tabled this as amendment 11 on Report.<sup>49</sup>

Lord Keen argued there is “considerable benefit” with the OPRC initially being “a small committee, but one where the membership and expertise can be adapted over time.”<sup>50</sup> This would be undermined by Lord Beecham’s amendment. He added that these amendments would create issues about who is appointing the membership of the committee and whether there was a disproportionate power of appointment between the Lord Chancellor and the Lord Chief Justice.<sup>51</sup>

Lord Keen maintained that (what is now) **clause 7** would allow for the Committee’s composition to change to accommodate particular expertise, such as when the Committee addressed family jurisdiction.<sup>52</sup> Lord Beecham’s amendment was withdrawn at Committee Stage and was not moved on Report.

On Report, Lord Keen tabled amendments 10, 15 and 17 to address concerns relating to the composition of the OPRC.<sup>53</sup> These amendments, which were agreed to without a division:

- increase the number of judicial members on the Committee;<sup>54</sup>
- enable the Lord Chief Justice to appoint one judicial member as chair of the Committee;<sup>55</sup>

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<sup>44</sup> [Ibid. c1528](#)

<sup>45</sup> [Ibid. cc1527-1528](#)

<sup>46</sup> [Ibid. cc1507-1508](#)

<sup>47</sup> [Ibid. c1511](#)

<sup>48</sup> [HL Deb 10 June 2019 Vol 798 c310](#)

<sup>49</sup> [HL Deb 24 June 2019 Vol 798 c968](#)

<sup>50</sup> [HL Deb 10 June 2019 Vol 798 c311](#). See similar comments made by Lord at Report Stage, for example, [HL Deb 24 June 2019 Vol 798 cc969-970](#).

<sup>51</sup> [HL Deb 10 June 2019 Vol 798 c311](#)

<sup>52</sup> [Ibid.](#) and [HL Deb 24 June 2019 Vol 798 cc969](#)

<sup>53</sup> Lords Report Stage, Government amendments [10](#); [15](#) and [17](#). See, also, [HL Deb 24 June 2019 Vol 798 cc967-968](#).

<sup>54</sup> Lords Report Stage, [Amendment 10](#)

<sup>55</sup> Lords Report Stage, [Amendment 15](#)

- require a majority of Committee members to approve rules;<sup>56</sup> and
- ensure that when the Committee is tied and cannot determine which rules to make, the Chair will have the casting vote.<sup>57</sup>

### IT expertise

The Bill requires only a single person to have “IT experience and knowledge relating to end-users’ experience of internet portals” to sit on the OPRC. Joe Tomlinson, Lecturer in Public Law at King’s College London, criticised the fact that this responsibility would fall upon a single person. He explained that there are different views as to which IT solution would work best in different circumstances.

He also suggested that “IT experience” and “knowledge relating to end-users’ experience of internet portal” are two distinct skills and therefore “seems to limit the pool of membership unnecessarily”.<sup>58</sup> Tomlinson therefore called for at least two such experts to be members of the OPRC.<sup>59</sup>

On Report, Lord Beecham tabled amendment 12. It sought to increase Committee representation of members with “IT experience and knowledge of end-users’ experience of internet portals”.<sup>60</sup> Lord Keen made similar arguments against this amendment as he had for other increases to the size of the Committee. He said the OPRC needed to be “small and agile” and that the OPRC is required to consult experts as necessary by (what is now) **clause 7**.<sup>61</sup> Amendment 12 was defeated on division by 219 votes to 132 at Report Stage.<sup>62</sup>

## 3.3 Digital exclusion

### Broad concerns

Access to justice was a common theme when the Lords debated the Bill at various stages. Several peers argued that the Bill, by mandating the use of digital processes through **clause 1**, would significantly hinder access to the Courts and Tribunals system for disadvantaged groups.<sup>63</sup> This would include, for example, those who:

- do not have access to or sufficient knowledge of using online systems, computers or the internet;<sup>64</sup>
- are elderly or disabled;<sup>65</sup>

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<sup>56</sup> Lords Report Stage, [Amendment 17](#). Previously, the Bill required that only three members of the Committee were required to sign the rules when rule making.

<sup>57</sup> Lords Report Stage, [Amendment 17](#)

<sup>58</sup> Joe Tomlinson, [Three Fixable Flaws in The Courts and Tribunals \(Online Procedure\) Bill](#), SSRN, 17 June 2019, pp. 4-6

<sup>59</sup> *Ibid.*

<sup>60</sup> Lords Report Stage, [Amendment 12](#)

<sup>61</sup> [HL Deb 24 June 2019 Vol 798 cc969-970](#)

<sup>62</sup> [Ibid. cc971-973](#)

<sup>63</sup> For relevant statistics, see, for example Lord Justice Briggs, [Civil Courts Structure Review: Final Report](#), July 2016, para 6.13; Office for National Statistics, [Exploring the UK’s Digital Divide](#), 4 March 2019 and Lloyd’s Bank, [UK Consumer Digital Index 2018](#).

<sup>64</sup> [HL Deb 10 June Vol 798 c297](#)

<sup>65</sup> [Ibid. c300](#) and [HL Deb 24 June Vol 798 c968](#)

- have physical or mental health issues;<sup>66</sup> and
- have poor literacy skills or have a limited command of the English language.<sup>67</sup>

The Constitution Committee maintained that the Bill is likely to force individuals to choose between online proceedings or not pursuing legal claims at all. The Bill posed the risk of “excluding large numbers of people from the justice system.”<sup>68</sup>

### **Government & digital assistance**

Several Lords suggested that the Government ought to do more to support individuals who find it difficult to use digital equipment and online processes. For example, at Second Reading, Lord Keen insisted that:

All our online services will be accompanied by appropriate and robust safeguards to protect and support users and to ensure that access to justice is maintained. In pursuing this approach, we recognise that there will be people who will need help accessing a new digital system.<sup>69</sup>

He referenced “a comprehensive ‘assisted digital’ programme” which would include help for court users by telephone, online or (by other electronic means), or face to face.<sup>70</sup>

Despite these reassurances, several amendments were tabled at Committee Stage on this issue. Several Lords argued for an explicit commitment to be included in the Bill which would guarantee digital assistance to litigants.<sup>71</sup> Speaking to these amendments, Lord Marks of Henley-on-Thames said that the appropriate Minister ought to be:

subject to an overriding requirement that he or she should consider that assistance is sufficient to enable the party to have a reasonable understanding of the nature of the proceedings, of the procedure under the Online Procedure Rules, and of how to access that procedure.<sup>72</sup>

And that:

This commitment could and should be clearly expressed in the Bill in a way that would make it much more difficult for future Governments to resile from it.<sup>73</sup>

Similarly, the Constitution Committee acknowledged the adverse effect the Bill could have on the individuals’ access to justice. The Committee recommended that “the Bill places a duty on the Lord Chancellor to ensure that adequate provision is made to enable access to online

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<sup>66</sup> [HL Deb 10 June Vol 798 cc281-283](#)

<sup>67</sup> [Ibid. c298](#)

<sup>68</sup> Lords Constitution Committee, [Courts and Tribunals \(Online Procedure\) Bill](#), HL Paper 373, 7 June 2019, para 16

<sup>69</sup> [HL Deb 14 May 2019 Vol 797 c1506](#)

<sup>70</sup> [Ibid.](#)

<sup>71</sup> [HL Deb 10 June 2019 Vol 798 c297](#)

<sup>72</sup> [Ibid. cc297-98](#)

<sup>73</sup> [Ibid.](#)

proceedings for those with limited digital means, digital literacy, or general literacy.”<sup>74</sup>

At Committee Stage, Lord Keen sought to address these concerns and explained that HMCTS is already trialing an assisted digital strategy where HMCTS staff offer support over the phone and face-to-face. This strategy is currently being trialled in 18 locations throughout England and Wales by the Good Things Foundation and would soon be rolled out across the country.<sup>75</sup>

Lord Keen moved amendments 1 and 18 to **clause 1** in an attempt to address some of these concerns. These amendments would mean that the OPRC and Lord Chancellor must have “regard to the needs” of those who require “technical support” in order to initiate, conduct, progress or participate in proceedings by electronic means when rule making. Lord Keen explained that these amendments would ensure that rules would be “accessible and fair”.<sup>76</sup> He added that the amendments would provide support to unrepresented litigants, and those that lack the ability or confidence to engage with online procedures. Amendments 1 and 18 were agreed to without division.

However, at Report Stage, Lord Marks tabled manuscript amendment 9A. This amendment proposed explicitly to require the Lord Chancellor to assess what the “appropriate and proportionate” level of support should be for those who need assistance to access electronic proceedings, and then to provide that support. He said the aim of this amendment was to meet “a concern powerfully expressed” by the Briggs Review and concerns made at previous stages of debate in the Lords. It was “extremely important” for the Lord Chancellor to be subject to such a statutory duty as this would “add teeth” to the requirement that rules ought to have regard to the needs of the digitally excluded, as set out by amendment 1 at Report Stage.<sup>77</sup> Lord Keen said that the Government remained committed to ensuring digital inclusion and so accepted amendment 9A.<sup>78</sup> Amendment 9A passed without a division and forms **clause 4** of the Bill as introduced in the Commons.<sup>79</sup>

At Report Stage, Lord Marks also tabled amendment 2 which sought to remove the word “technical” from amendment 1 in order to broaden the type of support offered to litigants.<sup>80</sup> Amendment 2 was withdrawn as Lord Keen gave reassurances that this matter would be revisited at Third Reading.<sup>81</sup> At Third Reading, Lord Keen tabled amendment 1 which removed “technical” from **clause 1**. This amendment was agreed to without a division.<sup>82</sup>

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<sup>74</sup> Lords Constitution Committee, [Courts and Tribunals \(Online Procedure\) Bill](#), HL Paper 373, 7 June 2019, para 16

<sup>75</sup> [HL Deb 10 June 2019 Vol 798 cc300-301](#)

<sup>76</sup> [HL Deb 24 June 2019 Vol 798 cc945-946](#)

<sup>77</sup> [Ibid. c948](#)

<sup>78</sup> [Ibid. c953](#)

<sup>79</sup> [Ibid. c968](#)

<sup>80</sup> [HL Deb 24 June 2019 Vol 798 c947](#)

<sup>81</sup> [Ibid. c953](#)

<sup>82</sup> [HL Deb 2 July 2019 Vol 798 cc1365-1367](#)

### Choosing between digital and conventional processes

At Committee Stage, Lord Marks of Henley-on-Thames moved amendment 3 which sought to provide parties with a choice between submitting documents and forms electronically or by paper, or by a combination of the both.<sup>83</sup> He explained:

If the Government intends to ensure a choice for parties between online and paper documents, there can be no good reason for them failing to spell that out in this legislation. Whatever the Government's good intentions may be, there is no guarantee that a future Government will honour a commitment that is not on the face of the statute. This is not a matter where a statement of intent by the Minister will satisfactorily safeguard future litigants.<sup>84</sup>

In response, Lord Mackay of Clashfern said he was unclear why parties would seek to use a combination of electronic and paper means. He claimed:

I would have thought that it should be one thing or the other. I imagine that it might cause confusion if you have an electronic bit and then a bit on paper stuck in, unless there is a clear way of showing in the electronic bit that there is another bit to follow. It is that part of the amendment that I find slightly difficult.<sup>85</sup>

Lord Keen, said that the Government agreed with the idea that individuals should have a choice between using digital or paper processes, and that "there is provision for this already".<sup>86</sup> He added, the Government:

has no plans to remove the availability of paper channels for citizens under the remit of the Online Procedure Rule Committee.<sup>87</sup>

Lord Keen explained that a choice between using digital or conventional procedures would be limited for some individuals. For example, this includes parties that want to make small debt claims which are below a particular threshold (such as those below £25,000).<sup>88</sup> In those circumstances, parties would not be able to decide to use "more complex and potentially more expensive conventional Civil Procedure Rules" instead of new procedures established by the OPRC.<sup>89</sup>

He also added that, where the appropriateness of online procedures was in question (e.g. if the case was sufficiently complex), it should be for the relevant judge to determine whether the case should proceed instead by non-digital means.<sup>90</sup>

When pressed on this issue by Lord Pannick at Committee Stage, Lord Keen refused include an explicit provision allowing for individuals to

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<sup>83</sup> [HL Deb 10 June 2019 Vol 798 c279](#)

<sup>84</sup> [Ibid. cc279-280](#)

<sup>85</sup> [Ibid. c284](#)

<sup>86</sup> [Ibid. c285](#)

<sup>87</sup> [Ibid](#)

<sup>88</sup> [HL Deb 10 June 2019 Vol 798 c284](#); Ministry of Justice, [Delegated Powers Memorandum: Courts and Tribunals \(Online Procedure\) Bill \(2019\)](#), para 33

<sup>89</sup> [Ibid. cc287-288](#)

<sup>90</sup> [Ibid. c288](#)

choose between using digital or conventional proceedings. Lord Keen said:

If every time we legislated we decided to guarantee everything from A to Z, we would end up with very long Bills. The position is this: there is the ability to proceed by way of the paper process. Nothing prohibits it, there is no inhibition on that process, and there is no intention to introduce such an inhibition.<sup>91</sup>

Following this, Lord Keen tabled amendment 4 at Report Stage. It provided for “proceedings initiated at a court or tribunals by non-electronic means” to be treated as if it were initiated electronically. This, for example, would include the court or tribunal being responsible for processing documents electronically on behalf of the litigants at the beginning of a case.<sup>92</sup>

At Report Stage, Lord Beith tabled amendment 5 seeking to ensure “that all documents, not only the initial claim, can be submitted in paper form and scanned for use with the simplified online procedure.”<sup>93</sup> Several Lords supported amendment 5 as they argued the wording of the Government’s amendment 4 only referred to the “initiation” of proceedings and therefore it was unclear whether litigants could choose between digital or conventional processes when submitting subsequent documents. They also supported amendment 5 because they believed litigants ought to be able to receive paper documents if they wished.<sup>94</sup>

Lord Keen explained that the use of the word “initiate” was:

intended to capture all engagement with online services throughout the proceedings...in other words, “initiate” was taken as a synonym for “engagement”, not “commence”—but I appreciate the uncertainty”.<sup>95</sup>

He said he would return to the issue at Third Reading and consequently amendment 5 was not moved.<sup>96</sup> At Third Reading, Lord Keen tabled amendment 3 which provides that individuals can choose to use non-electronic procedures when “initiating, conducting, progressing or participating in proceedings”. This amendment passed without division.<sup>97</sup>

### 3.4 Relationship with other Procedure Rule Committees

Lord Ponsonby of Shulbrede tabled amendment 2 at Committee Stage on behalf of the Official Opposition, which related to **Schedule 2** of the Bill. The aim of this amendment was to allow other procedure rule committees to determine the relevant jurisdiction which can be governed by the OPRC, and therefore to oversee the regulation-making

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<sup>91</sup> [Ibid. c285](#)

<sup>92</sup> [HL Deb 24 June 2019 Vol 798 c946](#)

<sup>93</sup> [Ibid. cc948-949](#)

<sup>94</sup> [Ibid.](#)

<sup>95</sup> [HL Deb 24 June 2019 Vol 798 c952](#)

<sup>96</sup> [Ibid. c954](#)

<sup>97</sup> [HL Deb 2 July 2019 Vol 798 c1368](#)

powers which the Bill provides to the Lord Chancellor.<sup>98</sup> In explaining his reasoning for tabling this amendment, Lord Ponsonby raised concerns regarding the OPRC's power to make decisions about the "appropriateness of online procedures" without the guidance of the most relevant existing procedural rule committee(s) to the case.<sup>99</sup>

Similarly, at Committee Stage, Lord Beith said:

The weakness in this part of the Bill seems to be that there are no limitations on or barriers to the total extension of the online procedure to all civil, family and tribunal proceedings. Nobody is actually suggesting that, but the absence of any barriers means that we can stray into that territory before there has even been a serious debate about how we could use online procedures in some of these areas.[...] the Bill is so wide that its lack of any specified criteria or other limitations is worrying.<sup>100</sup>

At Committee Stage and in response to broader issues relating to the jurisdiction of the Bill, Lord Keen said "it is not the case...[that the Bill]... brings in powers without limits or regulation".<sup>101</sup> He emphasised how the OPRC will operate under the Lord Chancellor or Secretary of State for Business, Energy and Industrial Strategy (BEIS) but also the Lord Chief Justice and, where relevant, the Senior President of Tribunals.<sup>102</sup>

Lord Keen made three arguments against Lord Ponsonby's amendment 2; claiming that it "posed a number of serious practical difficulties".<sup>103</sup> First, if accepted, this amendment would require subsequent statutory instruments to be laid under negative procedure developed by an independent rule committee. This would "not allow for the appropriate degree of parliamentary scrutiny" which would be applied if the statutory instruments were laid under affirmative procedure by the Government.<sup>104</sup>

Second, amendment 2 would allow the Secretary of State for BEIS in the case of employment tribunals or the Lord Chancellor for the Employment Appeal Tribunal, to direct the making of regulations. Lord Keen said, "I do not believe that that would be a consequence one would seek in the present context."<sup>105</sup>

Third, Lord Keen argued it is unclear how existing rules committees could decide amongst themselves which proceedings should be extended to the OPRC and which should not. He said that the Government anticipates that this would create "very real practical difficulties over the administration of the future Online Procedure Rule Committee."<sup>106</sup>

Lord Ponsonby withdrew amendment 2. Acknowledging the matter:

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<sup>98</sup> Lords Committee Stage, [Amendment 2](#)  
<sup>99</sup> [HL Deb 10 June 2019 Vol 798 cc290-291](#)  
<sup>100</sup> [Ibid. c292](#)  
<sup>101</sup> [Ibid. c293](#)  
<sup>102</sup> [Ibid.](#)  
<sup>103</sup> [Ibid. cc293-294](#)  
<sup>104</sup> [Ibid. c294](#)  
<sup>105</sup> [Ibid.](#)  
<sup>106</sup> [Ibid.](#)

may not be for this Bill, but all the committees will have to have a close working relationship which will have to be developed one way or the other.<sup>107</sup>

## 3.5 Oral hearings

### **Broad concerns about Ministers' power**

There was broad concern that the Bill prescribed too much power to Ministers who could limit the use of oral hearings in a range of cases. For example, at Second Reading, Lord Beith argued that this power could be used by Ministers to remove the possibility of oral hearings taking place even if both parties wanted one.<sup>108</sup> While, at Committee Stage, Baroness Drake argued that more needs to be done to protect the right of parties to proceedings to seek oral hearings because this would "have a particular impact on access to justice for vulnerable court users with limited digital means, digital literacy and general literacy skills."<sup>109</sup>

These concerns were reaffirmed by the House of Lords Constitution Committee. In its report, the Committee concluded

It is unsatisfactory for legislation to be drafted in a way that fails to acknowledge the fundamental right to a fair hearing, both at common law and under the European Convention on Human Rights.<sup>110</sup>

The Committee recommended that one solution would be to "require not just consultation with the Lord Chief Justice, or the Senior President of Tribunals where appropriate, but their concurrence."<sup>111</sup> This would provide an additional safeguard against the withdrawal of oral hearings where the judiciary had concerns as to its impact on court users.

Ultimately, this was the solution adopted to address those concerns, on which see also section 3.1 above.

### **Oral hearings and family proceedings**

Several Lords raised issues with the effect of the Bill on family proceedings and oral hearings. At Committee Stage, Lords Ponsoby said:

I am concerned that no limits are set out in the primary legislation in relation to the appropriateness of online processes within the Family court... the vast majority of family cases will not be appropriate for an online hearing, face-to-face normally required.<sup>112</sup>

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<sup>107</sup> [Ibid. c296](#)

<sup>108</sup> [HL Deb 14 May 2019 Vol 797 cc1509-1510](#)

<sup>109</sup> [HL Deb 10 June 2019 Vol 798 c283](#)

<sup>110</sup> Lords Constitution Committee, [Courts and Tribunals \(Online Procedure\) Bill](#), HL Paper 373, 7 June 2019, paras 11-12

<sup>111</sup> *Ibid.*

<sup>112</sup> [HL Deb 10 June 2019 Vol 798 cc290-291](#)

Lord Pannick agreed, adding:

there are plainly specific types of proceedings which it is wholly inappropriate to determine online. Perhaps the strongest example is any proceedings relating to the welfare of children.<sup>113</sup>

In response, Lord Keen agreed that online or digital procedures may not be appropriate for certain types of family law cases. But suggested that:

it is not necessary for us to list particular exclusions, because in doing so one is liable to overlook something... [it would be] an unnecessary straightjacket.<sup>114</sup>

Instead, he emphasised that “appropriate safeguards” would instead be put in place. Examples of this might have included judicial input or consultation or concurrence from an “appropriately qualified committee” on areas of child welfare or family law.<sup>115</sup>

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<sup>113</sup> [Ibid. c291](#)

<sup>114</sup> [Ibid. c295](#)

<sup>115</sup> [Ibid.](#)

## 4. How are online proceedings likely to be expanded?

### 4.1 Existing online proceedings

The Government has already rolled-out optional services (for some small claims and certain divorce and probate applications) whereby partial or complete online alternatives to ordinary court proceedings can be used.

The existing pilots have focused, to a significant extent, on digitising the submission and distribution of documents, whether to initiate legal proceedings or in relation to later stages in litigation. The Ministry of Justice has argued in the context of divorce applications, for example, that online applications have significantly reduced the prevalence of mistakes on forms, and therefore has saved time for court staff:

More than 1,000 petitions were issued through the new system during the testing phase – with 91% of people saying they were satisfied with the service. The new, refined and easy to use version was rolled out across England and Wales from 1 May.

Court staff currently spend 13,000 hours dealing with complex paper divorce forms, but this simpler and less technical online service has already contributed to a 95% drop in the number of applications being returned because of mistakes, when compared with paper forms. This means only 0.6% of forms have been rejected since January.<sup>116</sup>

### 4.2 Prospects for further expansion

The key difference this Bill would make is that Ministers would now be able to **require** certain proceedings to take place in whole or in part by electronic means.

It is necessarily difficult to say, however, exactly how such a statutory power would be used or how quickly changes would be made to the existing system as a result of it. The specifics will be the subject of further regulations (under **clauses 2** and **3**) and then subject to the Online Procedure Rules as developed by the Procedure Rule Committee. It seems likely (though is not required by the Bill) that the Ministry of Justice and/or HMCTS would consult (and perhaps pilot) any major proposals to move conventional proceedings to “online-only” before rolling them out on a nationwide basis.

Given the focus of pilots on digitising applications and court documents, it is less clear what the impact this bill might have on different types of departure from “traditional” justice delivery methods. The availability of oral hearings is not something for which online alternatives have yet attempted a mandatory and full substitute. This Bill would, however, allow the Government and the Online Procedure Rule Committee to make more significant changes in that direction in the future.

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<sup>116</sup> Ministry of Justice and HMCTS, [Fully digital divorce application launched to the public](#), 6 May 2018

## 5. Further resources

### Bill documents

- [Bill as introduced in the Commons](#), 3 July 2019
- [Commons Explanatory Notes](#), 3 July 2019
- [Impact Assessment](#), 24 April 2019
- [Human Rights Memorandum](#), 1 May 2019
- [Delegated Powers Memorandum](#), 1 May 2019

### Other Parliamentary materials

- Lords Constitution Committee, [Courts and Tribunals \(Online Procedure\) Bill](#), HL Paper 373, 7 June 2019
- Lords Library Briefing Paper, [Courts and Tribunals \(Online Procedure\) Bill \[HL\]](#), LLN-2019-0055, 9 May 2019
- Public Accounts Committee, [Transforming Courts and Tribunals](#), HC 976, 20 July 2018
- Commons Library Briefing Paper, [The Prisons and Courts Bill](#), 17/7907, 16 March 2017

### Government/Judiciary materials

- Ministry of Justice, [Even more people set to benefit from online court reform](#), 1 May 2019
- Ministry of Justice and HMCTS, [Transforming Our Justice System](#), September 2016
- Lord Briggs, [Civil Courts Structure Review: Interim Report](#), December 2015
- Lord Briggs, [Civil Courts Structure Review: Final Report](#), July 2016

### External Comment

- Michael Cross, [Online courts won't take off without compulsion, report for LSB claims](#), 10 July 2019
- Gordon Dalyell, [Small claims online portal must be done properly](#), 4 July 2019
- Jemma Slingo, [Online probate system to be widely rolled out from October](#), 28 June 2019
- John Hyde, [Peers rein in government over sweeping Online Court powers](#), 26 June 2019
- Joe Tomlinson, [Three Fixable Flaws in The Courts and Tribunals \(Online Procedure\) Bill](#), SSRN, 17 June 2019
- Michael Cross, [Online courts legislation 'intentionally broad' - justice minister](#), 12 June 2019
- Jemma Slingo, [Bill could force high value cases online, peers warn](#), *Law Gazette*, 7 June 2019

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