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Judicial Review and Courts Bill 2021-22

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Summary

On Wednesday 21 July 2021 the Government presented the Judicial Review and Courts Bill 2021-22 to the House of Commons. This Bill includes a range of measures, most of which were headlined in the Queen's Speech earlier in the year, and some of which are provisions reintroduced from bills that fell in previous parliaments. The Bill's Second Reading debate is scheduled for Tuesday 26 October.

The Bill subdivides into two substantive parts.

Part 1 makes reforms to the law of judicial review throughout the United Kingdom, but with a primary focus on England and Wales. In 2020, the Government commissioned the Independent Review of Administrative Law (IRAL), which was chaired by Lord Faulks and reported earlier this year.

The reforms in the Bill implement IRAL's recommendations to abolish so-called *Cart* judicial reviews (through a legal provision known as an "ouster clause") and to provide an explicit statutory basis for courts to make suspended quashing orders (delaying the legal effects of their judgments). The Bill goes further and makes provision about prospective-only judicial remedies (which partially or wholly treat historic illegal acts as though they were valid), for which IRAL made no recommendation.

Part 2 of the Bill covers a wide range of court and tribunal reforms, most of which have either been revived from bills that fell in previous parliaments, or which were otherwise flagged in the 2021 Queen's Speech.

- **Chapter 1** introduces reforms to criminal procedure, including making provision about automatic online convictions for certain offences and new written procedures;
- **Chapter 2** reintroduces proposals from the Court and Tribunals (Online Procedure) Bill 2017-19 to establish a new Online Procedure Rule Committee to regulate electronic court and tribunal proceedings;
- **Chapter 3** reforms the governing structure of the employment tribunals system, integrating it more closely with the unified two-tier tribunals and relieving the Secretary of State for Business, Energy and Industrial Strategy of responsibility for overseeing relevant statutory arrangements;
- **Chapter 4** introduces a range of reforms to the coroner system;
- **Chapter 5** makes miscellaneous changes to the justice system, including abolishing local justice areas (a proposal originally trailed in the Prison and Courts Bill 2016-17) and some updates to legislation enabling certain courts to be closed when replacement facilities are ready for use.

1 Overview

The Judicial Review and Courts Bill is divided into two substantive parts, with the second part being divided into five chapters.

1.1 Part 1: Judicial review

The first part of the Bill is concerned with the law of judicial review: where the legality of the acts and omissions of public bodies can be challenged in the courts. It is also concerned more widely with the question of judicial remedies in administrative law.

The two clauses in **Part 1** implement (and in limited ways, expand upon) recommendations of the Independent Review on Administrative Law (IRAL).

The first of those recommendations was that courts and tribunals should be able, when making quashing orders, to suspend those orders for a period. This would enable public bodies to remedy legal defects without their actions immediately being treated as void and of no effect. IRAL was concerned that the caselaw on suspended remedies was unclear and contradictory. It particularly deprecated the implications of the Supreme Court case *Ahmed v HM Treasury (No. 2)*.[1] In this case judges refused (indeed said it was not open to them) to suspend the relief they had granted (ie to delay the legal effects of their judgment).

The Government's clause goes further than IRAL's recommendations in two important respects. Firstly, it is not confined to suspended quashing orders. It also includes a proposal, set out in its own further consultation, on these reforms.[2] If a court makes a quashing order it could also limit the retrospective effects of its judgment. For example, it could treat unlawfully made regulations, for historical purposes, as having been partly or wholly valid, even if they were void for future purposes. Secondly, the new legislative framework limits the discretion of judges to decide when these new remedies should be used.

The second of IRAL's recommendations was to abolish so-called *Cart*[3] and *Eba*[4] judicial reviews. Those two cases, from England and Wales and from

[1] [2010] UKSC 5

[2] Ministry of Justice, Judicial Review Reform: The Government response to the Independent Review of Administrative Law, CP 408, March 2021

[3] *R (Cart) v Upper Tribunal* [2011] UKSC 28

[4] *Eba v Advocate General for Scotland* [2011] UKSC 29

Scotland respectively, concerned situations in which, exceptionally, a decision of the Upper Tribunal (to refuse an appeal of a First-tier Tribunal decision) could itself be judicially reviewed in the English High Court or the Scottish Court of Session. The Government has decided to abolish this ground of judicial review, completely in England and Wales and to the extent the matter is reserved in Scotland, by inserting an ouster clause into the Tribunals, Courts and Enforcement Act 2007. It has been suggested that this ouster clause may provide a template for future situations in which the Executive invites Parliament to exclude the jurisdiction of the courts.

1.2 Part 2: Courts, tribunals and coroners

Chapter 1: Criminal procedure

Chapter 1 reintroduces several proposals originally set out in the Prisons and Courts Bill 2016-17. The most significant are:

- a new automatic online conviction procedure for specified uncontested low level cases (the Government initially intends to make the new procedure available for the offences of 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);
- extending arrangements for pleading guilty in writing for summary offences; and
- new optional written procedures for dealing with cases involving either-way offences, and for conducting hearings when the defendant is absent.

Chapter 2: Online procedure

During the last Parliament, the Government introduced the Courts and Tribunals (Online Procedure) Bill 2017-19. It completed its stages in the House of Lords, but the Bill fell on prorogation in October 2019 and was not reintroduced. **Chapter 2 of Part 2** of the current Bill essentially reintroduces the measures contained in that Bill, as they stood before prorogation in October 2019, with minor drafting amendments.

Broadly speaking, **Chapter 2 of Part 2** of this Bill does three things. It:

- gives the Lord Chancellor the power (with the concurrence of the Lord Chief Justice or Senior President of Tribunals), via regulations, to require certain types of civil court, family court or tribunal proceedings to be conducted in whole or in part by electronic means (rather than being initiated and/or proceeded with physically);
- establishes an Online Procedure Rules Committee to govern proceedings undertaken by electronic means, and sets out its powers and duties; and
- determines the membership rules of the new Procedure Rules Committee.

Chapter 3: Employment tribunals and the Employment Appeals Tribunal

The third chapter reintroduces measures (from the Prisons and Courts Bill 2016-17) to reform the employment tribunals system in Great Britain (ie not Northern Ireland). Administrative arrangements and procedure rule-making will be more closely integrated and aligned with those of other tribunals (those in the unified "two-tier" tribunal system). This is, in part, to co-ordinate wider procedural reforms, including the greater use of technology in court proceedings (per **Chapter 2**). This will involve several changes, including:

- transferring the responsibility for making procedure rules from the Secretary of State for Business, Energy and Industrial Strategy (BEIS) to the Tribunal Procedure Committee (TPC);
- making the Lord Chancellor responsible for determining the composition of the Employment Tribunal (ET) and Employment Appeals Tribunal (EAT);
- transferring responsibility for paying ET judges from the Secretary of State for BEIS to the Lord Chancellor; and
- allowing for the delegation of some judicial functions to ET and EAT legal case officers (in a similar vein to the delegation of functions for other jurisdictions provided for by the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018).

Chapter 4: Coroners

As part of the 2021 Queen's Speech, the Government announced its Criminal Justice Catch-up and Recovery Plan. This included proposals for a package of measures relating to the coroner system in England and Wales. The legislative proposals in **Chapter 4** would, among other things:

- broaden the circumstances in which a coroner might discontinue an investigation;
- allow an inquest to be held wholly in writing in certain non-contentious cases, rather than with (at least) a limited public hearing;
- enable rules to be made which would allow all participants, including the coroner, to participate remotely in pre-inquest reviews and inquests;
- extend, beyond the period provided in the Coronavirus Act 2020, the flexibility not to hold a jury inquest for deaths linked to a suspected Covid-19 infection; and
- enable the Lord Chancellor, more flexibly, to merge coroner areas within a local authority area.

Calls for further actions and reforms to the coroner service are considered in the Library's briefing, Reforms to the coroner service in England and Wales.[5]

Chapter 5: Other provision

Some miscellaneous justice provisions are included in **Chapter 5 of Part 2** of the Bill.

Most significantly, **Chapter 5** reintroduces a proposal originally made in the Prisons and Courts Bill 2016-17 to abolish local justice areas (territorial subdivisions of the magistrates' courts). This is a measure intended to make the lower courts more flexible to administer and to make them more efficient.

Chapter 5 would also update primary legislation to allow two court buildings in the City of London to be closed. Those are the Mayor's and City of London Court and the City of London Magistrates' Court. They are expected to be fully replaced by a new shared facility from some point in 2026, but the existing buildings are currently legally preserved to be used as courts by Acts of Parliament.

[5] CBP 9328, 23 September 2021

2 Judicial Review reforms

2.1 Independent Review of Administrative Law

Background – Manifesto commitment

In its 2019 General Election manifesto, the Conservative Party pledged to establish a Constitution, Democracy and Rights Commission.[6] The purpose of this Commission, among other things, would be to enable the Government to:

> … update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government [and to ensure] that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays.

Since the election, the Government has adopted a different approach. Instead of carrying out one all-encompassing review, it has split its constitutional reform agenda into various different work streams, some led by the Cabinet Office and others led by the Ministry of Justice.

The (now former) Lord Chancellor, Robert Buckland, commissioned two separate "Independent Reviews" into, respectively, Administrative Law and the Human Rights Act 1998. The Independent Review of Administrative Law (IRAL) reported in March 2021, whereas the Independent Human Rights Act Review (IHRAR) is not expected to report until at least the autumn of 2021.

While in the post of Lord Chancellor, Robert Buckland also repeatedly indicated that he intended to review the operation of the Constitutional Reform Act 2005, but it is not yet clear what form that review might take, who will be involved in it, or what specific reforms he had in mind.[7]

[6] Conservative and Unionist Party General Election 2019 Manifesto, p48

[7] The issue was raised in two keynote speeches. See Ministry of Justice, Lord Chancellor speaks at UCL conference on the constitution, 17 June 2021; Lord Chancellor's Speech: Law and politics – the nightmare and the noble dream, 25 March 2021. The Lord Chancellor also referred to a review of the Constitutional Reform Act in remarks to the Joint Committee on Human Rights, Oral evidence: Ministerial Scrutiny: Human Rights, HC 548, 14 July 2021 (QQ9-11) and to the Public Administration and Constitutional Affairs Committee, Oral evidence: The Government's Constitution, Democracy and Rights Commission, HC 829, 8 December 2020 (QQ115-118)

Why was IRAL commissioned?

In July 2020, the Lord Chancellor launched an Independent Review of Administrative Law (IRAL), to be chaired by the former Justice minister, Lord Faulks. The chair led a panel comprising five other experts, and was asked to conduct a review not just of judicial review, but administrative law more broadly. The Lord Chancellor set IRAL's terms of reference, which are reproduced (excluding its extensive eight "notes") below:

Terms of Reference – Independent Review of Administrative Law[8]

The Review should examine trends in judicial review of executive action, ("JR"), in particular in relation to the policies and decision making of the Government. It should bear in mind how the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can be properly balanced with the role of the executive to govern effectively under the law. It should consider data and evidence on the development of JR and of judicial decision-making and consider what (if any) options for reforms might be justified. The review should consider in particular:

1. Whether the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute.
2. Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of the justiciability/non-justiciability of the exercise of a public law power and/or function could be considered by the Government.
3. Whether, where the exercise of a public law power should be justiciable: (i) on which grounds the courts should be able to find a decision to be unlawful; (ii) whether those grounds should depend on the nature and subject matter of the power and (iii) the remedies available in respect of the various grounds on which a decision may be declared unlawful.
4. Whether procedural reforms to judicial review are necessary, in general to "streamline the process", and, in particular: (a) on the burden and effect of disclosure in particular in relation to "policy decisions" in Government; (b) in relation to the duty of candour, particularly as it affects Government; (c) on possible amendments to the law of standing; (d) on time limits for bringing claims, (e) on the principles on which relief is granted in claims for judicial review, (f) on rights of appeal, including on the issue of permission to bring JR proceedings and; (g) on costs and interveners.

[8] Independent Review of Administrative Law, Terms of Reference, July 2020

What conclusions did IRAL reach?

On several of the issues IRAL was asked to consider, it recommended no, or very little, change. IRAL did not support, for instance, the codification of judicial review, and it opposed any move further to restrict the rules on standing or further to tighten time limits for bringing a judicial review claim.

This provided some re-assurance to sceptics of IRAL. As IRAL's report readily admitted, academics and practitioners had questioned both the breadth of its remit and the amount of time it had been given to carry out its work.[9]

IRAL made three core policy recommendations.

- Firstly, it said Parliament should legislate to reverse the decision in *R (Cart) v Upper Tribunal*.[10] That UK Supreme Court judgment established that, in limited circumstances, decisions of the Upper Tribunal could be judicially reviewed by the High Court of England and Wales. The panel concluded this type of case had a disproportionate impact on judicial resources with extremely low prospects of success and should therefore be discontinued.
- Secondly, IRAL concluded that "suspended" quashing orders should be recognised in statute as being available, "reversing", as it saw it, the conclusions of another Supreme Court decision in *Ahmed (No. 2)*.[11] Under this reform, courts could choose to give public bodies a time-limited opportunity to remedy an unlawful act instead of immediately striking it down. At the moment, judicial precedent on "nullity" appears to leave little, if any, discretion. Courts and tribunals must, post *Anisminic*, treat any unlawful act as though it had never been validly taken in the first place (i.e. as a "nullity").[12] New statutory flexibility to depart from that would, IRAL said, be particularly useful in "constitutional cases": courts could empower parliament to resolve disputes about the use of executive powers.[13]
- Thirdly, it recommended the Civil Procedure Rules should no longer require that a judicial review is made "promptly", but that the existing three-month time limit should be retained. This change does not require primary legislation.

On quashing orders, it should be noted, IRAL only made a recommendation about their suspendability. It did not comment on whether it should be possible to limit or eliminate the retrospective effects of a quashing order,

9 Independent Review of Administrative Law, CP 407, March 2021, para 1
10 [2011] UKSC 28
11 [2010] UKSC 5
12 *Anisminic Ltd. v Foreign Compensation Commission* [1968] UKHL 6
13 Independent Review of Administrative Law, CP 407, March 2021, para 3.64

save to observe that some of the responses to its call for evidence suggested that as a possible reform.[14]

IRAL made no specific recommendation with respect to 'ouster clauses' (legislative provisions that limit the jurisdiction of the Senior Courts in relation to the use of a particular power). It proceeded on the assumption that the doctrine of parliamentary sovereignty means that Parliament has the power to legislate to limit or exclude judicial review, but noted that the wisdom and risk in doing so are different matters, concluding that "there should be highly cogent reasons for taking such an exceptional course".[15]

Criticisms of IRAL process

Publicity and transparency of evidence submissions

Lord Faulks, the chair of the IRAL panel, had hoped to be able to publish the submissions made to it, especially those submitted by individual Government departments. This desire to publish was to support transparency about how the panel had arrived at its conclusions, and to give a clearer perspective on the attitude of different parts of Government to the judicial review process and its impact on their work.[16]

However, the Lord Chancellor did not give permission for those Governmental submissions to be published. Several Government departments have refused Freedom of Information requests to publish their submissions, citing two exemptions:

- that publication would prejudice effective conduct of public affairs; and
- that it relates to the formulation and development of government policy.

Instead, the Ministry of Justice published a curated summary of the responses given by fourteen government departments.[17]

The UK Administrative Justice Institute has collated a list of all publicly available submissions to IRAL (typically hosted on the websites of those submitting evidence).[18]

[14] Independent Review of Administrative Law, CP 407, March 2021, paras 3.49 and C20
[15] Independent Review of Administrative Law March 2021, para 2.89
[16] Monidipa Fouzder, Faulks: I wanted to publish government submissions on judicial review, Law Gazette, 17 June 2021
[17] Monidipa Fouzder, 'Chilling impact': summary of Whitehall submissions to public law review published, 7 April 2021
[18] UK Administrative Justice Institute, Collection of responses to the Independent Review of Administrative Law (IRAL), 4 November 2020

2.2 Judicial Review Consultation

Following the publication of the Independent Review of Administrative Law, the Government published its response. This indicated that it wished to consult further both about how best to implement IRAL's core recommendations, and on potentially more far-reaching reforms.[19]

Judicial Review Consultation: Government's proposals for "further reform"[20]

11. In addition, the Government is considering further reforms which build on the analysis in the Report, and on some of the options the Panel suggested but on which they did not make definite recommendations. The Government thinks there is merit in exploring the following areas to see whether practical measures could address some of the issues identified in the Report:

    a. legislating to clarify the effect of statutory ouster clauses

    b. legislating to introduce remedies which are of prospective effect only, to be used by the courts on a discretionary basis

    c. legislating that, for challenges of Statutory Instruments, there is a presumption, or a mandatory requirement for any remedy to be prospective only

    d. legislating for suspended quashing orders to be presumed or required

    e. legislating on the principles which lead to a decision being a nullity by operation of law

    f. making further procedural reforms (which would need to be considered by the [Civil Procedure Rule Committee])

The Ministry of Justice allowed six weeks for responses to be submitted to the consultation. This was criticised by several external commentators and organisations, who regarded this window as being too short.[21]

The Government published its formal response to the consultation at the same time as introducing the Judicial Review and Courts Bill before

[19] Ministry of Justice, Judicial Review Reform: The Government response to the Independent Review of Administrative Law, CP 408, March 2021, paras 9 and 10 and Consultation QQ1-2 and 9

[20] Ministry of Justice, Judicial Review Reform: The Government response to the Independent Review of Administrative Law, CP 408, March 2021, para 11 and Consultation QQ3-8

[21] Monidipa Fouzder, MoJ could face judicial review - over JR reform consultation, Law Gazette, 9 April 2021

Parliament.[22] It decided against legislating to clarify the effect of statutory ouster clauses or on the principles of nullity. However, it does intend to legislate (in this Bill) on the question of partially or wholly non-retrospective remedies.

2.3 Proposals in the Bill

Statutory scheme for "limited" quashing orders in administrative law proceedings

The current law on nullity and quashing orders

Currently, if a UK court or tribunal finds that a public body acted unlawfully, and/or that secondary legislation was made unlawfully, it will almost always (unless another rule of law otherwise requires) treat the actions and/or legislation as a "nullity" or "void ab initio" (void from the outset).[23] This means that the law regards those actions or legislative provisions as never having been taken or made in the first place, and anything legally following on from them is also not valid. A declaration of illegality by a court or tribunal is usually enough to deprive acts and secondary legislation of their effect, but a "quashing order" will sometimes be issued to clarify or re-enforce the full legal implications that flow from it.[24]

This default approach to what is known as the "metaphysic of nullity" prevents, as Professor Mark Elliott of the University of Cambridge has put it, a situation in which the Government can "do things, or be treated as if it could do things that it had never been given the legal power to do."[25]

Consequences of the current law

There are two necessary consequences of the existing law's approach to nullity and quashing of unlawful decisions.

Firstly, it has retrospective implications. Individuals and organisations will have presumed (often not unreasonably) that Government action or legislation was valid, and arranged their own affairs accordingly. Having done so may have been to their detriment, placing them in a worse position than if they had known from the outset the Government was acting or legislating unlawfully and therefore arranged their affairs in a different way.

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[22] Ministry of Justice, Judicial Review Reform Consultation: The Government Response, CP 477, July 2021

[23] *Anisminic Ltd. v Foreign Compensation Commission* [1968] UKHL 6

[24] The legal authority under which the High Court makes quashing orders is section 29 Senior Courts Act 1981. Equivalent provision exists under section 15 Tribunals, Courts and Enforcement Act 2007 for the Upper Tribunal.

[25] Mark Elliott, Constitutional Law: The Big Picture II – Judicial Review (Lecture), Public Law for Everyone, 28 May 2021

- For example, if regulations purported to offer a form of business tax relief, but the regulations were later declared null and void, those businesses that had claimed the tax relief would no longer be entitled to it and would (by default) be liable for the unpaid tax. Businesses may have relied on the relief to inform other business decisions, meaning that an adverse ruling causes them financial detriment or other difficulties.

Secondly, this approach has policy and administrative implications in the immediate aftermath of a court judgment. Public bodies and third parties can no longer rely on the actions or regulations that have been declared unlawful and not just for the individual who brought the successful legal challenge, but also others in the same, or a similar, position. This means that, unless and until new actions are taken or legislation is made, administrative action has to change and the rights and duties of third parties are affected.

- For example, if a set of social security regulations purported to impose benefits sanctions on those taking inadequate steps to find employment, and those regulations were then declared to be unlawfully made, the Department for Work and Pensions would both have to recompense those illegally sanctioned and, with immediate effect, it could not continue to sanction claimants under those void regulations.

The Government might consider that the implications of a court or tribunal judgment are undesirable, either because they unfairly reward or penalise groups of people retrospectively, or because they interfere with broader policy objectives, or the functions of administrative bodies going forward.

Crucially, however, it is the Government's constitutional responsibility, not for the courts, to bring forward legislation or other policy measures to deal with those problems, and where relevant for Parliament to decide whether to approve those measures. The courts expect to leave it to political institutions with the relevant expertise and democratic legitimacy to strike the balance between competing policy interests. Judicial review is not, and is not intended to be, a substitute for the evaluative decision-making of the political process.

Existing powers to suspend/limit retrospective effect of quashing orders

In its report, IRAL concluded that, while *Anisminic*'s "metaphysic of nullity" had been the established position in English law for some time, in practice the courts had taken an inconsistent and "half-hearted" approach to the legal effects of declarations and quashing orders.[26] Sometimes declarations would be regarded as rendering delegated action or legislation void. In other contexts, courts would make a declaration, but refuse to make a quashing order, and say this meant the illegal action or legislation would stand notwithstanding a finding of illegality. This position relied on the notion that judicial review remedies, including declarations, are inherently discretionary.

[26] Independent Review of Administrative Law, CP 407, March 2021 para 3.59

The example IRAL gave of this discretion was *R (Hurley and Moore) v Secretary of State for Business, Innovation and Skills*.[27] In that dispute, the Government had breached its duties under the Equality Act 2010 when making regulations. Those regulations, among other things, raised the maximum level of university tuition fees in England. The High Court made a declaration to that effect. However, it assumed that a declaration, on its own, would not invalidate the regulations: that only a quashing order would do that. The court's justification for not making a quashing order was that there was not a "substantial" breach of the Equality Act and that quashing the regulations would cause "administrative chaos".

IRAL said that *Hurley and Moore*, and cases like it, would have been better addressed if a court were to make a suspended quashing order, rather than just a declaration or a regular quashing order. This would give the Government time to revisit and fix the identified legal defect without up-ending the statutory scheme on which other public bodies, including Universities, had hitherto relied.[28]

Lewis Graham, a Research Fellow at the Public Law Project, has argued that both the Independent Review of Administrative Law and the Government have misinterpreted the judicial precedents on remedies, including *Ahmed v HM Treasury (No. 2)*.[29] He argues that it is already possible for judges to:

- make a quashing order limiting or eliminating its retrospective effects; and/or
- suspend the effect of a quashing order.

On this alternative reading of the case law, there is still a very strong presumption against suspended or non-retrospective remedies (because they would usually be incompatible with providing litigants with a fair and just remedy). However, there would not be an absolute bar: such orders are theoretically available to judges already, on a discretionary basis. So far as they do exist, there is no statutory steer as to when they should be used, or what factors a court should take into account when deciding, exceptionally, to suspend or restrict the effect of a quashing order.

Similarly, it has been suggested that declaratory relief (where a quashing order is not even made) can already be suspended, albeit the context in which judges would do so is typically very narrow. The legal commentator Joshua Rosenberg recently pointed to an example the case of *R (D4) v Secretary of State for the Home Department*.[30] This suggests cases like *Hurley* need not arise even under existing law: judges can already suspend relief.

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[27] [2021] EWHC 201 (Admin)

[28] Independent Review of Administrative Law, CP 407, March 2021, para 3.63, 3.60 and 3.64

[29] Lewis Graham, Suspended and prospective quashing orders: the current picture, UK Constitutional Law Association, 7 June 2021

[30] Joshua Rosenberg, Pulling the plug on void decisions, A Lawyer Writes, 1 August 2021

Suspending declaratory relief: A recent example

In the case of *R (D4) v Secretary of State for the Home Department*, the claimant successfully argued that, when the (then) Home Secretary made the British Nationality (General) (Amendment) Regulations 2018, he did so in breach of the powers delegated to him by the British Nationality Act 1981.

Justice Chamberlain concluded that the 1981 Act only intended to authorise the Home Secretary to make regulations that prescribed how someone is to be notified that they have been deprived of British citizenship. Part of the 2018 Regulations went further than this, stipulating circumstances where in effect the Home Secretary's decision does not have to be notified at all.

The offending regulatory provisions were therefore declared to be ultra vires (beyond the Home Secretary's powers) and therefore "void and of no effect". The knock-on effect of this was that the (current) Home Secretary's order to deprive D4 of her citizenship, which relied on the validity of the relevant 2018 regulations, was also a nullity: Parliament's intention would be frustrated if the unlawful regulations were treated as valid or otherwise given effect.

This judicial decision did not involve a quashing order; it was merely a declaration. As Justice Chamberlain explained, in a case like this, "a declaration and a quashing order would have the same legal effect… the proper relief is a declaration: where the challenged decision is in law a nullity, there is no need for a quashing order."[31]

Before handing down his judgment, Justice Chamberlain circulated a draft to the parties. As he explained in his final judgment:

> On receipt of the draft judgment, the Home Secretary invited me to suspend the effect of the declarations pending the resolution of any application for permission to appeal. D4 does not accept that the court can or should do that. However, the parties agreed that there should be further written submissions about this and that the declarations should be suspended on an interim basis pending resolution of the issue. Given that it is arguable that there is jurisdiction to do this, I shall suspend the effect of the declarations for a short period to allow the parties to make further written submissions on this question.[32]

[31] [2021] EWHC 2179 (Admin) para 62

[32] ibid. para 70

Exceptions in the current law

In the devolution context (in Scotland, Wales and Northern Ireland), the law on remedies and quashing orders is explicitly different.[33] If a court finds that:

- a provision of an Act of a devolved legislature "is not law" because it exceeded the competences of the devolved legislature;
- delegated legislation of a devolved authority was not validly made; or
- a devolved authority has otherwise acted beyond its powers;

it is open to the court to restrict the real-world consequences of such a finding. Specifically, a court can by order:

- limit or eliminate its retrospective effect; and/or
- suspend the order for a given period of time and impose conditions on that suspension, to enable the defect to be addressed.

The most important respect in which the devolution context differs is that judges can be confronted with cases concerned with the validity of devolved primary legislation, rather than just delegated legislation or executive/administrative acts. There is no equivalent context in which judicial review can operate for Acts of the UK Parliament, because those Acts are completely immune from common law judicial review (by virtue of the sovereignty of Parliament).

What would Clause 1 of this Bill do?

Clause 1(1) of the Bill would insert a **new section 29A** into the **Senior Courts Act 1981**. Under section 29 of that Act, the High Court already has powers, among other things, to make declarations and quashing orders. **New section 29A** would enable those quashing orders to restrict or eliminate the retrospective effect of a finding of illegality. It would also allow the court to decide that a quashing order should be suspended for a period of time, and to do so subject to conditions.[34]

If a suspended quashing order is made, the "impugned act" is to be "upheld" until the quashing order takes effect: the unlawful decision or legislation remains in force.[35] Similarly if an order purports to restrict or eliminate the retrospective effects of quashing, the impugned act is "upheld" and treated as if it had been validly done (to that extent).[36]

[33] See: section 102 Scotland Act 1998; section 153 Government of Wales Act 2006; section 81 Northern Ireland Act 1998

[34] Equivalent amendments are made to section 15 Tribunals, Courts and Enforcement Act 2007, so that the Upper Tribunal's quashing powers are treated in much the same way. See clause 1(3).

[35] See new section 29A(3) and (5) Senior Courts Act 1981 as inserted by clause 1(1)

[36] See new section 29A(4) and (5) Senior Courts Act 1981 as inserted by clause 1(1)

A court can, subsequently, decide to vary the date on which a suspended quashing order takes effect (for example if the Government successfully argues that it needs more time to meet the conditions of the order).[37]

When would a court or tribunal exercise these new powers?

New subsections 29A(8-10) of the **Senior Courts Act 1981** would stipulate the approach the courts take when considering the appropriateness and terms of a quashing order.

There are six factors that judges must "have regard to" before deciding whether to suspend a quashing order or to limit its retrospective effects:

- the nature and circumstances of the relevant defect;
- any detriment to good administration that would result from exercising or failing to exercise the power;
- the interests or expectations of persons who would benefit from the quashing of the impugned act;
- the interests or expectations of persons who have relied on the impugned act;
- so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act; and
- any other matter that appears to the court to be relevant.[38]

A presumption in favour of a limited quashing order?

The likely effect of (what would be) **new subsection 29A(9)** of **the Senior Courts Act 1981** is not immediately clear. On one reading, it makes the default position in law that a court will use its powers and make a limited quashing order wherever it finds an administrative act or secondary legislation would otherwise be illegal and therefore a nullity. The proposed statutory language of "the court must exercise the powers" points in this direction.

However, there are three important countervailing factors.

1. The duty might not be taken to arise at all if the court has decided not (or has not been asked) to make a quashing order. A quashing order is often considered unnecessary at the moment, because it provides substantially the same relief as a declaration.
2. The duty only applies where suspended or limited prospective remedies would still provide "adequate redress". The "adequacy" of redress will ultimately be a matter of judgment for the relevant court or tribunal.

[37] See new section 29A(7) Senior Courts Act 1981 as inserted by clause 1(1)
[38] See new section 29A(8) Senior Courts Act 1981 as inserted by clause 1(1)

3. The duty does not apply if the court "sees good reason not to" grant a suspended remedy, or one with limited retrospective effect. What is a "good reason" will be a matter of judgment for the relevant court.

On "adequacy of redress", the Bill would require a court or tribunal to take particular account of any undertakings made by the Government or relevant public body as to measures that will be taken to remedy a legal defect.

No presumption in favour of limited quashing order in devolution context

The approach in this Bill is notably different from that contained in the three devolution statutes. Those Acts are less prescriptive and do not contain a presumption in favour of making a limited quashing order. It is left entirely to the discretion of the court or tribunal whether to make an order limiting the annulling effects of a declaration or quashing order.

The only statutory duty imposed by the devolution statutes in this context is that the court or tribunal must "have regard to the extent to which persons who are not parties to the proceedings would otherwise be adversely affected".[39]

It might be thought that the power to suspend a quashing order in the devolution context is inherently more limited, as the statutes provide that the purpose of a suspension is "to allow the defect to be corrected". No such stipulation applies under this Bill, though in practice it seems as though that will be the usual justification for making a suspended order.

Assessing the potential impact of the new law on quashing orders

It is difficult, in the abstract, to assess what impact these statutory provisions will have on administrative law proceedings. Much will depend on how, if at all, they alter the behaviour and attitudes of litigants and the judiciary.

A plausible outcome of these changes is that public authorities will more often, and perhaps even routinely, request that a court or tribunal:

- makes a quashing order and not just a declaration of illegality; and
- suspends and/or limits the retrospective effects of that quashing order.

This will add greater significance to the question of remedies in the course of proceedings, especially in judicial review cases. As the legal commentator Joshua Rozenberg has suggested, the existence of the powers, and the statutory presumption in favour of their use, may be understood as a "clear steer to the courts to make a limited quashing order wherever possible".[40]

However, the statute appears to leave to the courts and tribunals at least some (and possibly a great deal of) discretion about whether and when to

[39] section 102(2)(b) Scotland Act 1998; section 153(2)(b) Government of Wales Act 2006; section 81(2)(b) Northern Ireland Act 1998

[40] Joshua Rozenberg, Fettering the courts' discretion, A Lawyer Writes, 23 July 2021

make limited quashing orders. In the vast majority of cases, it may well be that the "adequacy of redress" and "good reason" safeguards preclude the **new section 29A** powers being used. This would mean that the courts still prefer to grant relief in the form of a declaration and/or a full quashing order. This seems to be the view of Sir Jonathan Jones QC, former Treasury Solicitor:

> [Clause] 1 gives the court power to postpone or limit the retrospective effect of a quashing order. I agreed with [Joshua Rozenberg] yesterday that this isn't an "unfettered" discretion, because the Bill sets a sort of presumption that the power will be used [and] specifies relevant factors, but the clause allows the court to decide what is "adequate redress", and whether there is "good reason" not to limit the effect of an order, so overall the provision looks reasonable and should work fairly.[41]

Other reactions to the proposed changes

Professor Richard Ekins, Professor of Law and Constitutional Government at the University of Oxford and Head of Policy Exchange's Judicial Power Project, welcomed the changes to quashing order powers:

> The Bill's changes to the remedial discretion of the courts promise to help them avoid needless uncertainty or disruption, while still recognising and quashing unlawful action.[42]

Tom Hickman QC, Barrister and Professor of Public Law at University College London has argued that clause 1 represents a significant transfer of "quasi-legislative power" to the courts. He said of the reforms:

> In substance the change would permit courts to exercise a quasi-legislative power including to override primary legislation…
>
> This would permit, in effect, a Judge to rule: "this instrument (or decision) is unlawful – it is outside the powers conferred by Parliament and has no legal basis– but in my discretion I will give it temporary legal effect". The power would not be limited to procedural defects in the decision or measure and could be used even where the measure has been found to be contrary to the express or implied words of a statute. The courts would be given a substantial power to suspend temporarily the effect of a statute or to amend temporarily the effect of its terms.[43]

Hickman added that such a regime could enable Governments to "avoid the full consequences of executive decisions being unlawful" and enable it to

[41] Sir Jonathan Jones QC, Twitter thread, 8:52am 22 July 2021 [accessed 28.7.21]

[42] Ministry of Justice, Press Release: New Bill hands additional tools to judges, 21 July 2021

[43] Tom Hickman, Quashing Orders and the Judicial Review and Courts Act, UK Constitutional Law Association, 26 July 2021

avoid or limit the parliamentary scrutiny that comes with remedial legislation that often follows judicial review defeats.

Abolishing judicial review of the Upper Tribunal

The current law: *Cart* judicial reviews

Under section 13(8)(c) of the Tribunals, Court and Enforcement Act 2007, a decision by the Upper Tribunal (UT) to refuse to grant permission to appeal against a decision of the First-tier Tribunal (FTT) is not capable of being appealed. However in the case of *Cart*, the Supreme Court held that if the decision of the FTT was based on an error of law, then the UT's decision to refuse permission to appeal would also be affected by that error, and should thus be amenable to review.[44]

This category of case – applications to review decisions of the UT to refuse permission to appeal against decisions of the FTT based on an error of law – have become known as *Cart* judicial reviews ("*Cart* JRs").

In a very similar case, *Eba v Advocate General for Scotland*, the Supreme Court held that the position on reviewability of the Upper Tribunal in Scotland was the same as in England and Wales.[45]

The Civil Procedure Rules (which govern procedure in the civil courts in England and Wales) state that permission to make an application for a *Cart* JR should only be granted if "there is an arguable case, which has a reasonable prosect of success, that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the First Tier Tribunal against which permission to appeal was sought are wrong in law".[46] There is a further requirement that the claim raises an important point of principle or there is some other compelling reason to hear it.

In the subsequent case *Privacy International* (discussed in further detail below), Lord Carnwath suggested that:

> The critical step taken by this court in Cart was to confirm, what was perhaps implicit in some of the earlier cases, that it is ultimately for the courts, not the legislature, to determine the limits set by the rule of law to the power to exclude review. This proposition should be seen as based, not on such elusive concepts as jurisdiction (wide or narrow), ultra vires, or nullity, but rather as a natural application of the constitutional principle of the rule of law (as affirmed by section 1 of the 2005 [Constitutional Reform] Act), and as an essential counterpart to the power of Parliament to make law. The constitutional roles both of Parliament, as the maker of the law, and

[44] R (Cart) v Upper Tribunal [2011] UKSC 28

[45] *Eba v Advocate General for Scotland* [2011] UKSC 29

[46] Civil Procedure Rule 54.7

> of the High Court, and ultimately of the appellate courts, as the guardians and interpreters of that law, are thus respected.[47]

What did IRAL recommend?

IRAL reported that several members of the judiciary had requested that it consider *Cart* JRs in its review. It cited data provided by the Ministry of Justice showing that *Cart* JRs constitute the largest category of applications for judicial review to the Administrative Court, an average of 779 per year from 2015-2019.

In light of its analysis that *Cart* JRs had a very low rate of success, IRAL recommended that "the practice of making and considering such applications should be discontinued".[48]

What would clause 2 of the Bill do?

Clause 2 of the Bill would amend Chapter 2 of Part 1 of the Tribunals, Courts and Enforcement Act 2007 (the "2007 Act", which originally created the two-tier tribunal system). It would add **new section 11A** to the 2007 Act, which seeks to clarify that decisions of the Upper Tribunal cannot be judicially reviewed along the lines permitted following the UK Supreme Court judgments in *Cart* and *Eba*. The provision is, in essence, a partial and qualified ouster clause (see below for further discussion of ouster clauses).

New section 11A of the 2007 Act would (more or less) completely exclude the supervisory jurisdiction of the High Court of England and Wales to review the decisions of the UT. Any judicial review would be limited to questions about whether:

- an application before the Upper Tribunal to appeal a First tier Tribunal decision was a valid one;
- whether the Upper Tribunal had been properly constituted; or
- whether the Upper Tribunal's proceedings were conducted in bad faith or in breach of fundamental principles of natural justice.

The new section seeks to emphasise its effect by specifically providing that:

- if the Upper Tribunal makes an error in reaching its decision, it is not to be regarded as having exceeded its powers;[49]
- The "supervisory jurisdiction" of the High Court in England and Wales or the Court of Session in Scotland does not extend to a decision of the Upper Tribunal to refuse permission to appeal;[50]

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[47] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, para 131

[48] Independent Review of Administrative Law, CP 407, March 2021, para 3.46

[49] new subsection 11A(3)(a) Tribunals Courts and Enforcement Act, as inserted by clause 2

[50] new subsection 11A(3)(b)

- no application or petition for judicial review can be brought in relation to such a decision of the Upper Tribunal;[51] and
- the definition of "decisions" includes "purported decisions", meaning that even decisions that would be regarded as a nullity (on the basis that the Upper Tribunal did not have the power to make the decision) would be protected from challenge by the clause.[52]

In Scotland and Northern Ireland, the possibility of reviewing Upper Tribunal decisions about permission to appeal from the FTT would be retained where the underlying issue that is the subject of the challenge is within the competence of the Scottish Parliament or Northern Ireland Assembly.[53]

Criticism of the evidence base

The empirical basis for the recommendation to limit *Cart* JRs was IRAL's analysis of their success rate, which it put at 0.22%, based on figures supplied by the Ministry of Justice and case reports on Westlaw and BAILII (legal databases). IRAL concluded that the "continued expenditure of judicial resources … cannot be defended" with such a low prospect of success, and "that the practice of making and considering such applications should be discontinued".[54]

The Government agreed with this recommendation, endorsing IRAL's analysis, and committing to implement the recommendation. It acknowledged that "this may cause some injustice" in a few cases, but stated that it "considers the concept of diverting large amounts of public resources towards these cases to be disproportionate".[55]

However, subsequent analysis by Dr Joe Tomlinson and Alison Pickup of the Public Law Project suggested that this figure was "seriously misconceived" and thus undermined the premise of the recommendation, that *Cart* JRs constitute a disproportionate use of judicial resources.[56]

Tomlinson and Pickup noted that IRAL had found 45 reported cases between 2012-2019, of which 12 were successful. However, IRAL calculated the success rate as a proportion of the figure provided by the MoJ for the total number of *Cart* JRs over that period – 5502, thus artificially deflating the success rate by assuming (without any basis) that the 5457 cases which were not reported were all failures.

They further noted that the procedure for *Cart* JRs set out in the Civil Procedure Rules, which has been streamlined in order to limit the expenditure

[51] Ibid.
[52] new subsection 11A(7)
[53] new subsection 11A(5)
[54] Independent Review of Administrative Law, CP 407, March 2021, para 3.46
[55] Judicial Review Reform: The Government Response to the Independent Review of Administrative Law, Ministry of Justice, CP 408, March 2021, paras 49-52
[56] Joe Tomlinson and Alison Pickup, Putting the *Cart* before the horse? The Confused Empirical Basis for Reform of *Cart* Judicial Reviews, UK Constitutional Law Association, 29 March 2021

of judicial resource, means reported judgments are "inevitably extremely rare". Tomlinson and Pickup concluded:

> We do not know how many *Cart* judicial reviews get permission or are ultimately successful, but it is quite clear, on the empirical basis being relied upon for this proposal, that neither does the Government. They, and others supporting the proposal to discontinue this form of judicial review, ought to be, at very least, more nervous of the impact of the proposal.[57]

The Government addressed these criticisms in its response to the consultation. The Ministry of Justice conducted a fresh analysis of the data, which found the success rate to be around 3%.[58]

It concluded that this was still substantially lower than the success rate in other types of JR, and that together with the high number of *Cart* JRs, and the status of the UT as a Superior Court of Record,[59] this justified its position that *Cart* JRs constitute a disproportionate use of judicial resource. It therefore committed to legislate to overturn *Cart*.[60]

Other reaction to the proposed changes

Professor Richard Ekins welcomed the overturning of *Cart* and *Eba,* suggesting it would "restore the Upper Tribunal's jurisdiction, protecting it from unnecessary litigation and helping to vindicate Parliament's authority to determine the scope and reach of judicial review".[61]

David Greene, former President of the Law Society, warned on the other hand that removing the option of recourse to judicial review in any area risks injustice "not only for those people whom the court would have found in favour of, but also for the much larger number of cases where settlement is achieved only under the threat of judicial review".[62]

2.4 Wider implications

A template for ouster clauses?

Ouster clauses are clauses in primary legislation which seek to preclude the court's jurisdiction on specific issues, placing certain powers and decisions beyond the reach of judicial review.

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[57] ibid.

[58] Judicial Review Reform Consultation: The Government Response, Annex E

[59] This means it can set precedents. The Government's position is that the UT is equivalent in status to the High Court and should not therefore be subject to the High Court's supervisory jurisdiction.

[60] Judicial Review Reform Consultation: The Government Response, para 37

[61] Ministry of Justice, New Bill hands additional tools to judges, 21 July 2021

[62] Monidipa Fouzder, Society raises concern over JR proposal on ouster clauses, Law Gazette, 19 March 2021

The press release which accompanied the Bill's publication stated that, although the Bill would not address ouster clauses in the way set out in the consultation (which had proposed a general framework),

> … it is expected that the legal text that removes the Cart judgment will serve as a framework that can be replicated in other legislation. This will draw a line under decades of uncertainty and confusion as to their proper use.

Recent case law: *Privacy International*

In 2019, the Supreme Court ruled that decisions made by the Investigatory Powers Tribunal (the IPT) are subject to review by the High Court in England and Wales. This was despite apparently clear wording in the Regulation of Investigatory Powers Act 2000 (RIPA, which established the IPT) that "determinations … and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court" (s67(8)).

The Supreme Court decided by a majority of 4 to 3 that section 67(8) of RIPA did not prevent the High Court from judicially reviewing a decision of the IPT.

Giving the lead judgment, Lord Carnwath concluded that any decision by the IPT based on an error of law would not be legally valid. Further, the wording of an ouster clause has to be interpreted in the context of a common law presumption against interpreting legislation so as to exclude the possibility of judicial review by the High Court.

In light of this presumption, an ouster clause can only exclude the possibility of judicial review by using the most clear and explicit words. The wording of section 67(8) was not clear enough to exclude the possibility of judicial review of a decision by the IPT that was based on an error of law and therefore legally invalid. This conclusion was necessary to ensure the consistent application of the rule of law, because the legal issues decided by the IPT are of general public importance, and have implications for legal rights and remedies going beyond the IPT's remit.

The Supreme Court did not reach a firm conclusion on a second more general question as to the circumstances in which Parliament could oust the High Court's jurisdiction. However, Lord Carnwath concluded (at para 144) that there was:

> a strong case for holding that, consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal … . In all cases, regardless of the words used, it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld… .

Government consultation

One of the additional proposals for reform put forward in the Government's consultation was "legislating to clarify the effect of statutory ouster clauses", on the basis of a "core principle … that ouster clauses legislated for by Parliament should not be rendered as of no effect".[63]

This reflects the fact, illustrated by recent case law, that the courts have tended not to give effect to ouster clauses which purport to oust their jurisdiction entirely. Instead, they have found that decisions based on errors of law are still capable of being reviewed, on the basis that they involve the exercise of powers that Parliament did not intend to give to the decision maker. [64]

IRAL made no specific recommendation with respect to ouster clauses. It proceeded on the assumption that the doctrine of parliamentary sovereignty means that Parliament has the power to legislate to limit or exclude judicial review, but noted that the wisdom and risk in doing so are different matters, concluding that "there should be highly cogent reasons for taking such an exceptional course".[65]

The consultation noted that IRAL made no such recommendation on ouster clauses, but explained the Government's position that the courts' approach is:

> … detrimental to the effective conduct of public affairs as it makes the law as set out by Parliament far less predictable, especially when the courts have not been reluctant to use some stretching logic and hypothetical scenarios to reduce or eliminate the effect of ouster clauses … .The danger of an approach to interpreting clauses in a way that does not respect Parliamentary sovereignty is, we believe, a real one.[66]

Though it acknowledged that it is not unreasonable to presume that Parliament would not usually intend a body to operate with "unlimited restriction, and with no regards to any form of accountability", the paper concluded that further clarity is needed as to how the courts should interpret ouster clauses.[67]

It also suggested that ouster clauses are not a way of avoiding scrutiny, but rather "are a reassertion of Parliamentary Sovereignty, acting as a tool for Parliament to determine areas which are better for political rather than legal accountability".[68]

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[63] Ministry of Justice, Judicial Review Reform: The Government response to the Independent Review of Administrative Law, CP 408, March 2021, para 90

[64] See *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22

[65] Independent Review of Administrative Law, CP 407, March 2021, para 2.89

[66] Ministry of Justice, Judicial Review Reform: The Government response to the Independent Review of Administrative Law, CP 408, March 2021, para 39

[67] ibid.

[68] ibid. para 86

The consultation thus asked whether there should be a framework to give effect to ouster clauses. It proposed a 'safety valve' provision in how ouster clauses are interpreted, which "would allow the courts not to give effect to an ouster clause in certain exceptional circumstances".[69]

Another proposal reflected concern about *Privacy International*. It would have created a presumption for the courts when interpreting ouster clauses that, when creating a body of limited competence, Parliament would have intended that it should be subject to JR, unless Parliament made it clear that the body had "unlimited discretionary power to determine its own jurisdiction".[70]

A significant majority of respondents were opposed to a framework approach to ouster clauses, on the basis that it would be very difficult to devise one which would be applicable in all circumstances without potentially adding to the confusion. Instead, respondents said that the Government should focus on drafting more specific and tailored ouster clauses that are appropriate to the legislation in question.

The Government accepted this conclusion and agreed not to take the proposal forward. However, it stated that proposing a narrow ouster clause focused on removing *Cart* JRs would help to ensure that the courts "give more effect" to ouster clauses in the long term where there is sufficient justification.[71]

The Government's position on ouster clauses

The consultation paper set out the Government's position in relation to ouster clauses more generally. It noted that prior to the 1968 case of *Anisminic*, the courts did not interpret ouster clauses so as to remove the potential for JR of a decision if the public body in question had acted beyond the scope of its powers ('in excess of jurisdiction'), or in breach of natural fairness, in the case of tribunals. But where a decision was made in error but was within the public body's jurisdiction the courts upheld the ouster clause.

According to the Government's analysis, *Anisminic* did not reject the relevance of this distinction, but rather widened the circumstances in which an error would be treated as one of jurisdiction. As a result, Parliament passed wider ouster clauses which appeared to apply to jurisdictional errors, such as section 67 of RIPA, which was in issue in *Privacy International*.

The Government's view is that a distinction can be drawn between three different categories of challenge to decisions by public bodies:

- Excess of jurisdiction – where the body did not have the power to do what it did;

[69] ibid. para 91

[70] ibid. para 92, citing *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, para 210

[71] Ministry of Justice, Judicial Review Reform Consultation: The Government Response, CP 477, July 2021 para 47

- Abuse of jurisdiction – where the body breached principles of natural justice; and
- All other errors, including errors of law.

The Government believes that it would be highly unusual for Parliament to want to oust JR for the first two categories, but that there is no rule of law issue with removing JR for the third category in relation to quasi-judicial bodies. It is confident that the courts will accept the distinction between these categories "despite the possible existence of borderline cases".[72]

The drafting of the *Cart* ouster clause is intended to apply only to the third category, and will be used as "as an example to guide the development of effective legislation in the future".[73]

The Government intends to carry out an internal follow-up exercise to identify and review other ouster clauses currently on the statute book, including section 67 of RIPA, with a view to updating them where necessary.

[72] ibid. para 53
[73] ibid. para 55

3 Criminal procedure reform

3.1 Background

The criminal procedure provisions of the Bill form part of Her Majesty's Court and Tribunal Service's (HMCTS) Reform Programme, which was launched in March 2014.[74] The programme aims to deliver "a more effective, efficient and high performing courts and tribunals administration" through technology, an improved estate, and modernisation of working practices.

Types of criminal offence

There are three types of criminal offence: **summary**-only, **indictable**-only and **either-way**.

- Summary-only offences are the least serious group of offences, and can only be tried in magistrates' court.
- Indictable-only offences are the most serious group of offences, and can only be tried in the Crown Court before a jury.
- 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.

All cases – whatever the type of offence – begin in the magistrates' court.

Either-way cases undergo an 'allocation' process to end up in the appropriate court. This is subject to the defendant's right to elect trial by jury in the Crown Court, even if the case is considered to be more suitable for summary trial in the magistrates' 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.

In 2016 the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals published a joint statement, Transforming Our Justice System, which set out the aims and principles of the court reform programme. The programme's 'vision' was to "modernise and upgrade" the justice system,

[74] Lord Chief Justice of England and Wales, Senior President of Tribunals and Lord Chancellor and Secretary of State for Justice, Joint Letter, 28 March 2014

based on three core principles of the system being just, proportionate and accessible.

The joint statement was accompanied by a further white paper summarising the reforms and consultations proposed.[75] One of the key ambitions in relation to the criminal courts was "Improving process and technology for more efficient and digital justice".[76] The white paper sought views on the following proposals, as part of this ambition:

- streamlining processes, by removing unnecessary appearances in court (such as first appearances in magistrates' courts for cases that can only be tried in the Crown Court) and introducing a new allocation process for either-way cases
- using technology to make process more efficient, including increasing the use of audio and video technology.
- introducing a new collaborative IT system known as 'The Common Platform', to enable online case management by the courts, criminal justice agencies and the defence.
- enabling online convictions and fixed fines for certain 'routine' summary offences with no identifiable victim.

In 2017, Theresa May's Government introduced the Prisons and Courts Bill 2016-17, which would have implemented these proposals (alongside a number of other changes to the civil and family courts).[77] However, that Bill fell on prorogation ahead of dissolution for the 2017 General Election so the provisions never became law.

The proposals to increase the use of audio and video links were revived in 2020, after the onset of the Covid-19 pandemic brought 'in person' hearings to an abrupt halt. Temporary measures were enacted to enable the criminal courts to make greater use of video and telephone links.[78] The Police, Crime, Sentencing and Courts Bill 2019-21 – currently awaiting Committee Stage in the Lords – includes provisions to make these measures permanent.[79]

Most of the remaining proposals in the Prisons and Courts Bill on streamlining court appearances and allocation decisions, making use of written procedures (based on the Common Platform), and enabling automatic online convictions for certain offences have been reintroduced in this Bill.

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[75] HM Government, Transforming our justice system: summary of reforms and consultation (Cm 9321), September 2016

[76] ibid. p6

[77] See Commons Library briefing, The Prisons and Courts Bill: Court Reform, 15 March 2017 for full background

[78] sections 53-57 and Schedules 23-27 Coronavirus Act 2020; see also Commons Library briefing, Coronavirus Bill: implications for the courts and tribunals, 23 March 2020

[79] See Commons Library briefing, Police, Crime, Sentencing and Courts Bill: Part 12, Procedures in Courts and Tribunals, 12 March 2021 for full background

3.2 Written procedures for dealing with summary offences

Automatic online convictions

Clause 3 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 section 16A of the Magistrates' Courts Act 1980.[80] 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; they retain the right to opt for a hearing in a traditional court setting. The procedure is only available in respect of non-imprisonable summary offences where the accused was aged 18 or over when charged.

Covid-19 and the Single Justice Procedure

The Single Justice Procedure has itself proved controversial, particularly in relation to its recent use to prosecute Covid-19 offences.

The Justice Committee recently concluded that the use of the procedure for such offences was an efficient way to avoid overburdening the courts.

However, the Committee said that a "lesson learnt" from the use of the process in relation to Covid-19 offences was

> ...that the Ministry of Justice should review the transparency of the single justice procedure and consider how the process could be made more open and accessible to the media and the public.[81]

It also recommended that the Government should conduct a review of the use of the single justice procedure in Covid-19 cases, including analysis of the relative complexity of different Covid-19 cases and whether it was appropriate to allow use of the single justice procedure for more complex cases.

Background: The Transforming Our Justice System consultation

The Government first consulted on plans for a new online conviction process in September 2016, as part of the Transforming Our Justice System proposals. In its consultation document, the Government set out how it planned to

[80] Section 16A was added to the 1980 Act by section 48 of the Criminal Justice and Courts Act 2015 and has been in effect since April 2015

[81] Justice Committee, Covid-19 and the criminal law, HC 71, 24 September 2021, para 91

digitise the process and, in some cases, to automate it completely by removing the magistrate from the 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 mitigating circumstances or means information and (following consideration of the case by a magistrate) be informed of the magistrate's decisions – all 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 predetermined 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.[82]

The consultation listed several safeguards that the Government proposed to build 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;
- the defendant would have to actively opt in to the process by pleading guilty and agreeing to have their 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 (ie 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.[83]

[82] Ministry of Justice, Transforming our justice system: summary of reforms and consultation, September 2016, paras 7.2.2-3

[83] ibid. para 7.2.4

The Government sought views on whether respondents agreed with the scheme in principle. It received a total of 280 responses, of which 59% agreed with the principle and 20% disagreed.[84]

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".[85]

Some of those who opposed the idea 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).[86]

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 were innocent or had mitigating circumstances, or might choose to plead guilty purely to get the matter out of the way.[87]

The Government's view was that the various safeguards it was proposing – 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 – would 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.[88]

Access to legal advice was a key concern of those who disagreed:

> 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.[89]

The Government considered that mandating the receipt of legal advice was unnecessary. It noted that 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

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[84] 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

[85] ibid. para 19

[86] ibid. para 20

[87] ibid. paras 23 and 26

[88] ibid. para 28

[89] ibid. para 29

defendants in cases likely to be eligible for the procedure already proceed without legal representation.

The Bill

Clause 3 would introduce automatic online convictions as an alternative to the single justice procedure by adding **new sections 16G to 16M** to the Magistrates' Courts Act 1980, and (by virtue of consequential amendments set out in **Schedule 2, para 4**) would give prosecutors responsibility for selecting appropriate cases.

The key features of the procedure set out in **clause 3** 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 process;
- penalties (which would be limited to fines, penalty points, compensation, prosecution costs and surcharges) would be fixed 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 would be able to 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:

> 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
>
> (e) Offences in relation to which there is enough sentencing data available to enable an appropriate standard penalty to be set. [90]

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. [91]

Commentary

The charity Transform Justice, which campaigns for a justice system "which is fairer, more open, more humane and more effective", has raised a variety of concerns with the proposals. These include:

- the potential for breaching a defendant's right to "a fair and public hearing" under Article 6 of the European Convention of Human Rights
- potential barriers to effective participation by defendants, particularly those with mental health problems or learning difficulties and those on low incomes
- disability discrimination issues, if insufficient reasonable adjustments are put forward to enable disabled defendants to engage with the process
- lack of transparency and open justice
- security of the online system, and the possibility for fraudulent completion of the process
- the prospect of the system being extended in future to offences such as breach of Covid-19 regulation offences (where many of the prosecutions "were based on a misinterpretation of the law") and offences of school non-attendance (where defendants are "invariably very vulnerable")
- lack of testing and piloting to support the proposals. [92]

Writing in 2017 in relation to the Prisons and Courts Bill, legal commentator Joshua Rozenberg suggested that there should be a "cooling off" period for anyone who decides to accept an automatic online conviction:

> ...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

[90] Ministry of Justice, Delegated Powers Memorandum: Judicial Review and Courts Bill, para 24
[91] ibid. para 25
[92] Transform Justice, Briefing on the criminal justice aspects of the Judicial Review and Courts Bill, August 2021

> 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. [93]

Concerns have also been raised about the transparency of the process, and the public's ability to access records of automatic online convictions. Writing in 2017 the Magistrates' Association said it is "a core principle of our justice system that decisions are carried out transparently, so that everyone has the opportunity to see for themselves that a judgment was reached in a fair and understandable way". [94]

Pleading guilty in writing

Currently during preliminary proceedings a defendant charged with a criminal offence is asked to indicate whether they intend to plead guilty or not guilty. This 'indication of plea' must usually be made in court.

There are 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 single justice procedure set out in s16A of the 1980 Act, as described above.

The second is under the 'pleading guilty by post' provisions of s12 of the Magistrates' Courts Act, under which a defendant aged 16 or over who has been 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 for an offence website. The court may then try the case as if the defendant had pleaded guilty in court, but without the defendant (or the prosecution) having to attend.

Section 12 currently only covers cases that have been initiated against a defendant in writing by a postal requisition or summons away from a police station. The procedure is not available in cases where the defendant has been charged in person at a police station and bailed to appear at a magistrates' court for a first hearing.

Clause 4 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. If the defendant chose to make use of the written procedure, the court would then be able to try the case as if the defendant had pleaded guilty in court, but without the defendant (or the prosecution) having to attend.

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[93] Joshua Rozenberg, "Virtual realities", Law Gazette, 6 March 2017

[94] Magistrates' Association, MA Briefing on the Prisons and Courts Bill (Second Reading), 17 March 2017, p7

The Prisons and Courts Bill included an additional clause (clause 23 of that Bill as introduced) that would have required the Criminal Procedure Rules to make provision for a new "written information procedure", allowing persons "charged with offences" to choose to give specified information to the court in writing.[95] This would have enabled people charged with more serious offences not covered by section 12 to give a written indication of plea. The current Bill does not include a provision equivalent to clause 23.

Corporations

Clause 5 would amend section 16A of the Magistrates' Courts Act 1980 to clarify that the single justice procedure can be used to prosecute legal persons such as corporations, as well as individuals.

3.3 Either way offences: Mode of trial

Clauses 6 to 9 of the Bill deal with allocation proceedings for either way offences. They would enable such proceedings to take place in writing in certain cases, and would expand the circumstances in which court-based proceedings could be conducted in the absence of the defendant.

Allocation proceedings are the process for deciding whether an either-way offence should be tried in a magistrates' court or the Crown Court. The process begins with a 'plea before venue' hearing then an allocation decision. 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 aged 18 or over 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.[96] If the defendant indicates that they intend to plead guilty, then the court may convict them without hearing any evidence and then proceed to sentencing.

If the defendant indicates that they intend to plead not guilty, or does not indicate a plea, then the magistrates' court will proceed to make an allocation decision.[97] This involves deciding whether the case should be tried

[95] See pages 29 to 30 of Commons Library briefing, The Prisons and Courts Bill: Court Reform, 15 March 2017 for full background

[96] section 17A Magistrates' Courts Act 1980. Under section 17B 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. The legal representative may then act on the defendant's behalf.

[97] Under sections 18 to 23 of the Magistrates' Courts Act 1980

in the magistrates' court or in the Crown Court. Again, this currently requires the defendant's presence in court. [98]

Allocation decisions in either-way cases

When deciding whether to allocate a case to the magistrates' court or the Crown Court, the magistrates' court will go through the following steps:

12. The court will decide whether the offence appears more suitable for summary trial or for trial on indictment. The court should consider:
    a. whether the sentencing powers of the magistrates' court would be sufficient to deal with the defendant if convicted;
    b. any representations made by the prosecution or the defendant;
    c. the Sentencing Council's Allocation Guideline.
13. If the court decides that the case is more suitable for summary trial, it shall explain this to the defendant. It shall also explain to the defendant that they are entitled to choose whether to consent to a summary trial, or to elect for trial on indictment in the Crown Court.
14. The defendant may then request an indication of whether a custodial or non-custodial sentence would be more likely if they were to choose summary trial and to plead guilty. The court may, but need not, give such an indication.
15. If the court does give an indication of sentence, it shall ask the defendant whether they wish to reconsider the indication of plea they gave at the plea before venue hearing.
16. If the defendant wishes to change their 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.
17. 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 their indication of plea to guilty), then the court shall proceed to ask the accused whether they consent to be tried summarily:
    a. If they do consent, the court shall proceed to summary trial.
    b. If they do not consent, the court sends the case to the Crown Court for trial under s51 of the Crime and Disorder Act 1998. This currently requires the defendant to be brought before a magistrates' court.

[98] Subject to two exceptions set out in the 1980 Act: the court can proceed in the absence of the defendant if their disorderly conduct makes it impracticable to proceed with them in court (section 18(3)) or if the defendant's legal representative signifies the defendant's consent to the proceedings taking place in their absence (section 23)

Written procedure for allocation proceedings

Clause 6 would add **new sections 17ZA to 17ZC** to the Magistrates' Courts Act 1980 to enable defendants to engage with the plea before venue and allocation procedures in writing, rather than in court. The new sections would only apply in cases involving a defendant aged 18 or over who has been charged with an either way offence.

New section 17ZA would require the magistrates' court in such a case to:

- provide the defendant with a range of specified information in writing (including a statement of the charge, an explanation of the plea and allocation procedures, and any other information specified by the Criminal Procedure Rules); and
- ask the defendant whether they wished to give a written indication of plea and, if so, whether that plea would be guilty or not guilty.

If the defendant failed to give any written indication at all, then the allocation proceedings would proceed using existing court-based procedures. Existing court-based procedures would also be used if the defendant gave a written indication of plea but then subsequently withdrew this before trial.

If the defendant chose to give a written indication of a guilty plea, then the court would proceed under **new section 17ZB**. This would require the court to consider whether the case should be sent to the Crown Court for conviction and sentencing, or kept in the magistrates' court. The defendant and prosecutor would each have the right to object to the case being sent to the Crown Court.

If the defendant chose to give a written indication of a not guilty plea under **new section 17ZA**, then the court would proceed under **new section 17ZC**. This would require the court to ask the defendant, in writing, the following questions:

- Does the defendant wish to give a written indication of non-consent to summary trial (i.e. does the defendant wish to exercise their right to elect trial by jury)?
- If not, does the defendant wish to opt for written allocation proceedings (rather than court-based allocating hearings)?

If the defendant chose to give a written indication of non-consent to summary trial, the magistrates' court would proceed by sending the case to the Crown Court for trial in according with section 51 of the Crime and Disorder Act 1998. The Explanatory Notes state (at para 159) that **section 17ZC**:

> provides a magistrates' court with the chance to bypass the allocation decision procedure for a triable either-way case by providing a defendant with an earlier additional opportunity to elect for their case to be sent to the Crown Court for a jury trial.

If the defendant did not give a written indication of non-consent to summary trial, the court would proceed with conducting the allocation procedure set out in the Box on page 40 above, either in writing or in court depending on the defendant's election.[99] If the defendant failed to make an election, then the allocation procedure would take place in court.

"In writing": The Common Platform

Although the Bill would enable certain procedures to be conducted "in writing", the meaning of this phrase is not specified further on the face of the Bill.

However, the Bill's supporting documents (including the Explanatory Notes) indicate that in practice conducting proceedings "in writing" will involve using the Common Platform. This is a digital case management system that the judiciary, court staff and professional court users (including defence solicitors/barristers and the Crown Prosecution Service) use to access case information. The Common Platform is currently being rolled out across criminal courts in England and Wales. HM Courts & Tribunals Service aims to have completed the roll-out by the end of 2021.

The Government's Judicial Review and Courts Bill Fact Sheet (Courts) states that using the Common Platform for the written procedures will effectively mean that defendants will only be able to access these procedures if they are legally represented, as unrepresented defendants will have no means of accessing the system:

> …defendants will not be able to access the online procedure for indication of plea or trial venue allocation decision directly; they will need to instruct a legal representative to act on their behalf who will of course ensure they fully understand the process and will be able to identify any vulnerabilities.

Option to reject summary trial at hearing

Clause 7 would introduce a new opportunity for a defendant to reject a summary trial (thereby exercising their right to trial by jury) at an early stage in the allocation process, where that process is being conducted in court.

The current legislation only enables the court to ask the defendant whether he consents to be tried summarily or wishes to be tried on indictment at the end of the allocation procedure set out in the Box on page 40 above. **Clause 7** would insert a **new section 17BA** into the Magistrates' Courts Act 1980

[99] By virtue of the consequential amendments in Schedule 2, para 7 of the Bill

enabling it to ask the defendant this question at a plea before venue hearing under section 17A or 17B. The Explanatory Notes state:

> This clause essentially seeks to replicate the new 'written/online' opportunity to indicate non-consent to a summary trial at an earlier stage in the allocation decision procedure (provided for under new section 17ZC of the MCA 1980), so that this provision is also available for plea and allocation procedures that take place 'at court' during a traditional hearing.[100]

The opportunity to reject summary trial at an earlier stage would only be available to defendants who had given a plea indication of not guilty at the plea before venue hearing.

Powers to proceed in absence of accused

Clause 9 deals with cases where the allocation proceedings set out in the Box on page 40 above would still be required to take place in court, rather than in writing (eg where the defendant has failed to give a written indication of plea under **clause 6**).

Clause 9 would consolidate and expand the existing provisions enabling such court hearings to take place in the absence of a defendant aged 18 or over. The existing provisions permit allocation hearings (under s18 of the 1980 Act) in the absence of the defendant for reasons relating to the defendant's disorderly conduct, or where the defendant gives consent via their legal representative for proceedings to take place in their absence.[101]

Clause 9 would enable an allocation hearing to take place in the defendant's absence in the following additional circumstances:

- where the defendant's legal representative is present at the hearing and the court considers there is no acceptable reason for the defendant's failure to attend;
- where the court is satisfied a notice of the allocation proceedings was served on the defendant within a reasonable time of the hearing, and there is no acceptable reason for the defendant's failure to attend; and
- where the defendant has appeared in court on a previous occasion to answer the charge and the court does not consider there is an acceptable reason for the defendant's failure to attend.

Where the court proceeds with an allocation decision in the defendant's absence, the defendant would be deemed to have indicated a not-guilty plea and the court would proceed to allocate the case to the magistrates' court or the Crown Court on this basis.

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100 Explanatory Notes, para 172

101 sections 18 and 23 of the 1980 Act: see fn 93 above

Children and young people

The Bill would also introduce similar new procedures for child defendants aged between 10 and 17. Child defendants are normally tried in the youth court (a specially constituted type of magistrates' court). However, in some circumstances – for example cases involving particularly serious offences, or an adult co-defendant – it will be necessary to try them in the Crown Court.[102] Unlike adult defendants, children do not have the right to elect trial by jury in the Crown Court if charged with an either-way offence.

The Explanatory Notes set out the need for a "bespoke" approach for child defendants, given these procedural differences:

> The criminal court system recognises the increased vulnerability and additional requirements that children have, so treats these types of defendants differently from adults in the youth court. This includes bespoke plea before venue and allocation decision procedures in legislation which also take into account the fact that children and young people do not share the same right as adults to elect for their case to be sent to the Crown Court for a jury trial. Therefore, children and young people also require bespoke legislation for the new written/online plea and allocation procedures to cater for their needs.[103]

The Bill would therefore introduce separate plea and allocation procedures specifically for child defendants:

- **Clause 8** would insert **new sections 24ZA and 24ZB** to the 1980 Act, which would introduce the option of a new written procedure for child defendants to give an indication of plea (similar to clause 6 for adults)
- **Clause 9** would insert **new section 24BA** to the 1980 Act, introducing a power for the court to proceed with allocation proceedings in the defendant's absence (clause 9 also sets out similar provisions for adults)

Clause 13 would require parents or guardians to be made aware of the written proceedings. Section 34A of the Children and Young Persons Act 1933 currently enables the court to require the attendance of a parent or guardian at a hearing involving a child defendant. **Clause 13** would extend this by introducing an equivalent requirement for parental involvement where any stage of the proceedings is to be conducted in writing, or where the defendant gives a written indication of plea under **new section 24ZA** of the Magistrates' Courts Act 1980 (see **clause 8**).

In such cases, the court may (or must, in the case of defendants aged under 16) ascertain whether a parent or guardian of the defendant is aware that the written proceedings are taking place or that the written plea indication has

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[102] See Sentencing Council, Sentencing Children and Young People, 2017, section 2 for a full overview of the general approach to allocating cases involving child defendants

[103] Explanatory Notes, para 180

been given. If it appears that no such person is aware, the court would be required to bring the written proceedings or plea indication to the attention of at least one such person.

Commentary

Joshua Rozenberg has called for a further review of criminal justice procedure once the changes have been brought into effect. He considers that "at the very least these complicated statutory provisions should be consolidated into new legislation that is easier for everyone to follow".[104]

The legal blogger 'Obiter J' has described these clauses of the Bill as "particularly convoluted". They added:

> Given the serious nature of many either-way offences, this change of process has the appearance of diluting the open justice principle considerably. It will be interesting to see how this proceeds through Parliament and whether the relentless pursuit of supposed efficiency will prevail.[105]

Tristan Kirk, courts correspondent for London Evening Standard, has described the proposals as a "massive threat" to principles of open justice and as "music to the ears of defendants who'd rather no one knew they've been accused of a crime". He said that open hearings "leave a trail" for court reporters to follow, and that preliminary hearings have "immense value" to those reporting proceedings.[106]

3.4 Transfer of cases between courts

Clauses 10 to 12 of the Bill deal with the transfer of cases between the magistrates' court and the Crown Court.

Sending cases

'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.[107]

The current process for adult defendants is set out in section 51 of the Crime and Disorder Act 1998, and requires the accused to appear or be brought before a magistrates' court in order to be sent to the Crown Court. Section 51A

[104] Joshua Rozenberg, Automating more criminal courts, 28 July 2021

[105] Law and Lawyers blog, Judicial Review and Courts Bill ~ Criminal Courts and Coroners, 24 July 2021

[106] Tristan Kirk, Twitter, 21 July 2021

[107] 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, defendants in such cases must still make a first appearance before a magistrates' court in order to be 'sent' to the Crown Court for trial

of the 1998 Act makes similar provision for child defendants whose cases need to be sent to the Crown Court.

Clause 10 would amend sections 51 and 51A to enable magistrates' courts to send a defendant charged with an indictable-only or either-way offence to the Crown Court without the need for a court hearing.[108] The magistrates' court would instead be able to serve the defendant with one or more documents which:

- state the charge against the accused;
- explain that the court is required to send the accused to the Crown Court for trial; and
- set out any other information that is required by the Criminal Procedure Rules or that is authorised by the Criminal Procedure Rules and that the court decides to include.

As soon as practicable after serving these documents, the court would then be required to send the accused to the Crown Court for trial (which would not need to be done in open court).

Clause 10 would require that where a person is sent for trial other than in open court, they must be sent on bail. That bail must be unconditional (if the accused was not already on bail, or was on unconditional bail) or, if the accused was already on conditional bail, on bail subject to the same conditions. The Explanatory Notes state that as the new **clause 10** procedure is discretionary, "magistrates' courts will only deem a case suitable to be sent under this power where it is appropriate to issue bail on the papers".[109] If the court considers that the issue of bail needs to be addressed in open court, then the case would not be suitable for the new **clause 10** procedure.

Remitting cases

Clause 11 would give the Crown Court a new general power to remit summary or either-way offences that have been sent to it back to the magistrates' court (including the youth court) for trial or sentencing. It would do so by adding a **new section 46ZA** to the Senior Courts Act 1981.

Key features of **new section 46ZA** are:

- The power to remit would not be available in cases where the offence is indictable-only, or where (for child defendants) it is an offence falling within section 51A(12) of the Crime and Disorder Act 1998. Such offences can only be tried in the Crown Court.
- 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

[108] The court would still be able to send the defendant to the Crown Court at a hearing if the defendant was already before the court when it was determined that the case was to be sent.

[109] Explanatory Notes, para 224

obtain the defendant's consent. This is intended to preserve an adult defendant's current right to elect for jury trial in an either-way case.
- If a person under 18 appears before the Crown Court, the court must consider (if need be of its own motion) whether to send that person back to the youth court. If it decides not to send the person, the Crown Court must give reasons for not sending. The Explanatory Notes state that this provision reflects "the general principle of summary trial in the youth court for under 18-year-olds".[110]

Clause 11 would also add **new section 25A and subsection 25(2A)** to the Sentencing Code.

New section 25A would give the Crown Court the power to remit a defendant to the magistrates' court or youth court for sentence, where the defendant has either been convicted of an offence by a magistrates' court and committed to the Crown Court for sentence, or convicted of an offence by the Crown Court following a guilty plea.

New subsection 25(2A) would enable the Crown Court to remit a defendant back to the youth court for sentencing, in cases where the defendant had been convicted by a magistrates' court and committed to the Crown Court for sentence. The Explanatory Notes state that this provision "is likely to be used in relation to those individuals believed to be over 18 who have been committed for sentence by the magistrates' court, who later turn out to be under 18 years of age".[111]

Transferring cases to the youth court

Clause 12 would amend section 47 of the Crime and Disorder Act 1998 to enable the youth court to transfer defendants to the adult magistrates' court or the Crown Court, where a person who appears before the youth court charged with an offence subsequently turns 18 before the start of the trial.

The process would depend on the type of offence:

- If the offence is summary only, the youth court may remit the defendant for trial to a magistrates' court.
- If the offence is indictable-only, the youth court may send the defendant to the Crown Court.
- If the offence is either-way, the youth court may remit the defendant for trial to a magistrates' court, but must first give the defendant the opportunity to elect a jury trial. If the defendant so elects, the youth court must send the defendant to the Crown Court.

[110] Explanatory Notes, para 227
[111] Explanatory Notes, para 234

The youth court would not be required to exercise this power in open court in the presence of the defendant. However, if it is not exercised in open court, the court must instead provide the defendant with documents setting out details of the charge, the court's proposal to remit or send the defendant to an adult court, and any other information required or authorised by the Criminal Procedure Rules.

3.5 Other provisions

Procedural hearings 'on the papers'

Clause 14 would remove the requirement for a hearing in relation to certain procedural matters, which could instead be made by the court 'on the papers' without a hearing. The procedural matters covered by clause 14 are:

- Crown Court determinations of an application for a witness summons in criminal proceedings, under section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965
- consideration (at various levels of court) of representations from an accused person who objects to the lifting of reporting restrictions imposed in relation to:

    a. pre-trial rulings by a magistrates' court;

    b. preparatory hearings in a complex or serious fraud case or an appeal arising from such a hearing;

    c. preparatory hearings in a complex, serious or lengthy case, or an appeal arising from such a hearing;

    d. pre-trial rulings in a case which is to be tried on indictment;

    e. allocation or sending proceedings;

    f. applications for dismissal of a charge in a case which has been sent to the Crown Court for trial;

    g. special measures directions in relation to a vulnerable or intimidated witness;

    h. directions for a vulnerable accused to give evidence through a live link; and

    i. directions prohibiting an accused person from cross-examining a witness in person.[112]

[112] Explanatory Notes, para 250

Service of documents

Clause 15 would give effect to **Schedule 1**, which sets out various amendments to existing legislation to enable the service of documents to be "in accordance with the Criminal Procedure Rules".

The Explanatory Notes state that this change would mean "service can be effected by whichever means is the most appropriate in any given case including by electronic means".[113]

Power to make regulations

Clause 16 would give the Lord Chancellor a power, exercisable by regulations, to make consequential or supplementary provision in relation to the criminal procedure provisions of the Bill. This would include the power to amend, repeal or revoke provision made by or under Acts of Parliament (i.e. it is a 'Henry VIII clause').

Regulations that sought to amend or repeal any Act of Parliament would be made subject to the affirmative procedure (giving each House the opportunity to veto the regulations before they are made). Otherwise, regulations would be made under the negative procedure (subject to annulment) and therefore would not require prior parliamentary approval.

The Government's Delegated Powers Memorandum justifies this power on the basis that "The Bill, where it concerns criminal procedure is complex and the need for the further changes may not emerge until the reforms begin to be implemented."[114]

[113] Explanatory Notes, para 251

[114] Ministry of Justice, Delegated Powers Memorandum: Judicial Review and Courts Bill, para 32

4 Online procedure reforms

Previous consideration by Parliament

The proposals for creating an Online Procedure Committee originated in the far-reaching of the Prisons and Courts Bill 2016-17. That Bill never passed because of dissolution and the early general election in 2017. The proposals were reintroduced in a more narrowly focused bill, the Courts and Tribunals (Online Procedure) Bill 2017-19 [HL].

The latter Bill completed its consideration in the House of Lords during the last Parliament. The Government introduced a number of significant amendments to that bill, to address concerns about the powers of the Lord Chancellor under the new scheme and to increase the number of Lord Chief Justice appointees on the new Online Procedure Rule Committee.

The bill did not complete its passage through the House of Commons and fell on prorogation in October 2019. For a detailed account of the issues raised in those proceedings, see:

- Commons Library briefing, Courts and Tribunals (Online Procedure) Bill 2017-19 [HL], CBP 8621, 12 July 2019
- Lords Library note, Courts and Tribunals (Online Procedure) Bill 2017-19: Briefing for Lords Stages, LLN-2019-0055, 9 May 2019

4.1 Background

For a comprehensive chronology and analysis of the Government's policy development on online dispute resolution, see the legal commentator Joshua Rozenberg's online publication for The Legal Education Foundation.[115] Originally published in 2016, this has since been updated several times, most recently in July 2020.

Origins of the Online Court

The proposals for creating an "Online Court" have their origins in a review carried out by the Civil Justice Council (CJC) between April 2014 and February

[115] Joshua Rozenberg, The Online Court: will IT work?, The Legal Education Foundation, July 2020

2015. It explored the feasibility of a form of online dispute resolution for civil claims worth less than £25kpa. These claims constitute a significant proportion of the overall caseload in the County Courts in England and Wales. The intention was to develop forms of dispute resolution that were more efficient, less expensive, and more accessible than those that already existed.

In its recommendations, the CJC advocated the creation of a new "internet-based court service" with three distinct strands of online provision:

- **Online evaluation** (helping aggrieved parties to classify and categorise problems, understand their rights and obligations, and understand the options and remedies available to them;
- **Online facilitation** (staff working for the court would review papers and statements, and assist parties through electronic forms of mediation and negotiation, and some negotiation would be "automated", not involving "the intervention of human experts"); and
- **Online adjudication** (judges would decide disputes on an online basis, predominantly on the basis of online pleadings, but supplemented where necessary or expedient by telephone or video hearings).

The report acknowledged that such a change would require additional training for judges and court staff and appropriate safeguards, and made three specific supporting recommendations, namely that:

- HM Courts and Tribunals Service introduces an online dispute resolution stream into its work programme and allocates appropriate levels of funding to it;
- that cross-party agreement in principle is secured for the project; and
- that HMCTS and related bodies proactively pilot forms of online dispute resolution and prominently raise awareness of those alternatives to traditional forms of dispute resolution.

The original remit of the CJC Advisory Group had been to make recommendations only about civil claims below £25k. However, it made clear in its report that there were opportunities to expand this modernisation project both to cover other civil proceedings and to cover some proceedings in the family courts and in the tribunals system.[116]

Briggs Review

In 2015, the Lord Chief Justice commissioned Lord Justice Briggs (now Lord Briggs, Justice of the UK Supreme Court) to review the operation of the civil courts in England and Wales and make recommendations about structural reform. Modernisation and greater use of technology played a significant part in that review.

[116] Civil Justice Council, Online Dispute Resolution for Low Value Civil Claims, February 2015, pp6-7

In both his Interim and Final Reports, Lord Justice Briggs emphasised the opportunities that would be presented by embracing technology.[117] The fact that the Government had accepted the business case for reform meant, in his view, there was an opportunity to simplify court processes and to make them more accessible, quicker, and less expensive for litigants.[118]

Briggs endorsed the Civil Justice Council's plans to introduce a new online court and supporting platform for civil claims below £25k.[119] He noted that the legacy IT systems used by HMCTS were "limited, antiquated and inefficient" and that the new programme, with its efficiency gains, would justify greater short-term expenditure. By embracing a modernisation programme, he observed, the courts and tribunals system could mitigate against other, more immediate, budgetary pressures.[120]

Lord Justice Briggs also hoped that a new forum of online dispute resolution would mitigate the disadvantages faced by litigants-in-person compared to those in a position to rely on independent legal representation. This would be achieved by substantially simplifying court procedures and making them more lay-user friendly.[121]

The preference, on Lord Justice Briggs' part, was that the new court would be a distinct jurisdiction in its own right, separate from the existing civil and family courts and the tribunals.

Transforming Our Justice System – Vision Statement

In September 2016, a joint report was published by the (then) Lord Chancellor, Lord Chief Justice and Senior President of Tribunals. Transforming Our Justice System set out a "vision" for reforming the operation of the courts and tribunals system, predominantly in England and Wales, but also for reserved courts and tribunals in other parts of the UK.[122] In a section entitled "Tomorrow's justice system" the joint statement said (emphasis original):

> In certain circumstances, of course, justice will require that parties, their advisers and judges conduct hearings in physical courtrooms.
>
> Meanwhile, those who use our courts and tribunals – including legal professionals – should expect two significant developments. The first is our aim for **all** cases to be started online, whether or not they are scheduled for the traditional system or for online resolution. The second will be the completion of some cases entirely online, which will be much more convenient for everyone involved. Suitable cases –

[117] Lord Justice Briggs, Civil Courts Structure Review: Interim Report, December 2015 and Civil Courts Structure Review: Final Report, July 2016

[118] Interim Report, para 1.18.4

[119] Final Report, para 6.1

[120] Interim Report, para 1.18.2

[121] ibid. para 1.18.4

[122] Lord Chancellor, Lord Chief Justice and Senior President of Tribunals, Transforming Our Justice System, September 2016

> initially lower value debt and damages claims and appeals to the Social Security and Child Support Tribunal – will be able to be managed through affordable and simple online services, specifically designed to meet user needs.
>
> There will be a new, highly simplified procedural code. An online form will guide people through their application and the progress of their case. This new approach will be designed to promote more conciliatory approaches to dispute resolution, and to be understandable to non-lawyers, helping ordinary people resolve their issues in a low-key way, without needing expensive legal representation to help them understand what to do.[123]

Slightly departing from Lord Justice Briggs' preference, the Government's new online proceedings would operate within the structure of the existing civil, family and tribunal jurisdictions, albeit it would have procedure rules made separately under an Online Procedure Rules Committee that could operate across all three such jurisdictions.

Court and Tribunals (Judiciary and Functions of Staff) Act 2018

The original "package" of reforms in the Prison and Courts Bill 2016-17, intended to implement the Transforming Our Justice System vision statement, was wide-ranging. Moves to provide a statutory underpinning for online procedure were proposed alongside other related measures. Other measures included, for instance:

- relaxing the rules about which judges could sit in which courts and tribunals;
- making it easier in the family and magistrates courts for qualified court staff to provide formal legal advice to (lay) judges; and
- enabling judges to delegate case management functions and decisions to authorised court and tribunal staff who are not themselves judges.[124]

The Prisons and Courts Bill fell on prorogation ahead of dissolution for the 2017 General Election. Its proposals were only partly revived, in a series of "mini" bills during the 2017-19 Parliament. The measures on judicial deployment and on the role of court staff were legislated for, in the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018.[125] Most concerns raised during the passage of the 2018 Act related to what judicial delegation would mean in practice, rather than the principle of whether it was acceptable. The major unknown factor was how delegation would

[123] ibid. p6

[124] See Schedule 11 Prison and Courts Bill 2016-17

[125] See Commons Library briefing, Courts and Tribunals (Judiciary and Functions of Staff) Bill 2017-19 [HL], CBP 8440, 11 December 2018

interact with moves to conduct more proceedings by online or remote means. The then Shadow Lord Chancellor, Baroness Chakrabarti, said at the time:

> The implication is that [delegated judicial] decisions will move to new off-site service centres—which I think we have all experienced with varying degrees of satisfaction in relation to other services. Given their off-site nature, the implication that these service centres will be supervised by authorised staff, not judges, is worrying. To have authorised staff who are not subject to the training, experience, ethos and oaths that a professional judge is, and who are performing judicial functions but employed directly by HMCTS, raises questions worth considering of accountability and independence. Concerns that they would be subject to administrative pressures, such as meeting targets, are also worth thinking about.[126]

Moves towards electronic proceedings so far

There are, broadly speaking, three ways that courts and tribunals have moved to embrace greater use of technology and electronic communications:

- enabling cases to be **initiated** by electronic means (i.e. the formal application to commence a case is done with e-forms/on an online portal and other documentation submitted by parties is then completed, submitted, stored and accessed digitally-by-default);
- enabling **proceedings** to take place with remote participants (e.g. via video or telephone link); and
- enabling **proceedings to be conducted without oral hearings**, through online portals (an electronic equivalent of settling matters "asynchronously" or "on the papers" based on parties' submissions).

A great deal of this can already be, and has been, done using the powers of the Civil, Family and Tribunal Procedure Rule Committees and the powers to make practice directions. However, a statutory underpinning makes it easier not simply to **enable** these technological developments to be used, but to make them **mandatory** or the **default** route for litigants.

There are several existing examples of mechanisms that **enable** types of court or tribunal action to be initiated or conducted partly or completely by electronic means and/or by having hearings take place remotely.

In the civil courts, these have focused predominantly on high frequency claims typically made in the County Courts. Practice directions underpin both:

[126] HL Deb 20 June 2018 [Courts and Tribunals (Judiciary and Functions of Staff) Bill [HL]] c2032

- the **Online Civil Money Claims Pilot** (which has been running since April 2018 and enables certain money claims up to a value of £10k to be initiated and proceeded with online);[127] and
- the **Damages Claims Pilot** (which was introduced in May 2021 and enables, among other things, certain claims for damages to be initiated and proceeded with online).[128]

Similarly, practice directions have been used by the Family Procedure Rule Committee to enable **aspects of divorce proceedings and orders relating to children** to be initiated and conducted by electronic means.[129]

Various other court and tribunal proceedings can be initiated and conducted, in whole or in part, by online or electronic means. These notably include:

- certain tax appeals to the First-tier Tribunal;
- probate applications to the High Court in England and Wales; and
- Social Security and Child Support appeals to the First-tier Tribunal.

In all of these cases, there is currently the option to initiate proceedings by an application in hard copy, and hearings can still take place physically rather than via video link. Similarly, respondents usually have the choice not to participate by online or electronic means.

However, in some cases, the relevant procedure rules mandate that those who are legally represented, rather than litigants-in-person, must initiate proceedings via online procedures. Practice Direction 36X of the Family Procedure Rules, for example, will remove this discretionary element for divorce applications made by solicitors on behalf of clients effective 13 September 2021.

Relatedly, HMCTS runs an online case management tool for solicitors and other legal professionals. MyHMCTS (as it is known) enables them to submit, pay for and manage online case applications for probate, divorce, financial remedies, family public law order or immigration and asylum appeals.

Coronavirus Pandemic and remote proceedings

The Covid-19 pandemic has fundamentally changed the working practices of the courts and tribunal systems in the UK. Hearings moved abruptly from

[127] Civil Procedure Rules, Practice Direction 51R: Online Civil Money Claims Pilot, last updated 6 August 2021; HM Courts and Tribunals Service, Guidance: Online Civil Money Claims, 14 May 2021 and Press Release: Quicker way to resolve claim disputes launched online, 6 April 2018; Letter from Parliamentary Under-Secretary of the Secretary of State for Justice, Letter to the Chair of the House of Commons Justice Select Committee, April 2018;

[128] Civil Procedure Rules, Practice Direction 51ZB: Damages Claims Pilot, last updated 27 May 2021

[129] Family Procedure Rules, Practice Directions 36D-P, variously introduced and updated between 2017 and August 2021

taking place almost entirely in person in court rooms to being conducted either in a "hybrid" manner or entirely remotely.

The existing law already allows considerable flexibility for the civil, family and tribunal jurisdictions to hold hearings in this way, but temporary measures had to be put in place to enable the criminal courts to make greater use of video and telephone links.[130]

Most court proceedings are (at least notionally) accessible to both journalists and the wider public in order to ensure transparency and accountability of the justice system. With the closure of public galleries, however, arrangements also had to be made to enable the broadcast/transmission of court and tribunal proceedings where previously this was relatively unusual. This included new temporary legislative provisions regulating the recording and onward transmission of broadcast proceedings.

Among the other measures taken to respond to the pandemic included the opening of "Nightingale" courts. These were venues not traditionally or predominantly used for court and tribunal hearings, but which have been temporarily requisitioned to enable physical or hybrid hearings to take place.[131]

4.2 Proposals in this Bill

Chapter 2 of Part 2 of this Bill almost, though not quite, verbatim reintroduces the measures contained in the Courts and Tribunals (Online Procedure) Bill 2017-19. Broadly stated, it does the following:

- it gives the Lord Chancellor the power to require certain types of civil court, family court or tribunal proceedings to be conducted in whole or in part by electronic means (rather than being initiated and proceeded with in a physical court room in front of a judge);
- it establishes an Online Procedure Rules Committee to make rules that govern proceedings to be undertaken by electronic means, setting out its powers and duties; and
- it determines the rules for the membership of the Online Procedure Rules Committee.

The text of this bill takes into account amendments that were made to that previous bill when it was considered by the House of Lords in 2019. For example, the "concurrence requirement" significantly constrains how the Lord Chancellor can exercise his powers without the agreement of the Lord

[130] sections 53-57 and Schedules 23-27 Coronavirus Act 2020; see also Commons Library briefing, Coronavirus Bill: implications for the courts and tribunals, 23 March 2020

[131] HM Courts and Tribunals Service, Guidance: Temporary Nightingale courts and extra court capacity, 30 July 2021

Chief Justice (or as the case may be, the Senior President of Tribunals). In earlier versions of the Bill, the senior judiciary only had a consultation role for those key decisions.

What are the Online Procedure Rules?

Clause 18 of the Bill formally establishes a body of court and tribunal procedure rules, to be known as the Online Procedure Rules ('OP Rules'). These rules govern whether, when and how cases are to be **initiated** and then **proceeded with** by "electronic means". Procedure rules are a type of delegated legislation, which tell judges and the parties to legal disputes the process by which legal disputes will be resolved.

"Online" forms of dispute resolution, to be covered by the OP Rules, differ from normal court and tribunal procedures in that:

- documents might be completed, submitted, stored and shared electronically;
- hearings might be conducted over video or telephone link instead of physically in person; and/or
- court proceedings that are not oral hearings may be progressed by electronic means, such as case management decisions or mediation, rather than being conducted in person.

The objectives of the Online Procedure Rules

Clause 18(3) sets out the core objectives the OP rules. They must ensure that:

- practice and procedure under the Rules are accessible and fair;
- the Rules are both simple and simply expressed;
- disputes may be resolved quickly and efficiently under the Rules; and
- the Rules support the use of innovative methods of resolving disputes.

Clause 18(4) further emphasises that, to fulfil those objectives, "regard must be had to the needs of persons who require online procedural assistance".

Who decides whether proceedings are covered by the Online Procedure Rules?

Under **clause 19**, the Lord Chancellor would have the power, by regulations, to "specify" certain kinds of proceedings as ones to which the OP rule apply.[132]

If the Lord Chancellor "specifies" a particular kind of proceeding, the Online Procedure Rule Committee **must**, rather than merely **may** (as with "excluded" proceedings) ensure that there are OP rules to govern it. The Lord Chancellor can also specify that the person initiating proceedings has a choice between initiating proceedings under the online procedure or the ordinary procedure

[132] clauses 18(1) and 19

rules by physical means.[133] Otherwise, the question of whether and how proceedings are governed by the OP rules is a discretionary matter left to the Online Procedure Rules Committee.[134]

If the OP rules govern a type of proceeding, this means that the proceedings in question must be in some way "initiated" by electronic means, and the Rules may authorise or require aspects of the subsequent proceedings, including any hearings, to be conducted by electronic means.[135]

The Lord Chancellor cannot unilaterally specify a type of proceeding as being subject to the OP rules. He must secure the "concurrence" of the Lord Chief Justice (for civil or family proceedings) or the Senior President of Tribunals (for any tribunal proceedings).[136] The regulations are made subject to the draft affirmative procedure, meaning both Houses of Parliament must first approve the regulations before they can be made.[137]

The "concurrence requirement" in the Bill reflects a government "concession" made in the House of Lords, while equivalent measures were being considered in the Courts and Tribunals (Online Procedure) Bill during 2019.[138] Originally that bill had provided only for "consultation" of the Lord Chief Justice or the Senior President of Tribunals in this context.

Change from previous Bills – no role for the Secretary of State for BEIS

Under earlier versions of these legislative proposals, it was for the "appropriate minister" to specify the types of proceeding to be governed by the OP rules.[139] The appropriate minister was the Lord Chancellor for civil and family proceedings, and for proceedings in the First-tier or Upper Tribunals.

However, the current statutory framework for employment tribunals and the Employment Appeal Tribunal is more complicated. Those tribunals are distinct from the unified two-tier tribunals introduced by the Tribunals, Courts and Enforcement Act 2007. Responsibilities for a range of administrative and rule-making matters in employment tribunals are either exercised partly or exclusively by the Secretary of State for Business, Energy and Industrial Strategy. Originally, the intention had been that the "appropriate minister" would, in certain employment tribunal contexts, be the Secretary of State for BEIS, and for others it would have been the Lord Chancellor.

Elsewhere in this Bill (see Section 5 below), the Government proposes to transfer the Secretary of State for BEIS's responsibilities for employment tribunal rule-making to the Tribunal Procedure Committee (which already regulates the First-tier and Upper Tribunals) and in other administrative respects to the Lord Chancellor. The distinction of "appropriate minister" will

[133] clause 20(1)
[134] clause 19(9-11)
[135] clause 18(1)
[136] clauses 19(6) and 30(1)
[137] clauses 19(7) and 45(3)
[138] HL Deb 24 June 2019 [Courts and Tribunals (Online Procedure) Bill [HL] c955
[139] See clause 2(3) Courts and Tribunals (Online Procedure) Bill 2017-19 [HL] (as introduced)

therefore no longer be necessary: the Lord Chancellor would be the only Minister responsible for oversight of employment tribunal proceedings.

What kind of proceedings will be moved online?

In principle **any civil, family or tribunal (including employment tribunal) proceedings** could be "specified" in regulations as being subject to the new OP rules. It seems likely the initial list of "specified proceedings" will reflect the priorities and outcomes of HMCTS' online pilot schemes. We can plausibly expect the Lord Chancellor to designate small money claims, divorce applications and certain social security appeals as having to be initiated by online means under new rules.

The "concurrence requirement" gives the Lord Chief Justice and/or the Senior President of Tribunals a veto over the Lord Chancellor "specifying" proceedings. This makes it unlikely for proceedings to be "specified" before the judiciary is content they are suitable for regulation by the new Rules.

This Bill's overarching legislative framework plausibly could lead to (or at least facilitate) greater use of **mandatory or default** online initiation and proceedings in areas covered by the pilots. This would represent a more concerted move away from treating online and remote mechanisms as an **optional** alternative to paper applications and physical hearings.

In a recent speech at the London School of Economics, Sir Geoffrey Vos, the Master of the Rolls and Head of Civil Justice in England and Wales, indicated that online proceedings will be expanded substantially by late 2023:

> In the next two years, online justice in England and Wales will become a reality for most common types of claim, whether they are damages claims, money claims, possession claims, employment tribunal claims or public or private family claims…
>
> My sense about this… is that the vast bulk of civil disputes, and possibly the vast bulk also of employment, tribunal and private family disputes are amenable to a streamlined online dispute resolution process. The speed of that process - even if there are still face-to-face hearings in the most difficult cases - will allow the parties to spend less time and emotional energy agonising over their disputes, and more time concentrating on their economic or personal lives.[140]

[140] Sir Geoffrey Vos (Master of the Rolls), Recovery or Radical Transformation: the Effect of Covid-19 on Justice Systems, 17 June 2021

4.3 Creating an Online Procedure Rule Committee

What are procedure rule committees?

Although some aspects of court and tribunal proceedings are set out in statute, most of the rules that govern procedure are actually delegated to statutory non-departmental public bodies, known as "procedure rule committees".[141] These bodies, which typically consist of a combination of judicial, other legal and lay members, have the power to amend, make and revoke procedure rules for the relevant jurisdiction. They do this by way of a statutory instrument (typically subject to annulment by either House in Parliament). The Lord Chancellor normally has the power to "direct" that rules are to be made in relation to a particular type of proceedings.

There are five notable sets of procedure rules relevant to England and Wales, each of which apply to a different set of courts or tribunals: the Civil Procedure Rules, the Family Procedure Rules, the Criminal Procedure Rules and the (where relevant, UK- or GB-wide) Tribunal Procedure Rules and Employment Tribunal Procedure Rules.

Practice Directions

Procedure rules are usually made by committees. However, they are not the only source of rules that govern the proceedings of courts and tribunals. The statutes that set up procedure rule committees also confer certain powers to issue "practice directions".

These are not issued by the relevant procedure rule committee. Instead, they are issued by the Lord Chief Justice (or the Senior President of Tribunals).[142] Practice directions typically cannot be issued without the consent of the Lord Chancellor, but they are not made by way of a statutory instrument. This means Parliament has no real say over whether a direction should be adopted, unlike (in theory) with procedure rules.

Most of the pilots for online initiation and proceedings of court cases have, thus far, been implemented through practice directions rather than changes to the Civil, Family or Tribunal Procedure Rules. It might be expected that more permanent changes would be made by amending the Rules themselves, but practice directions need not be time limited in their application.

Why create the Online Procedure Rule Committee?

The Online Procedure Rule Committee is not strictly necessary to introduce or expand the use of online proceedings in the courts and tribunals. The existing

[141] Employment tribunals are the exception, but if this bill becomes law they will be brought more into line with other courts and tribunals. See Section 5 below.

[142] Each may instead delegate the responsibility for issuing Practice Directions to another senior judge.

rules of procedure, predominantly through practice directions, have enabled pilots for online proceedings several different areas already.

What an Online Procedure Rule Committee could do is provide the opportunity to co-ordinate, across the different jurisdictions, the approach taken by the Ministry of Justice and HMCTS towards online legal procedure. Online proceedings present common challenges across the different jurisdictions, which may warrant common procedural responses less easily implemented through three separate jurisdiction-based procedural rule committees. The membership of the Online Procedure Rule Committee (more on which, below) might also be thought better placed to assess the needs of certain court users in partially or wholly online proceedings.

The Government said in an Impact Assessments on the Bill:

> The Online Procedure Rules Committee (OPRC) will be responsible for drafting rules to underpin the new online procedure, with the aim of making it easier for parties to resolve disputes earlier using effective triage services and online dispute resolution, or via a mediated settlement, so reserving judicial time for only the most complex cases.[143]

How would the new Committee interact with existing procedure rules and committees?

If the OP rules apply to a set of court/tribunal proceedings, those proceedings are "opted-out" from the civil, family or tribunal procedure rules.

The OP rules can co-opt some or all of the procedure rules of the other procedure rule committees, and can stipulate the circumstances in which proceedings are to be conducted under the original rules instead of the online rules and vice versa.[144] In particular **subsections 19(6) and (7)** of the Bill would require that litigants-in-person (who lack legal representation) must be given the opportunity to initiate and participate in proceedings physically, and the court or tribunal must be able, if appropriate, to give them an "opt-out" of electronic participation in any hearing.

Schedule 4 of the Bill would restructure the statutory provisions underpinning the existing procedure rule committees. These changes would clarify that the Civil, Family and Tribunal Procedure Rules will deal with physical proceedings only, whether or not the OP rules happen separately to apply those same rules to equivalent online proceedings.

[143] Ministry of Justice, Impact Assessment: Judicial Review & Courts Bill: Employment Tribunals, Online Procedure Rules Committee and Coroners Court measures, 21 July 2021, para 7

[144] clause 19(6-11)

The powers of and constraints on the new Committee

According to **clause 22**, the substantive powers of the Online Procedure Rule Committee are essentially the same as those of the Civil, Family and Tribunal Procedure Rule Committees, except that the rules should be concerned with whether, when and how the equivalent proceedings are to be conducted by electronic means, as required by **clause 19**.

Subsections 22(2-4) say that the Online Procedure Rule Committee will have the power both to apply existing rules (with or without modifications) and to apply to a set of online proceedings any rules that would not normally apply to that particular set of proceedings when conducted physically.

The OP rules can also provide for certain legal matters to be grouped and decided together in the same proceedings, when they would otherwise have been treated as separate disputes (possibly even in different courts or tribunals) had they been resolved under the Civil Procedure, Family Procedure and/or Tribunal Procedure Rules. The Explanatory Notes give an example of what **subsections 18(12-13)** might mean in practice:

> certain housing-related matters might be brigaded together in a single set of proceedings before a single court or tribunal rather than having to be spread across one or more courts and/or tribunals...[145]

The objectives of the Online Procedure Rules

Clause 19(3) sets out the core objectives the Online Procedure Rule Committee must pursue when making OP rules. It must ensure:

- practice and procedure under the Rules are accessible and fair;
- the Rules are both simple and simply expressed;
- disputes may be resolved quickly and efficiently under the Rules; and
- the Rules support the use of innovative methods of resolving disputes.

Clause 19(4) further emphasises that, when seeking to fulfil those objectives, "regard must be had to the needs of persons who require online procedural assistance".

How will Online Procedure Rules be made?

OP rules, like other procedure rules, will be made by statutory instrument by the Committee, subject to annulment by either House of Parliament.[146] As is the case with other procedure rule committees the Lord Chancellor would be able to "direct" the Committee, in writing, to make rules for a specified purpose.[147]

[145] Explanatory Notes, para 258
[146] clause 24(6)(b) and (7)
[147] clause 25

The new Committee cannot make, revoke or modify any rules unless:

- it has first consulted with those it considers to be "appropriate" persons;
- members hold a Committee meeting (unless holding one would be inexpedient);
- a majority of its members support the proposals (or in the event of a 3-3 tie, if the chair supports them); and
- the Lord Chancellor has "allowed" the rules.

If the Lord Chancellor "disallows" a set of rules, he must provide the Committee with written reasons for doing so.

Clause 26 would enable the Lord Chancellor to change other legislation, including Acts of Parliament, where it is "necessary or desirable" in "consequence" of, or to "facilitate" changes to the OP rules. This power is exercised subject to the negative resolution procedure and must only be exercised in consultation with the Lord Chief Justice and Senior President of Tribunals. These arrangements broadly mirror those for other court and tribunal procedure rules.

During scrutiny of the Courts and Tribunals (Online Procedure) Bill 2017-19, several Peers argued this power of the Lord Chancellor should also be exercisable subject to the "concurrence" requirement rather than merely a duty to consult, but the Government resisted amendments to that effect.[148]

Joshua Rozenberg, the legal commentator, has observed that this clause differs in this bill than it did in its earlier forms in the Courts and Tribunals (Online Procedure) Bill 2017-19 and the Prisons and Courts Bill 2016-17. Previously there were more stringent limits on the ability of this power to be used to amend future Acts of Parliament.[149] He described the refinement of the drafting as "Henry VIII mission creep":

> Let's imagine that parliament passes new legislation of some sort in 2030. There is a change of government in 2035 and the new lord chancellor thinks the 2030 legislation gets in the way of procedural rules that the incoming government wants to introduce. Using legislation passed in 2022, the lord chancellor will have power to sign an order in 2035 which, if all goes to plan, will repeal legislation made by parliament in 2030.
>
> It's no excuse to say that this is very unlikely to happen — and the clauses are simply included just in case. Having got a foot in the door, ministers are pushing it a bit further open every time they try. Soon, they'll be pushing at an open door. If they really need to amend or repeal an act of parliament, ministers should take the trouble to bring forward legislation in the normal way.

[148] HL Deb 24 June 2019 [Courts and Tribunals (Online Procedure) Bill [HL]] cc955-967

[149] Joshua Rozenberg, New rules for online justice, A Lawyer Writes, 30 July 2021

What about practice directions?

Practice directions will also form a part of the framework for OP rules. **Subsection 22(6)** says a rule can make provision by reference to a practice provision, rather than by embodying the substance of a rule itself.

Schedule 3 sets out the powers of senior members of the judiciary to issue a practice direction for proceedings covered by the OP rules. These mirror the existing powers of those judicial offices to make practice directions about ordinary proceedings in the relevant jurisdiction. Mostly, though not exclusively, this means the Lord Chief Justice (or a nominee) or the Senior President of Tribunals can issue online proceedings practice directions.

The default position, as with existing law on practice directions, is that such directions for online proceedings cannot be issued without the agreement of the Lord Chancellor. There are exceptions to this rule, where they can be issued without agreement, though in those cases he must still be consulted.

It is not yet clear what balance will be struck between the Committee making OP rules and the judiciary issuing online practice directions.

How might Online Procedure Rules be made in practice?

There has been discussion about the extent to which the OP rules themselves will actually set out the rules of procedure for online initiation and progression of cases or whether instead they will themselves effectively "delegate" that rule-making. In a recent speech at the Cyprus Judicial Conference, the UK Supreme Court Justice Lord Briggs set out what he saw as two plausible "models" for the OP rules:

> The first is that the online court should be designed and regulated by detailed rules, as far as possible by amending the current [Civil Procedure Rules] model, even though it was designed for paper and face to face encounters between lawyers and judges. That will mean that there will have to be a rule (or practice direction) for every electronic step, and a rule amendment every time that the online creation undergoes an improvement, as, like software on a laptop, it is bound to do, very frequently, to avoid going out of date.
>
> The alternative, more radical, view is that the online court… really needs a completely new approach to regulation. Rather than prescribe every step by a written rule in a separate book, the electronic forms will themselves contain all the necessary rules and guidance for the litigant. The only or main rule will be, do what it says in the electronic form. And the guidance will all be accessible, as in most electronic forms these days, via help boxes. The regulation will take the form of authority to the software writers and may have to be couched in their (probably weird) scientific language. On any view the predominant make-up of a rule-making committee for that purpose will be techies, people who understand

> litigants in person, and perhaps a very few judges and or lawyers, but nothing like the current preponderance of them.[150]

4.4 Membership of the Online Procedure Rule Committee

What the Bill says

Clause 21 of the Bill would set out the membership of the Online Procedure Rule Committee and make other provision (e.g.) for the Lord Chancellor to reimburse expenses of members appointed to it.

The rules on the number of committee members, who may appoint them, and what their qualifications or experience must be, can be modified by regulations under the negative procedure. However, regulations cannot be made unless the agreement of the Lord Chief Justice and the Senior President of Tribunals has each been secured, and only after consulting other specified members of the senior judiciary.[151]

As thing stand, the Online Procedure Rule Committee would have six members. Three of these would be judicial appointments made by the Lord Chief Justice and would include the chair of the Committee. The other three appointments would be made by the Lord Chancellor, and would be drawn from elsewhere: in the legal profession, the lay advice sector, and those with professional experience of online portals.

Lord Chief Justice appointees

The Lord Chief Justice will appoint three of the Committee's members.

One of these must be a judge of the Senior Courts of England and Wales. Before appointing this person, the Lord Chief Justice must consult both the Lord Chancellor and the Senior President of Tribunals.

The other two appointees can each be either:

- a judge of the Senior Courts, a Circuit judge or a district judge; or
- a tribunal judge (whether in the two-tier tribunals or in the employment tribunal system).

Before making either appointment, the Lord Chief Justice must consult the Lord Chancellor and secure agreement from the Senior President of Tribunals.

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[150] Lord Briggs, Cyprus Judicial Conference: National Experience – Change of civil procedure rules in the UK, 10 March 2021, paras 32-33

[151] The Head of Civil Justice, the Deputy Head of Civil Justice (if there is one) and the President of the Family Division

The Lord Chief Justice may nominate any of his appointees to be the chair of the Online Procedure Rule Committee.

He may also delegate the responsibility for making appointments to another judicial office holder.

Lord Chancellor appointees

The Lord Chancellor will appoint three of the Committee's members.

The first of these appointees must be a barrister, solicitor or chartered legal executive in England and Wales. Before appointing them, the Lord Chancellor must consult the Lord Chief Justice, the Senior President of Tribunals and the relevant professional body to which the qualified lawyer belongs (i.e. the Bar Council, Law Society or the Chartered Institute of Legal Executives).

The second of these appointees need not be a lawyer, but must have experience in, and knowledge of, the lay advice sector. It is plausible, for example, that someone in this position might have, or have had, a professional connection with Citizens Advice or similar organisations.

The third of these appointees also need not be a lawyer, but must have experience in, and knowledge of, information technology relating to end-users' experience of internet portals.

The second and third of these appointments must be made in consultation with the Lord Chief Justice and Senior President of Tribunals.

Previous scrutiny of the Committee membership rules

When the Courts and Tribunals (Online Procedure) Bill 2017-19 was debated in the House of Lords, several Peers questioned:

- why the Online Procedure Rule Committee would be much smaller than the other procedure rule committees;
- why the Lord Chancellor would be able to appoint such a high proportion of its membership; and
- how diverse its membership would be in terms of demographics, experience and perspectives.

The composition of the Committee would have been slightly different under that Bill (as introduced). Originally, there would be only five members of the Committee, with the Lord Chief justice appointing only two judges, rather than three. This would have meant that Rules could (theoretically) have been made without the support of any of the judges on the Committee.

Size and demographics of the Committee

Lord Beecham argued that the Committee should be larger than was (and still is) proposed, both to improve representation of different interests and to ensure a better demographic balance than might otherwise arise:

> Given the wide range of application of the new procedure, why is the committee restricted to [as was then] five members? The Civil Procedure Rule Committee has 16 members, the Family Procedure Rule Committee has 15 members and the Tribunal Procedure Committee has nine. Here a much smaller figure is proposed. Will the Government ensure that there is gender balance within the composition of the committee and its staff, and that the Bar and solicitors are represented, together with representatives from the advice sector and, as has been suggested this afternoon, from the judiciary itself? And will they look again at the suggestion in Lord Justice Briggs's report that the membership of committees should include in relevant cases members with relevant skills such as engineering and IT?[152]

Lord Beecham tabled, but did not press to a vote, two notable amendments in Committee. The first would have required the Lord Chancellor to have regard to gender balance when making appointments to the Committee.

The other would have implemented a Law Society recommendation: that there should be representation for each of the legal professions (barristers, solicitors and chartered legal executives) rather than just one for all three.[153]

Lack of family jurisdiction representation of the Committee

Lord Ponsonby criticised the fact that there was no guarantee of representation of a judge with experience operating in the family courts, whether judges or magistrates.[154] The Lord Chief Justice's three nominees (as they are now) seem likely, given the criteria, to cover both the civil jurisdiction and the tribunals, but no mention is made of distinct family jurisdiction representation.

Balance of power between Lord Chief Justice and Lord Chancellor appointees on the Committee

Lord Judge observed that, on the other procedure rule committees, only a "tiny number" of appointments were nominated by the Lord Chancellor. By contrast, with this Committee, the majority of the nominees, under the original proposals, would be there on the instigation of the Lord Chancellor. This would, he argued, fundamentally alter the balance of power, and weaken the position of the Lord Chief Justice in overseeing the making of procedure rules.[155]

At Lords Report stage of the Courts and Tribunals (Online Procedure) Bill 2017-19, the Government acknowledged Lord Judge's concern. It moved two key amendments. One was to the effect that the Lord Chief Justice would appoint three judges, instead of two, to the Committee.[156] This change

[152] HL Deb 14 May 2019 [Courts and Tribunals (Online Procedure) Bill [HL]] c1522
[153] Law Society, Parliamentary Briefing: Courts and Tribunals (Online Procedure) Bill, 14 May 2019
[154] HL Deb 14 May 2019 [Courts and Tribunals (Online Procedure) Bill [HL]] c1508
[155] HL Deb 14 May 2019 [Courts and Tribunals (Online Procedure) Bill [HL]] c1511
[156] HL Deb 24 June 2019 [Courts and Tribunals (Online Procedure) Bill [HL]] c968

increased the Committee's overall membership from five to six. The second amendment allowed the Lord Chief Justice to appoint the chair of the Committee, and for the chair's vote to be decisive in the event of a 3-3 tie. This would prevent the Lord Chancellor's appointees from "outvoting" the Lord Chief Justice's judicial appointees in the event that there was disagreement about whether new rules should be made.

The current Bill reflects these Government "concessions" made in the last Parliament.

4.5 Digital exclusion and safeguards

A core concern of Peers during consideration of the Court and Tribunals (Online Procedure) Bill was what it would mean for those who are "digitally excluded". There are groups of people who are more likely to face difficulties if they have no choice but to access parts of the justice system through online or electronic means. This includes those who do not have the necessary IT equipment, those with language barriers, those who lack proficiency in IT, and those whose health or other circumstances make it more difficult for them to engage with services in an online context.

Although online proceedings are intended, for those who are able to use the technology, to make the justice system more accessible, there is a risk of making the justice system less accessible precisely to groups of people that are more reliant on it to protect their interests. This might pose particular problems for those of advanced age, those who have health difficulties, and/or those for whom English is not a first language.

The nature and scale of digital exclusion

Research from the Office of National Statistics suggests that the proportion of internet "non-users" in the UK more than halved in the space of five years, from 20.3% of adults in 2013 to 10.0% of adults in 2018.[157] This has fallen further to 7.8% in 2020.[158]

Other estimates suggest that, although significantly more adults are now internet users than even a few years ago, for many people, proficiency in basic "digital skills" is limited. A Lloyds Banking Group study from 2018 estimated that over one in five UK adults had "zero" or "limited" online abilities.[159] The same survey estimated that 8.6 million adults (16%) were unable to complete an online application form.

[157] Office for National Statistics, Exploring the UK's digital divide, 4 March 2019
[158] Office for National Statistics, Internet users, UK: 2020, 6 April 2021
[159] Lloyds Banking Group, UK Consumer Digital Index 2018, p6

The most recent ONS figures suggest that digital exclusion disproportionately affects older people, especially women of retirement age, and people with a disability:

- Only 54% of those over the age of 75 were internet users, compared to 86% of those aged 65-74 and 98% of those under 65;
- Under 50% of women over 75 were internet users, compared with almost 60% of men over 75; and
- People with a disability (18.6%) were more than four times as likely to be internet non-users as those without a disability (4.3%).

The vast majority of digital exclusion affects those of retirement age, but internet use is also notably lower among the economically inactive and unpaid family workers than it is for those in work, further education or those who are short-term unemployed or in government employment or training programmes.[160]

Certain types of court or tribunal case are more likely to engage vulnerable people at greater risk of digital exclusion because of the subject matters with which they are concerned. These include, for instance, social security appeals, housing eviction cases, immigration and asylum appeals, and debt enforcement.

What does the bill say on digital assistance?

The Government readily recognises that some people will face additional obstacles if required to participate in court or tribunal proceedings by electronic means.

Online procedural assistance

The bill makes explicit reference to a requirement to "have regard to the needs of persons who require online procedural assistance". This is something:

- the Online Procedure Rule Committee must take into account when drafting rules (to ensure that they are "accessible and fair");[161] and
- the Lord Chancellor must take into account when deciding whether to allow or disallow rules proposed by the Committee.[162]

The Bill also includes an obligation on the Lord Chancellor to make available:

> such support as [he] considers to be appropriate and proportionate for persons who require online procedural assistance.[163]

[160] Office for National Statistics, Internet users, UK: 2020, 6 April 2021
[161] clause 18(3)(a) and (4)
[162] clause 24(4)
[163] clause 27

Someone is a person who "requires online procedural assistance" if:

> because of difficulties in accessing or using electronic equipment, [they] require assistance in order to initiate, conduct, progress or participate in proceedings by electronic means in accordance with Online Procedure Rules.[164]

A similar provision was added to the Courts and Tribunals (Online Procedure) Bill in the last Parliament at Lords Report stage, after the Government accepted an amendment from Lord Marks of Henley-on-Thames.[165]

Alternative means of participation

Additionally, if someone is a litigant-in-person, the Bill would give them greater flexibility about how they participate in proceedings than someone who is legally represented. Someone without legal representation must be given the choice to initiate, conduct, or progress proceedings, or to participate in any proceedings other than hearings, by "non-electronic means". This does not mean that the "ordinary" procedure rules will apply but it means that the online rules must accommodate other forms of participation. It may be the case in practice, and this new framework allows, for cases of that kind not to be governed by the OP rules.[166]

The rules for hearings are slightly different. The OP rules have to give a court or tribunal discretion about whether, in a given case, a hearing should be conducted wholly, partially or not at all electronically. This might be done either on the court's own initiative, or on an application made by one or more of the parties to that effect. However, a party does not have the "right", as such, to opt-out of their hearing taking place over video or telephone link if that is what the OP rules provide is the default course of action.[167]

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[164] clause 31

[165] HL Deb 24 June 2019 [Courts and Tribunals (Online Procedure) Bill [HL]] c953

[166] clause 18(6)

[167] clause 18(7)

5 Employment tribunals reforms

Chapter 3 of Part 2 of the Bill is concerned with reforms of the Employment Tribunal (ET) and Employment Appeals Tribunal (EAT).

5.1 Overview of the Employment Tribunal system

The employment tribunal (called the industrial tribunal until 1998) was set up by the Industrial Training Act 1964 to consider appeals by employers against industrial training levies. Over time, the jurisdiction of tribunal was expanded to cover claims by workers for breaches of employment legislation, including claims about redundancy, equal pay, written particulars and unfair dismissal.

The Employment Protection Act 1975 set up the Employment Appeal Tribunal to hear appeals on a point of law from the industrial tribunal.

Today, the ET and EAT are governed by the Employment Tribunals Act 1996.

The ET hears most statutory employment rights claims, including those relating to pay, working time, time off, family-related leave, discrimination, redundancy and dismissal. It can also hear some contractual claims, such as claims for damages for breach of contract arising or outstanding when the contract is terminated. The ET cannot hear claims relating to personal injury or claims concerning restraint of trade, such as post-termination restrictive covenants. When dealing with breach of contract claims, the ET can only award damages up to £25,000.[168]

The EAT has jurisdiction to hear appeals on points of law arising from a decision of the ET. It can also hear appeals relating to certain decisions of the Certification Officer, such as a decision to refuse to list a trade union.[169]

Since 2006, the ET and EAT have been administered by what is now HMCTS. However, they are separate from the unified tribunal structure set up in 2007.

The Secretary of State for BEIS can make rules governing the composition and procedure of the ET. The current rules are set out in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The rules cover issues such as starting a claim, case management, decisions and cost orders. These rules are supplemented by practice directions issued by the Presidents of the

[168] section 3 Employment Tribunals Act 1996; Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994; Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994

[169] section 21 Employment Tribunals Act 1996; section 9 Trade Union and Labour Relations (Consolidation) Act 1992

Employment Tribunals. However, some aspects of what might be considered procedure, such as time limits for bringing claims or caps on compensation, are set out in other primary legislation.[170]

The Lord Chancellor can make rules governing procedure in the EAT. The current rules are the Employment Appeal Tribunal Rules 1993. Again, these are supplemented by practice directions issued by the President of the EAT.

The ET in particular has a large backlog of cases. According to the most recent HMCTS data, the ET had 50,287 outstanding claims in March 2021 (including multiple lead claims). The average clearance time for single claims was 45.4 weeks.[171] The backlog has grown throughout the course of the Covid-19 pandemic and was particularly impacted by a pause in most hearings between March 2020 and June 2020.[172]

In September 2020, the Government amended the ET Rules of Procedure to address the backlog. The changes included:

- Allowing other judges to sit as Employment Judges;
- Delegating certain functions to ET legal officers;
- Allowing two or more claimants to make a claim on the same form;
- Discretion to accept claim forms with errors in them;
- Amending rules around witness statements to facilitate remote hearings;
- Giving judges the ability to list final hearings more quickly;
- Extending the early conciliation period from one month to six weeks.[173]

There have been a number of recent consultations and reports which have recommended changes to the ET, including a report by the Law Commission in April 2020. The Law Commission recommended various changes, including extending time limits for bringing claims to the ET, expanding its jurisdiction to hear breach of contract claims, expanding the ET's jurisdiction for certain employment claims and improving the enforcement of ET awards.

These issues are not addressed in this Bill, which is focused on transferring responsibility for ET and EAT procedure to the Tribunal Procedure Committee.

5.2 Proposals in this Bill

The Bill provides for the following across **clauses 32 to 36 and Schedule 5**:

[170] See e.g. sections 111 and 124 Employment Rights Act 1996 (concerning unfair dismissal claims)
[171] HMCTS, HMCTS management information - June 2021, 12 August 2021
[172] HMCTS, National Employment Tribunal user group minutes May 2021, 2 July 2021
[173] Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020

- transferring the responsibility for making procedure rules from the Secretary of State for Business, Energy and Industrial Strategy (BEIS) to the Tribunal Procedure Committee (TPC);
- making the Lord Chancellor responsible for determining the composition of the ET and EAT;
- transferring responsibility for paying ET judges from the Secretary of State for BEIS to the Lord Chancellor; and
- allowing for the delegation of some judicial functions to ET and EAT legal case officers.

Similar proposals were included in the Prisons and Courts Bill 2016-17 which did not pass the House of Commons due to the 2017 General Election. This is discussed in further detail below.

This section of the Bill covers England, Wales and Scotland. Northern Ireland has a separate and devolved system of employment-related tribunals, which include the Industrial Tribunals and the Fair Employment Tribunal. Under the Scotland Act 2016, powers over the management of the ET and EAT can be devolved to Scotland by an Order in Council. In 2016, the Scottish Government consulted on this issue but, to date, no Order in Council has been made.

Transferring responsibility for procedure to the TPC

Clause 32 of the Bill would transfer responsibility for procedure rules in the ET and EAT to the Tribunal Procedure Committee. The TPC is a non-departmental public body sponsored by the Ministry of Justice (MoJ). It currently has nine members and makes procedure rules for the First-tier and Upper Tribunals.

Leggatt Review

In 2001, Sir Andrew Leggatt published the report on the review of tribunals, Tribunals for Users – One System, One Service. Among other things, the report recommended the creation of a single tribunal service.

The review received a substantial amount of evidence about the ET and EAT and considered whether they should form part of the new unified tribunal. The review considered two possible alternatives: (a) turning the ET and EAT into new industrial courts; and (b) keeping responsibility for the ET and EAT within the Department for Trade and Industry (DTI, now BEIS). Ultimately, the review rejected both arguments and recommended that the ET and EAT form part of the single tribunal structure.[174]

The review concluded that responsibility for ET procedure should transfer from the DTI to the Lord Chancellors' Department (now Ministry of Justice). The review said the LCD was better placed to ensure swift reforms to procedure rules to address user needs. The review also noted case law which

[174] Lord Chancellor's Department, Tribunals for Users – One System, One Service: The Report of the Review of Tribunals by Sir Andrew Leggatt, March 2001, paras 3.21-3.28

said that placing responsibility for procedure rules within the DTI, which as an employer was often a respondent to claims, risked the independence of the ET, particularly in the context of Article 6 of the ECHR (right to a fair trial).[175]

On 11 March 2003, Lord Irvine, then Lord Chancellor, announced that the Government would set up a new unified tribunal system.[176] A more detailed overview was provided in a White Paper published in 2004: Transforming Public Services: Complaints, Redress and Tribunals.

Chapter 8 of the White Paper set out the position of the ET and EAT with respect to the new unified tribunal. The Government concluded that the ET and EAT should not form part of the unified tribunal and should remain separate tribunals, although it committed to keep the matter under review. The Government noted that cases in the ET and EAT usually involved disputes between private parties rather than disputes between an individual and the state (as is the case for most other tribunals). On this basis, it decided that the ET and EAT needed to retain a separate identity and procedure.[177]

From 2006, administrative support for the ET and EAT was provided by the new Tribunals Service (now HMCTS), an executive agency of the Department for Constitutional Affairs (now Ministry of Justice). However, the ET and EAT were not included in the First-tier and Upper Tribunal which were set up by the Tribunals, Courts and Enforcement Act 2007. The procedure rules for the First-tier and Upper Tribunal are set by the TPC. By contrast, responsibility for procedure rules in the ET remained with the Secretary of State for Business, Enterprise and Regulatory Reform (formerly DTI, now BEIS) and responsibility for procedure in the EAT remained with the Lord Chancellor.

Briggs Review

In 2015, Lord Justice Briggs (as he then was) was commissioned by the Lord Chief Justice to undertake a review of the civil courts, including boundaries between the civil courts and the tribunals. He published an interim report in 2015 and a final report in 2016.

In the interim report, Lord Justice Briggs considered the boundaries between the ET and the EAT and the civil courts.[178]

He identified three possible options: (a) keeping the ET and EAT as distinct tribunals; (b) moving the ET and EAT under the civil courts; and (c) moving the ET and EAT into the tribunal system.

[175] See e.g. *Smith v Secretary of State for Trade and Industry* [2000] IRLR 6, paras 21-32

[176] See also PQ HL2083 [on Tribunals: Reform], 11 March 2003

[177] Department for Constitutional Affairs, Transforming Public Services: Complaints, Redress and Tribunals, Cm 6243, July 2004, paras 8.6-8.7

[178] Lord Justice Briggs, Civil Courts Structure Review: Interim Report, December 2015, paras 11.10-11.19

He concluded that option (a) (the status quo) was the least attractive option as it left the ET and EAT without the management structure and support that the civil courts and tribunal have.

Ultimately, he concluded that option (b) (moving the ET and EAT under the civil courts) was the best option. Among other things, he noted that the ET and civil courts both deal with disputes between private parties (unlike the other tribunals) and that they already share jurisdiction in a number of areas relating to contractual disputes. He noted that moving the ET under the civil courts would mean that it could no longer have lay members sitting as judges. However, he concluded that the jurisprudence of the ET had grown so detailed that in practice most cases are already judge-led.

He suggested that if the ET and EAT were moved under the civil courts, they could retain their own procedure rules which are recognised as being less complex and more user-friendly than the Civil Procedure Rules which apply in the civil courts. He noted that it might be difficult for the Department for Business, Industry and Skills (BIS, now BEIS) to retain responsibility for the procedure rules of the ET and EAT were moved under the civil courts but he concluded that this was ultimately a political question.

In the final report, Lord Justice Briggs returned to the issue of the ET and EAT and noted that many consultees supported the idea of creating a specific Employment and Equalities Court with its own procedure rules and exclusive jurisdiction to hear employment and equalities cases. He noted there was no significant support for the status quo and that moving the ET and EAT into the tribunal system was seen as workable rather than preferable.[179]

Reforming the Employment Tribunal system (2016)

In 2016, the Government launched a consultation, Reforming the Employment Tribunal system. The consultation document announced that the Government would transfer responsibility for the procedure rules in the ET and EAT from the Secretary of State for BEIS and the Lord Chancellor to the TPC. This was a decision and not a matter that was being consulted upon, although it sought views on related matters, such as adding new members to the TPC.

The consultation document explained that the reason for transferring responsibility was to ensure that ET and EAT procedure could be reformed more quickly and keep pace with wider reforms to the tribunals, including the adoption of digital technologies and the delegation of judicial functions.[180]

The Government's response to the consultation noted that while the transfer of responsibility was not an issue that was consulted upon, a number of bodies did raise concerns. It noted the response of the Confederation of British Industry (CBI) which said that responsibility should remain with BEIS

[179] Judiciary of England and Wales, Civil Courts Structure Review: Final Report by Lord Justice Briggs, July 2016, paras 11.11-11.21

[180] BEIS, Reforming the Employment Tribunal system, December 2016, paras 1-8; BEIS, Reforming the Employment Tribunal system: final impact assessment, February 2017, paras 5-8

and that procedure rules should be updated through judge-led review, such as the 2012 review by Mr Justice Underhill (as he then was) which led to the adoption of the current ET Rules of Procedure in 2013.[181] Similar concerns were expressed by other bodies, including the Employment Lawyers Association and Unite the Union.[182]

The Government's consultation response acknowledged that judge-led reviews were effective for major reforms of procedure rules but that they were not appropriate for iterative reforms to ensure modernisation and effective administration. It concluded it was necessary to transfer the responsibility for procedure rules to the TPC.[183]

In 2017, the Government introduced the Prisons and Courts Bill. Among other things, the Bill made provision for transferring responsibility for procedure in the ET and EAT to the TPC. For a detailed overview of that Bill, see the Library Briefing, Commons Library Analysis: The Prisons and Courts Bill (CBP-7907).

As noted above, the Bill did not complete its Parliamentary process because of the 2017 General Election.[184]

What will the Bill do?

Clause 32 of the Bill would replace section 7 and section 30 of the Employment Tribunals Act 1996 (ETA 1996) as well as insert a **new section 37QA**.

At present, section 7 of the ETA 1996 provides that the ET is governed by procedure regulations made by the Secretary of State for BEIS. It also makes provision about matters which may be included in procedure regulations.

The **new section 7** simply provides that the ET will be governed by "Procedure Rules".

At present, section 30 of the ETA 1996 provides that the EAT is governed by procedure rules made by the Lord Chancellor. It makes provision about the matters which may be included in procedure rules. Furthermore, it provides that the EAT can govern its own procedure, subject to the procedure rules and any practice directions.

The **new section 30** also provides that the EAT will be governed by "Procedure Rules". It will keep the provision that the EAT can govern its own procedure.

The **new section 37QA** will provide that the Tribunal Procedure Committee is responsible for making "Employment Tribunal Procedure Rules". Despite the

[181] BEIS, Reforming the Employment Tribunal system: Government response, February 2017, para 85
[182] Employment Lawyers Association, Consultation: Reforming the Employment Tribunal System Response from the Employment Lawyers Association, January 2017, pp4-5; Unite the Union, Unite the Union response to consultation – Reforming the Employment Tribunal system, January 2017, pp9-10
[183] BEIS, Reforming the Employment Tribunal system: Government response, February 2017, paras 86-88
[184] HC Deb 20 April 2017 c800

name, it is provided that these are called "Procedure Rules" and can govern both the ET and the EAT.

Clause 32 also gives effect to **Schedule 5** of the Bill which would make further provision about procedure rules.

Part 1 of Schedule 5 would insert a **new Schedule A1** to the ETA 1996. This would make provision about matters which can be included in Procedure Rules made under **section 37QA**. The contents of **Schedule A1** will mirror Schedule 5 of the Tribunals, Courts and Enforcement Act 2007, meaning the TPC would be able to make Procedure Rules for the ET and EAT in the same way that it does for the First-tier and Upper Tribunals.

Part 2 of Schedule 5 would make various technical amendments to the ETA 1996 to reflect the fact that the ET and EAT will be governed by Procedure Rules made by the TPC. An overview of these amendments can be found in the Explanatory Notes to the Bill at paragraphs 366 to 380.

One notable provision is **paragraph 23 of Schedule 5**. This would insert a **new section 37QB** into the ETA 1996. It will provide the Lord Chancellor with the power to amend any enactment, including primary legislation, in order to facilitate the making of Procedure Rules or as a consequence of Procedure Rules. This is an example of what is commonly called a 'Henry VIII power'.

Part 3 of Schedule 5 would make minor amendments to other legislation to reflect the fact that the ET and EAT will now be governed by Procedure Rules.

It is important to note that the Bill does not affect the continued operation of the ET Rules of Procedure 2013 or the EAT Rules 1993 (see **clause 34**). The Explanatory Notes say that this will ensure the rules remain in force until new Procedure Rules are made by the TPC.[185]

It should also be noted that while the Bill will transfer the responsibility for procedure rules to the TPC, the ET and EAT will remain separate from the unified tribunal system and will have their own rules.[186]

5.3 Appointment of two additional members to the TPC

Paragraph 28 of Schedule 5 of the Bill would enable two additional members to be appointed to the Tribunal Procedure Committee.

As noted above, the TPC is a non-departmental public body sponsored by the Ministry of Justice. The membership includes:

[185] Judicial Review and Courts Bill Explanatory Notes (Bill 152), para 290
[186] ibid. para 51

- The Senior President of Tribunals;
- Three people with experience of practice in the Tribunals, appointed by the Lord Chancellor following consultation with the Lord Chief Justice;
- One judge from the First-tier Tribunal, one judge from the Upper Tribunal and one member of either tribunal who is not a judge, appointed by the Lord Chief Justice following consultation with the Lord Chancellor;
- One person with experience of the Scottish legal system appointed by the Lord President of the Court of Session following consultation with the Lord Chancellor; and
- Any person who has particular experience of an issue or subject area for which the First-tier Tribunal and Upper Tribunal have jurisdiction, appointed by an appropriate senior judge at the request of the Senior President of Tribunals.[187]

The TPC currently has 10 members. The list of members can be found on the GOV.UK website, Tribunal Procedure Committee: About Us.

In the 2016 consultation, the Government said a new person with expertise in employment law would need to be appointed to the TPC if it was to be given responsibility for ET and EAT procedure. The consultation sought views on the criteria that should be used to make appointments. The Government's response to the consultation said that the majority of respondents thought the new member should be a person who has extensive knowledge of employment law and experience practicing in the ET and the EAT.[188]

What will the Bill do?

The membership of the TPC is governed by Schedule 5 of the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007).

Paragraph 28 of Schedule 5 of the Bill would amend Schedule 5 TCEA 2007 to provide for two additional members to be appointed.

Firstly, it would increase the number of the Lord Chancellor's appointments from three people to four. It will also add a provision that at least one of the four appointees must have experience practicing in the ET and EAT or advising people involved in proceedings before the ET and EAT.

Secondly, it would allow the Lord Chief Justice to appoint an additional member. The appointee must be either a judge or member of the ET or EAT, including any lay members.

[187] Part 2 of Schedule 5 Tribunals, Courts and Enforcement Act 2007

[188] BEIS, Reforming the Employment Tribunal system: Government response, February 2017, para 83

5.4 Transferring certain responsibilities to the Lord Chancellor

Clause 33 of the Bill would give the Lord Chancellor the exclusive responsibility for deciding the rules relating to the composition of the ET and EAT.

Current rules on composition of employment tribunals

Currently, section 4 of the Employment Tribunals Act 1996 (ETA 1996) provides that ET claims must be heard by an Employment Judge and two lay members. It also lists certain cases which can be heard by an Employment Judge sitting alone. The list can be amended by the Secretary of State for BEIS and the Lord Chancellor acting together.

Where an ET is made up of three members, one member is drawn from a panel of Employment Judges, one member is drawn from a panel of lay members representing employers and one member is drawn from a panel of lay members representing employees.[189]

In the EAT, as in the ET, cases can be heard either by a judge sitting alone or by a panel of three or five, including a judge and two or four lay members (representing employers and employees in equal numbers). Since 2013, section 28 of the ETA 1996 has provided that by default cases in the EAT are heard by a judge sitting alone (called "chairman-alone questions") and the judge can direct if a case is to be heard by a panel of two or three.

In the 2016 consultation, the Government said that it was not appropriate for non-legal members to be called upon in a case as a matter of course. It proposed that the ET follow the model of the First-tier and Upper Tribunal where the Senior President of Tribunals has responsibility for determining the composition of panels, based on the need for tribunals to be accessible, fair, quick and efficient.[23] The Government's response to the consultation noted that this proposal was generally supported, although it highlighted that some groups expressed concern that it could lead to a diminished role for non-legal members, who were seen as particularly valuable in the ET.[190]

What will the Bill do?

Clause 33 of the Bill would replace sections 4 and 28 of the ETA 1996 with new provisions.

New section 4would provide that the Lord Chancellor has the power to make regulations specifying the composition of an ET for any type of claim that may be brought before it. Every panel must contain at least one Employment

[189] Regulation 8 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013
[190] BEIS, Reforming the Employment Tribunal system: Government response, February 2017, para 74

Judge and if a case is to be heard by a single member that member must be an Employment Judge. The decisions relating to panel composition can be delegated by the Lord Chancellor to either the Senior President of Tribunals or the President of the Employment Tribunal. The Impact Assessment that accompanied the Government response to the 2016 consultation suggested that, in practice, the power would be exercised for the ET and EAT by the Senior President of Tribunals in consultation with the Lord Chancellor.[191]

New section 28 is broadly similar to **new section 4**, but makes provision for the EAT rather than the ET.

Responsibility for paying employment judges

Clause 36 of the Bill would amend sections 5 and 27 of the ETA 1996 to transfer responsibility for paying ET and EAT members from the Secretary of State for BEIS to the Lord Chancellor.

5.5 Delegating certain judicial functions to legal officers

Clause 35 and Schedule 5 of the Bill, which would insert a **new Schedule A1** into the ETA 1996, would allow the delegation of certain judicial functions to legal officers in the ET.

Existing flexibilities

Under section 4(6B) of the ETA 1996, the Secretary of State for BEIS currently has the power to make procedure regulations that allow certain functions that are normally carried out by an Employment Judge sitting alone to be carried out by "legal officers". As a general rule, regulations cannot delegate tasks that involve the "determination of any proceedings", although the Secretary of State and Lord Chancellor, acting together, can specify certain proceedings that can be determined by legal officers provided all parties to the case agree in writing.

The power under section 4(6B) was used in September 2020 to permit the delegation of certain functions to legal officers, including the determination of substantial defects in the claim form, applications for the extension of time limits and applications for the postponement of hearings.[192] The delegation of functions was to be authorised by the Senior President of Tribunals. A Practice

[191] BEIS, Reforming the Employment Tribunal system: final impact assessment, February 2017, para 27

[192] Regulation 4 Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020

Direction authorising the delegation of these functions was made on 25 March 2021.

Consultation on further reform

In the 2016 consultation, the Government sought views on the delegation of certain judicial functions to caseworkers in the ET. The Impact Assessment that accompanied the consultation listed a number of tasks that could be delegated, including initial case assessments, case management hearings, dismissals, postponements and more.[193]

Some respondents to the consultation said the senior tribunal judiciary, to whom the power of delegation would be given, needed to be cautious. The Employment Lawyers Association, for example, noted that many cases in the ET involve litigants in person who benefit from interacting with a judge, both in terms of having legal issues explained to them but also in terms of being heard. They also noted that decisions which might be characterised as "procedural" may have a significant impact on the outcome of the case.[194]

The Government response to the consultation noted that the majority of respondents had given qualified support to the delegation of certain tasks. However, it also noted a general hesitation about ensuring the appropriate tasks were being handled by staff with appropriate qualifications, especially case management issues. Several respondents had also highlighted that the ET was different to other tribunals and that the party-to-party nature of the cases meant that a large number of decisions by legal officers could be challenged. Nevertheless, the Government concluded that it was right to give the ET the flexibility to delegate task to meet demand.[195]

What will the Bill do?

Part 1 of Schedule 5 of the Bill would insert **new Schedule A1 to the ETA 1996**, concerning the making of Procedure Rules. **Paragraph 2 of Schedule A1** provides that Procedure Rules may make provision for the delegation of functions to staff appointed under either the Courts Act 2003 (court staff) or the Tribunals, Courts and Enforcement Act 2007 (tribunal staff). Staff may only carry out the functions if authorised by the Senior President of Tribunals.

The Explanatory Notes to the Bill say these provisions on the delegation of functions are similar to those introduced in the unified tribunal system by the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018.[196]

[193] BEIS, Reforming the Employment Tribunal system: Impact Assessment, October 2016, para 119
[194] Employment Lawyers Association, Consultation: Reforming the Employment Tribunal System Response from the Employment Lawyers Association, January 2017, pp19-24
[195] BEIS, Reforming the Employment Tribunal System: Government Response, February 2017
[196] Explanatory Notes, para 54

6 Coroner reforms

Read more about coroner reform

This section sets out the provisions in this Bill to change aspects of the coroner system in England and Wales. For more detail on the wider policy context in which the legislation would operate, read:

- Reforms to the coroner service in England and Wales

6.1 Background

Chapter 4 of Part 2 of the Bill deals with coroners. In its background briefing notes on the Queen's Speech, the Government indicated that it would be introducing legislation to reform some aspects of the system of investigating deaths in England and Wales:

> We will provide a package of coroner measures for England and Wales aimed at putting aspects of the running of the coronial system on the same footing as other courts and tribunals. Efficiency will be increased, through virtual hearings, inquests to be held without a hearing in non-contentious cases, investigations discontinued where the cause of death is natural without first requiring a post mortem, and allowing coroner areas to merge across local authority boundaries.
>
> By ensuring the coroners jurisdiction is in line with other courts and tribunals which already have remote hearings and enabling the recovery of coroner services following the COVID-19 pandemic, we will reduce delays in progressing cases and therefore reduce the distress of bereaved families.[197]

[197] Cabinet Office, Queen's Speech 2021 – Background Briefing Notes, pp84-85, 11 May 2021

6.2 Proposals in this Bill

The current Bill addresses five distinct issues to do with the coroner's system, namely the circumstances in which:

- an investigation could be discontinued otherwise than following a post-mortem examination revealing the cause of death (**clause 37**);
- an inquest could be held wholly in writing (**clause 38**);
- inquest participants, including the coroner, could take part in a pre-inquest review and inquest via audio or video link (**clause 39**);
- a jury inquest could be dispensed with in relation to deaths suspected to be Covid-19 related (**clause 40**); and
- the Lord Chancellor could merge coroner areas within a local authority area (**clause 41**).

6.3 Discontinuance of investigation where cause of death becomes clear

The current law

Section 4 of the Coroners and Justice Act 2009 currently requires a coroner to discontinue an investigation if a post-mortem examination (under section 14 of that Act) reveals the cause of death before the coroner has begun holding an inquest, and the coroner thinks that it is not necessary to continue the investigation. If the investigation is discontinued the coroner cannot then hold an inquest into the death.

Chief Coroner's view

The Chief Coroner has recommended that section 4 be amended to broaden the circumstances in which a coroner might discontinue an investigation:

> In practice, [section 4] allows a coroner who has commenced an investigation into a death under section 1 of the 2009 Act to bring the investigation to an end without having to hold an inquest. However, the coroner can only do so if the cause of death has been revealed by a post-mortem examination. In all other circumstances, once an investigation has been commenced, the coroner has no power to discontinue it; there must be an inquest.
>
> The effect of this provision is that even if the coroner discovers the cause of death by means other than by a post-mortem examination, for example through medical records that become available at a later stage, the coroner must nevertheless proceed to inquest even though the outcome may be a foregone conclusion. This is an

> unnecessary step. It is time consuming, may be costly and adds to the distress of a bereaved family.
>
> The solution is to amend section 4 of the 2009 Act so as to broaden the circumstances in which an investigation can be discontinued...[198]

What would the Bill change?

Clause 37 would amend section 4 of the 2009 Act to enable a coroner to discontinue an investigation if:

- the coroner is satisfied that the cause of death has become clear in the course of that investigation and
- an inquest into the death has not yet begun.

There would no longer be a specific reference to the cause of death having been revealed by a post-mortem examination.

It would continue to be the case that a coroner may not discontinue an investigation if they suspect that the deceased died a violent or unnatural death or died while in custody or otherwise in state detention.

6.4 Power to conduct non-contentious inquests in writing

The current law

Rule 23 of the Coroners (Inquests) Rules 2013 provides for a "documentary inquest", that is, where witnesses are not required to attend and give oral evidence.[199] A limited public hearing must still take place.[200] The Government has noted in this Bill's Explanatory Notes how this operates in practice:

> Each year, circa 30,000 inquests are held in England and Wales, and in a significant number of these cases, those most likely to attend (the bereaved family) are content not to attend. In practice, many hearings are held in a completely empty courtroom, with the coroner conducting the hearing to no-one (other than a recording device).[201]

[198] Chief Coroner's combined annual report 2018 to 2019 and 2019 to 2020, November 2020, paras 142-144

[199] For more on this see Commons Library briefing, Reforms to the coroner service in England and Wales, CBP 9328, 24 September 2021, section 1.2

[200] Explanatory Notes, para 63

[201] Explanatory Notes, para 62

Chief Coroner's view

The Chief Coroner has proposed that the law should be changed to enable inquests without a hearing:

> There is no need for all inquests to be concluded with a hearing. In a case where the facts are not contentious, no witness are required to attend, the outcome is clear (at least on the balance of probabilities), the family do not want an inquest and there is no other public interest for conducting an inquest in a public hearing, the case could be concluded by a decision 'on the papers' with a written ruling. [202]

The Chief Coroner considers that a reasoned written ruling would have the advantage of being clear and that it could be given in open court and provided to the family for them to keep. He also set out other potential benefits:

> Such a ruling would be more focused than an ex tempore decision [one made at the time] and more permanent. In some cases, it need be no more than the completed Record of Inquest. In others, a page or two will usually suffice. There would be no need for an inquest, thereby saving court time, coroner time and other resources. Families would not need to attend court. [203]

The Chief Coroner said a hearing would be held where this is a requirement or where there is a clear public interest in holding an inquest with a hearing. In most cases where there is no hearing, he said, the public nature of the coroner's investigation and conclusion could be recognised by publication of the ruling, sometimes in a redacted form, or publication of the Record of Inquest (which is a public document). [204]

The Chief Coroner considers there would be significant advantages to the coroner service if this change were to be implemented, given the backlogs created by the Covid-19 pandemic. [205]

What would the Bill change?

Clause 38 would insert a **new section 9C** into the 2009 Act which would enable a coroner to decide to hold an inquest which is to be held without a jury at a hearing or, if the coroner considers a hearing to be unnecessary, in writing. A coroner would not be able to decide that a hearing is unnecessary unless:

[202] Chief Coroner's combined annual report 2018 to 2019 and 2019 to 2020, November 2020, para 145
[203] ibid, paragraph 147
[204] ibid. paras 148-9
[205] ibid. para 149

- the coroner has invited representations from each interested person known to the coroner; [206]
- no interested person has represented on reasonable grounds that a hearing should take place;
- it appears to the coroner that there is no real prospect of disagreement among interested persons as to the determinations or findings that the inquest could or should make; and
- it appears to the coroner that no public interest would be served by a hearing.

The Explanatory Notes state this provision would enable coroners to determine when an inquest can be held without a hearing, "which could be where there is no practical need or public interest to do so, and in turn free up physical space and resources for inquests which do need a hearing." Coroners would still be expected to hold a full public hearing when necessary. [207]

The Government intends that this provision would serve as "a natural extension of the existing arrangement" and anticipates that the Chief Coroner would provide guidance to coroners accompanying any law change, "ensuring that 'paper' inquests are conducted fairly and cases which require a full public hearing continue as required". [208]

6.5 Use of audio or video links at inquests

The current position

The Explanatory Notes set out information about developments during the pandemic:

> During the COVID-19 pandemic, coroners have sought ways to ensure that inquest hearings could continue, whilst being mindful of the need to support the government in its efforts to curb the spread of the virus. The Chief Coroner in his guidance on hearings during the pandemic [209] noted that whilst it was possible for all parties who needed to be present could do so by virtual link, the coroner (or jury if there was one) had to be physically present at the hearing.

[206] "Interested person" is defined in section 47 of the Coroners and Justice Act 2009 and includes a spouse, civil partner, partner, parent, child, brother, sister, grandparent, grandchild, child of a brother or sister, stepfather, stepmother, half-brother or half-sister and a personal representative of the deceased.

[207] Explanatory Notes, para 62

[208] Explanatory Notes, para 63

[209] Footnote to quoted text: "Chief Coroner Guidance No.35- Hearings during the pandemic ChiefCoroner-Guidance-No.-35-hearings-during-the-pandemic.pdf (judiciary.uk)

> Whilst coroners have been able to continue to conduct very routine inquests, in almost all coroner areas backlogs have built up of more complex inquests with multiple attendees, in particular jury inquests, as courts have lacked the necessary infrastructure to operate during the lockdown restrictions.[210]

What would the Bill change?

Clause 39 would amend section 45 of the 2009 Act (on Coroners rules) to add as a category of what might be included in the rules, "provision for or in connection with the conduct of hearings wholly or partly by way of electronic transmission of sounds or images". This would enable participants, including the coroner, to participate remotely in pre-inquest reviews and inquests.

The Explanatory Notes state this would help to address issues relating to recovery from the pandemic, which "are likely to continue for many years". and in particular the provision would:

> help reduce the backlog quicker and contribute to the effort to stop the spread of the virus. Wholly remote hearings are allowed in mainstream courts and tribunals so this provision will bring coroner's courts in line with them, and avoid them being outliers.[211]

Any rules which enable jurors to participate remotely would have to specify that all members of the jury must be physically present in the same place.

6.6 Suspension of requirement for jury at inquest where Covid suspected

The current law

Section 7 of the 2009 Act requires a coroner to sit with a jury if (among other things) the coroner has reason to suspect that the death was caused by a notifiable disease. Covid-19 is a "notifiable disease" under the Health Protection (Notification) Regulations 2010.[212]

However, section 30 of the Coronavirus Act 2020 has temporarily modified the 2009 Act to provide that Covid-19 is not a notifiable disease for the purposes of section 7, so that the duty to hold a jury inquest does not apply. The coroner retains the discretion to hold a jury inquest where they consider that there is sufficient reason to do so.

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[210] Explanatory Notes, paras 64-65

[211] Explanatory Notes, para 66

[212] Department of Health and Social Care, Coronavirus (COVID-19) listed as a notifiable disease, 5 March 2021

By default, section 30 of the Coronavirus Act 2020 is due to expire in late March 2022. The Explanatory Notes set out the consequences this might have:

> There is concern that when the CVA 2020 sunsets, coroners will be required again to hold inquests with a jury where they have reason to suspect a death has been caused by COVID-19. If there were future outbreaks of COVID-19 after March 2022, or coroners were already investigating deaths then where COVID-19 was suspected to be the cause, they would be required to hold an inquest with a jury. If coroners were required to hold jury inquests in cases where COVID-19 were suspected as the cause of death, this would add to the existing backlog of jury inquests.[213]

What would the Bill change?

Clause 40 would omit section 30 of the Coronavirus Act 2020. Instead, it would replicate the effect of section 30 by amending section 7 of the 2009 Act to provide that Covid-19 is not a notifiable disease for the purposes of the requirement for the coroner to sit with a jury.

This amendment would expire two years after it comes into effect. However, the Lord Chancellor would be required to assess the likely effect on the coronial system of the provision expiring, and would have power, if they consider it expedient to do so, to make regulations setting a new expiry date, no later than two years after the previous expiry date. The regulations would be subject to the affirmative resolution procedure requiring the consent of both Houses of Parliament to become law.

6.7 Phased transition to new coroner areas

The current law

Section 22 and Schedule 2 of the 2009 Act make provision about coroner areas. The Lord Chancellor has power to alter the boundaries of these areas. Where a new coroner area is created by combining two or more old coroner areas, the new coroner area must consist of the whole of one local authority area or the whole of two or more local authority areas.

The Explanatory Notes set out the rationale for merging coroner areas and the difficulties which are encountered under the existing statutory framework:

> It is a long-standing central government and more recently Chief Coroner objective to merge coroner areas when the opportunity arises to improve consistency of coroner provision and standardise practice. Paragraph 2 of Schedule 2 to the CJA 2009 provides that a coroner area consists of a local authority area or the combined

[213] Explanatory Notes, para 69

> areas of two or more local authorities. In practice, this means that where there are a number of coroner areas within a local authority, it is not possible to merge them if that would result in the new coroner area consisting in less than the area of the local authority.
>
> This has caused difficulties. For example, a local authority area which consists of three or more separate coroner areas may wish to combine all of them into one coroner area, but may prefer to achieve this piecemeal by merging one area with another as and when a senior coroner from one of the coroner areas retires. This is not possible under Schedule 2 to the CJA 2009 in its present form. Schedule 2 therefore needs minor revision to provide greater flexibility.[214]

Chief Coroner's view

The Chief Coroner considers that merging coroner areas has benefits:

> There are currently 85 coroner areas in England and Wales and the long-term joint target with the Ministry of Justice is to reduce the number to around 75. Mergers are always considered when the opportunity arises, invariably when a senior coroner retires. The merging of coroner areas has many benefits as combining areas leads to greater consistency and uniformity of approach within the coroner service, as well as potential savings for the local authorities concerned. A reduction in the number of coroner areas over the last few years has been of considerable benefit, leading to more areas that are of similar size. All mergers that have taken place have been achieved through consensus and agreement.[215]

The Chief Coroner has also acknowledged the difficulties caused by the current law and has recommended "a minor revision so as to provide greater flexibility".[216]

The Chief Coroner proposed that Schedule 2 be amended to permit two coroner areas to combine, by order of the Lord Chancellor, into one coroner area which consists of the area of a local authority or part of the area of the local authority. The House of Commons Justice Committee also called for reform of the 2009 Act "to make it easier to merge areas".[217] The Government accepted this recommendation for reform.[218]

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[214] Explanatory Notes, paras 72-73

[215] Chief Coroner's combined annual report 2018 to 2019 and 2019 to 2020, November 2020, para 35

[216] ibid. para 139

[217] House of Commons Justice Committee, The Coroner Service, HC 68, 27 May 2021, para 32

[218] House of Commons Justice Committee, The Coroner Service: Government Response to the Committee's First Report, HC 675, 10 September 2021, p3

What would the Bill change?

Clause 41 would amend Schedule 22 of the 2009 Act to provide that the Lord Chancellor might combine two or more coroner areas within a local authority where the new area will not be the entire local authority area. The Explanatory Notes provide an example of how this might operate in practice:

> Kent consists of four separate coroner areas. Kent County Council, with the approval of the Chief Coroner, wishes all four areas to be combined into one coroner area, coterminous with the area of Kent County Council and Kent Police Authority. Kent would have liked to achieve this piecemeal, merging one area with another as and when a senior coroner from one of the coroner areas retires. But that is not possible under Schedule 2 to the 2009 Act in its present form. This amendment will permit Kent County Council by order of the Lord Chancellor to combine all four areas into one coroner area.[219]

[219] Explanatory Notes, para 319

7 Other provisions

7.1 Abolition of local justice areas

Clause 42 of the Bill would:

- abolish local justice areas (LJAs);
- make consequential amendments to the Courts Act 2003 (which created LJAs in the first place); and
- delegate to the Lord Chancellor the power to make further consequential provision in light of LJAs' abolition.

What are local justice areas?

Local justice areas (LJAs) are administrative subdivisions (in essence, catchment areas) of the magistrates' courts in England and Wales. This structure for magistrates' courts differs from the Crown Court, which is administered on a unified national basis.

LJAs underpin three key elements of the magistrates' courts business:

- deciding where (i.e. in which physical courts) to initiate and list cases;
- providing for the payment and enforcement of fines and community orders; and
- the leadership and management arrangements for the magistracy.

The geographical boundaries of LJAs are set in secondary legislation by the Lord Chancellor. There are currently 75 LJAs in England and Wales.

Why is the Government seeking to abolish them?

Sir Brian Leveson's Review of Efficiency of Criminal Proceedings in England and Wales was published back in early 2015. He supported further steps being taken to "unify" the criminal courts, though did not refer directly to abolishing local justice areas:

> A unified court would allow for greater jurisdictional flexibility in the allocation of cases, and the ability to match judicial resources to caseload…
>
> I believe three not insignificant factors have held back the move to a fully unified system. These are the lack of a single IT system, the very distinct physical estate the two jurisdictions still maintain and the

> absence of legislation to support the free movement of criminal work between the jurisdictional tiers...
>
> Two of the above are being addressed, the first through the development of the CJS Common Platform and the second through HMCTS reform programme. These two alone will only improve the single administrative function: legislation is required to modernise the management of cases that a single system would offer.[220]

This led to the (then) Government proposing to abolish local justice areas as part of its Prisons and Courts Bill in the 2016-17 session, though the legislation never completed its Commons consideration before the 2017 General Election.

Alongside the Prisons and Courts Bill, the Government published a fact sheet setting out the policy rationale behind abolishing local justice areas.[221] It gave several reasons for abolition and reform:

- difficulties transferring cases to a court in another area (and its knock-on effect on waiting times for hearings);
- the arbitrariness of cases not being heard in a court nearest to a victim or defendant, because the nearest court was in a different LJA; and
- additional administrative burdens faced when enforcing community penalties and fines across different LJAs.

The current Bill's Increasing efficiency and accessibility in the criminal courts Impact Assessment makes very similar arguments, but also draws attention to the fact that the existing statutory system makes it more difficult to distribute lay justices themselves across LJA boundaries than is the case for distributing judges England and Wales-wide for the Crown Courts.[222]

What will abolition of LJAs mean in practice?

Abolition of local justice areas means that the magistracy will be organised on a national (i.e. England and Wales-wide) basis, rather than on the basis of 75 distinct units. This will have four major implications:

- Firstly, there will be greater flexibility to allocate cases to other nearby magistrates' courts where business need, or the interests of the parties involved, warrants it.
- Secondly, although each lay justice will still have a primary court out of which they operate, they will be able to serve in other magistrates' courts across England and Wales more easily where required or desired.

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[220] Sir Brian Leveson, Review of Efficiency of Criminal Proceedings, January 2015, paras 359-361

[221] At that time, there were 104 LJAs, but many have since been merged or had their boundaries altered by the Local Justice Areas Order 2016

[222] Ministry of Justice, Impact Assessment: Increasing efficiency and accessibility in the criminal courts, 21 July 2021, paras 40-41

- Thirdly, any magistrates' court will be able to enforce fines and community orders without geographical constraint based on LJA boundaries.
- Fourthly, arrangements for the training, approval and authorisation of magistrates, which is currently partly statutory, will be replaced with a non-statutory framework under greater control of the judiciary. This will mean that administrative arrangements for the magistracy will more closely resemble that of the rest of the judiciary in England and Wales.[223]

Concerns about implications for local justice

The original proposals to create a unified magistracy emerged in the context of substantial consolidation and down-sizing of the court and tribunal estate. Many observers and practitioners raised concerns that HMCTS' Estates Programme would lead to greater difficulties in delivering an effective and locally focused form of justice. In a report for Transform Justice, Penelope Gibbs said in 2016 that, as a result of court closures:

> Magistrates are no longer presiding over their own community, or able to bring their local knowledge to decision-making.[224]

A more centralised magistracy may be regarded as exacerbating this departure from the principle of local justice, the importance of which was emphasised in the October 2016 report of the House of Commons Justice Committee.[225]

Difference of drafting approach from the Prison and Courts Bill 2016-17

The drafting of the provisions to abolish local justice areas differs in the current bill from that in the Prison and Courts Bill 2016-17. Under the Prison and Courts Bill, the Government set out consequential modifications and repeals exhaustively in a Schedule.[226]

Under the current bill, the Lord Chancellor will instead be given a power, exercisable by regulations, to make consequential or supplementary provision in relation to the abolition of local justice areas. This power includes the power to amend, repeal or revoke provision made by or under Acts of Parliament (i.e. it is a 'Henry VIII clause').

Regulations that amend or repeal any Act of Parliament would be made subject to the affirmative procedure (giving each House the opportunity to veto the regulations before they are made). Otherwise, regulations are made

[223] Ministry of Justice, Impact Assessment: Increasing efficiency and accessibility in the criminal courts, 21 July 2021, paras 92-95

[224] Penelope Gibbs, The role of the magistrate?, Transform Justice, January 2016

[225] Justice Committee, The role of the magistracy, HC 165, 19 October 2016, p5

[226] See clause 51 and Schedule 12 of the Prison and Courts Bill 2016-17

under the negative procedure (subject to annulment) and therefore do not require prior parliamentary approval.

This difference of approach is not likely to be of great practical significance. It seems likely that most of the modifications in what was the Prison and Courts Bill's Schedule 12 would now instead simply be made in a Statutory Instrument, and both Houses will be asked to approve that instrument before it is made. However, this delegated power approach might give the Government greater flexibility in re-organising the post-abolition statutory framework, as it will be less likely to need a further Act of Parliament further down the line when re-organising the magistracy.

Joshua Rozenberg has suggested this is another example of the Government placing greater reliance on Henry VIII powers under these justice reforms.[227]

7.2 Courthouses in the City of London

The current law

The provision of the Mayor's and City of London Court is protected under section 29 of the Courts Act 1971. This requires the Common Council of the City of London to ensure that the courthouse and associated premises continue to be available, and that the buildings are not substantially altered without the Government's agreement.

In a similar vein, Schedule 2 of the Courts Act 2003 and Schedule 14 of the Access to Justice Act 1999 protect the continuing provision of the premises used by the City of London Magistrates' court.

The new proposals

Agreement has been reached to close the premises in which these two courts operate, and to move them into new shared premises on a different site elsewhere in the City of London. This would eventually make the provisions in the 1971, 1999 and 2003 Acts redundant (to the extent that they relate to those court buildings). **Clauses 43 and 44** of this Bill would repeal those provisions to the extent they will become redundant.

The new building is not expected to become operational until 2026. Therefore, the provisions in this Bill relating to the existing premises are not expected to come into force until that work is complete. The new premises will be covered by a 125-year lease, but will not be protected by statute in the same way as its predecessors.[228]

[227] Joshua Rozenberg, The end of local justice, A Lawyer Writes, 8 August 2021

[228] Ministry of Justice, Impact Assessment: Judicial Review and Courts Bill: Overarching Assessment, 21 July 2021, paras 3, 30 and 31

7.3 Miscellaneous provisions

Extent

Most of this Bill extends to the whole of the United Kingdom. Some measures, however, apply only to England and Wales, or to England and Wales and Scotland. This reflects the existence of separate legal systems, in particular, in Scotland and Northern Ireland, and the fact that some tribunals are Great Britain-wide only.[229]

Commencement

Most of this Bill will not come into effect by mere virtue of Royal Assent. Instead, the Bill allows the Lord Chancellor to bring different parts of it into effect using commencement regulations at a time of his choosing.

There are two exceptions to this general approach to commencement:

- **clause 14** (concerned with the removal of procedural requirements in criminal proceedings); and
- **Chapter 4 of Part 2** (concerned with coroners reform)

In both of these cases, the relevant provisions will come into force two months after Royal Assent.

Delegated powers

The Government published a Delegated Powers Memorandum alongside the Bill. It sets out for each regulation-making power:

- to whom the power has been delegated (typically the Lord Chancellor);
- whether the power can be used to amend primary legislation (i.e. is it a 'Henry VIII power'); and
- what form of parliamentary oversight is required for regulations to be made by statutory instrument (i.e. does the affirmative procedure apply, or does the negative procedure apply).

Clause 45 makes general provision about regulation-making powers under the Bill. This includes enabling any power to be used for making incidental, transitional or saving provision. The clause also confirms that the affirmative and the negative procedure for different statutory instruments each have their normal meaning under this Act. Finally, it provides that if a statutory instrument can be made subject to the negative procedure, it can instead be made under the affirmative procedure, if the Government wishes.

[229] clause 46

Human Rights Memorandum

The Government is required by section 19 of the Human Rights Act 1998 to make a statement before Second Reading of a Bill as to its compatibility with the European Convention on Human Rights (ECHR).

The Government does not consider that the Bill raises any significant issues in relation to the ECHR, and the former Lord Chancellor, Robert Buckland QC, has made a statement under section 19(1)(a) that it is compatible.[230]

The Human rights memorandum produced by the Ministry of Justice notes that articles 2, 6 and 13 of the European Convention on Human Rights (ECHR) may be engaged by the Bill, but concludes that its provisions are capable of being exercised in a manner that is compatible with the Convention.

Article 2

Article 2 protects the right to life. It imposes on the state both negative obligations not to take life intentionally, and positive obligations to protect life. The positive duty to protect life implies a duty to investigate unnatural deaths, including, but not confined to, deaths in which state agents may be implicated.[231]

Article 2 inquests are enhanced inquests held in cases where the state or its agents have failed to protect the deceased against a human threat or other risk or where there has been a death in custody.

The Bill's provisions on coroners may therefore engage Article 2.

The memorandum states that it is unlikely that an Article 2 inquest would be dealt with in writing, as provided for by **clause 37** of the Bill, and in any case, the proposals are all capable of being dealt with in a way that is Article 2 compliant.

Article 6

Article 6 protects the right to a fair trial.

In relation to the JR measures, the memorandum states the MoJ's position that the availability of new remedies does not raise any issue of compatibility because the full range of remedies will still be available to the courts to apply when appropriate, and as public authorities, the courts are required to exercise their discretion compatibly with the Convention.

The MoJ considers that removing the possibility of *Cart* JRs does not interfere with Article 6 rights, because permission to appeal will have been considered by both the FTT and the UT. In any case, any interference would be in

[230] Explanatory Notes, para 269

[231] *McCann v UK* (1996) 21 EHRR 97; *Ergi v Turkey* (2001) 32 EHRR 18; *Yasa v Turkey* (1999) 28 EHRR 408, Joint Committee on Human Rights, Scrutiny: First Progress Report, 24 January 2005, HL Paper 26 HC 224 2004-05, p48

pursuance of the legitimate aim of alleviating a significant burden on the court system, and proportionate to that aim.

The criminal procedure provisions, which would enable certain matters to be dealt with in writing rather than via in-court hearings, and provide for automatic online convictions and standard statutory penalties, also raise Article 6 issues.

The determination of a criminal charge will generally require an oral hearing in order to be compatible with Article 6. However, the MoJ considers that the Bill contains sufficient safeguards to ensure compatibility with the right to an oral hearing, or that the right is only limited in circumstances where the interference is justified.

The MoJ also notes that it is possible in principle for a defendant to waive their Article 6 rights, and considers that where consent is relied on, the new procedures will ensure that the defendant has sufficient information to make an informed decision, and that there are adequate safeguards to protect against the consequences where consent may not be valid.

Article 6 and the common law both require as a general rule that hearings be in public because of the public interest in scrutiny of the judicial procedure. However, the MoJ considers that open justice will be served by the public having access to records of the court's decision under the new procedure, and that no issue of compatibility arises therefore.

Similar considerations as to the right to an oral hearing, the waiving of Article 6 rights, and open justice arise in relation to the Bill's provisions on Employment Tribunal procedure, however the MoJ considers that they are capable of operating compatibly with Article 6.

Article 13

Article 13 protects the right to an effective remedy.

It would be engaged by **clause 1** if a claim for JR concerned a breach of the ECHR and the availability of remedies was in question. The MoJ's position is that **clause 1** would not limit the availability of any existing remedies, and the presumption in favour of the new remedies would only operate where it would provide adequate redress.

The memorandum also notes that the court would be required to consider whether using the new remedial orders would impact on the ability of others to claim redress, or whether to impose conditions on an order to ensure that it provides an effective remedy in cases concerning Convention rights.

Transitional, transitory and saving provision

As is common in bills of this kind, a mopping-up delegated power to make transitional, transitory and saving provision is conferred on the relevant

minister, in this case the Lord Chancellor.[232] This can be used, for example, to ensure that implementation of different parts of the Bill (often done at different times) is done in an orderly way as and when different parts are commenced.

Short title

The short title of the Bill is the Judicial Review and Courts Bill.[233] As its name suggests, this bill has essentially consolidated legislative proposals covering two related, but distinct, areas.

The Queen's Speech referred directly to the "Judicial Review Bill". However, elsewhere in its supporting documentation on the Queen's Speech, the Government highlighted its intention to develop the law on criminal procedure, coroners and employment tribunals.[234]

Other measures to do with aspects of the courts system were included in the Government's Policing, Crime, Sentencing and Courts Bill, which was introduced earlier in the session.

[232] clause 47

[233] clause 48

[234] Cabinet Office, Queen's Speech 2021 – Background Briefing Notes, p84, 11 May 2021

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