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**Research Briefing**

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# Judicial Review and Courts Bill 2021-22: Progress of the Bill

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# Summary

The Judicial Review and Courts Bill 2021-22 was introduced to the House on 21 July 2021. Second reading took place on 26 October 2021.

The Bill would reform rules affecting judicial reviews and bring in changes to the court system, including allowing remote access to inquests.

The Bill was considered by a Public Bill Committee over 11 sittings between 2 and 18 November 2021. The Committee took evidence from expert witnesses for the first two sittings and external stakeholders submitted written evidence. It is due to have Commons report stage on 25 January 2022.

The Bill, together with its Explanatory Notes and an overview of its parliamentary progress, is available on the Parliament website. Overarching documents are available on GOV.UK. Full policy background to the Bill as it was introduced is set out in Library briefing, Judicial Review and Courts Bill 2021-22.

## Government amendments in Committee

The only amendments agreed by the Committee were relatively minor changes to two of the criminal procedure clauses (and a related schedule).

The Committee agreed some minor Government amendments to clause 7 and schedule 2, to correct drafting errors (these are not covered in this paper). The Committee also agreed several Government amendments to clause 9 (on hearings in the absence of the defendant):

- One group of Government amendments extended the scope of clause 9 to cover plea before venue hearings (when a defendant gives an indication of plea in a magistrates' court) as well as allocation hearings (when the case is referred to either magistrates' or Crown Court to continue). This was to remove what the Justice Minister James Cartlidge described as "a legislative roadblock".
- Another Government amendment dealt with what the Minister described as a "drafting error". It removed the requirement for a legal representative to be present at a hearing that is being conducted in the defendant's absence, due to the defendant's disorderly behaviour. This requirement does not appear in the existing legislation that the Government intended clause 9 to replicate, and its inclusion in clause 9 had been a mistake.

# Other main areas of debate

## Judicial review

The two clauses in the judicial review part of the Bill were approved by the Public Bill Committee without amendment.

The Opposition tabled a number of amendments to clauses 1 and 2. These aimed to ensure that courts retain discretion over whether to use the new remedies provided for by the Bill; to **remove** the power to limit the retrospective effect of quashing orders; and to **limit** the rule that decisions of the Upper Tribunal cannot be reviewed, among other things.

The Opposition also pressed clauses 1 and 2 to stand part votes (on the question of whether the clause should remain part of the Bill (PDF)), unsuccessfully.

## Criminal procedure

The Opposition tabled multiple amendments to the criminal procedure clauses, with the overarching aim of introducing more procedural safeguards for defendants and removing children from the scope of the proposed new procedures. The Opposition pressed four of these amendments to a vote, in each case unsuccessfully. The Opposition also pressed clauses 3, 6, 8 and 13 to clause stand part divisions, again unsuccessfully.

## Online procedure

The main debate in relation to online procedure concerned statutory safeguards for those who would find it difficult to engage in court proceedings by digital means. Debate also covered the proposed size and composition of the Online Procedure Rule Committee. No amendments were pressed to a vote.

## Employment tribunals

The Bill's clauses relating to employment tribunals were not subject to any significant debate and were not amended.

## Coroners

The Opposition tabled amendments to clause 37 aiming, among other things, to introduce safeguards relating to the proposed extension of when a coroner might end an investigation into a death, if the cause of death becomes clear.

Further Opposition amendments were tabled to clauses 38 and 39 aimed at ensuring the agreement and particiation of families and openness regarding proposals to allow non-contentious inquests to be held in writing and on the use of audio or video links at inquests.

New clauses were also tabled which would have increased the availalbility of legal aid for those participating in inquests.

There were divisions on several of the amendments and a new clause, and a stand part divison on clause 39, all of which were defeated by the Government.

### Local justice areas

The Committee considered an Opposition amendment to clause 42, which would have required the Government to consult with relevant stakeholders before abolishing local justice areas (jurisdictional boundaries between magistrates' courts (PDF)). The amendment was withdrawn after debate.

## Further Government amendments for report stage

The Government has tabled a number of amendments for report stage aimed at clarifying provisions in the Bill or changing terminology.

New Clause 1 and a series of consequential amendments would faciliate the Government's proposal to increase the sentencing powers of magistrates' courts.

The Government has announced it intends to increase the maximum sentence that can be imposed by a magistrates' court for one offence from six months to 12 months, which it says is necessary to deal with the backlog of cases built up during the pandemic. The Government said it will do this by bringing into force a provision that was contained in section 154 of the Criminal Justice Act 2003 and is now found in Part 5 of Schedule 22 of the Sentencing Act 2020.

The Government's amendments to the Bill would allow it to reduce the maximum sentence a magistrates' court could impose in the future back to 6 months and subsequently increase it again to 12 months via regulations. The Government has described this as putting an 'off-switch' in law so it can quickly stop the measures if needed.

# 1 Introduction

## 1.1 Background

This Bill includes a range of measures, most of which were headlined in the Queen's Speech last year, and some of which are provisions reintroduced from bills that fell in previous parliaments.

The Bill subdivides into two substantive parts.

**Part 1** makes reforms to the law of judicial review. In 2020, the Government commissioned the Independent Review of Administrative Law (IRAL), which was chaired by Lord Faulks and reported last 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.

## 1.2 Progress of the Bill

The Judicial Review and Courts Bill 2021-22 was introduced to the House on 21 July 2021. Second reading took place on 26 October 2021. The Bill was considered by a Public Bill Committee over 11 sittings between 2-18 November 2021. The Committee took evidence from expert witnesses for the first two sittings and stakeholders submitted written evidence. Report stage is due to take place in the Commons on 25 January 2022.

The Bill, together with its Explanatory Notes and an overview of its parliamentary progress, is available on the Parliament website. Overarching documents are available on GOV.UK. Full policy background to the Bill as it was introduced is set out in Library Briefing Paper 9253 Judicial Review and Courts Bill 2021-22.

## 1.3 Debate during second reading

Second reading took place on 26 October 2021.[1] The debate's main focus was the judicial review provisions.

Introducing the Bill, the Lord Chancellor, Dominic Raab, said it would make good on the Government's manifesto commitment "to ensure that judicial review is not subject to abuse and to deliver more effective, more efficient justice for the citizens of our country".[2]

David Lammy responded for the Opposition, suggesting that by reforming judicial review the Government was seeking to avoid accountability, and that it reflected the wrong priority at a time when there were more pressing issues in the justice system. He also noted that the proposals went significantly beyond those recommended by the Independent Review of Administrative Law.[3] He concluded:

> The Bill is unnecessary and unwanted at a time of crisis in the justice system: it robs citizens of effective remedies when they have been wronged by the state; it would leave some of the most vulnerable people in society without a last defence against unlawful Government action; and it could act as a prelude to a wider assault on the rights and protections of individuals.[4]

Anne McLaughlin for the SNP suggested that the Bill was part of a programme of constitutional reform "designed to allow the Government to restrict the

1 HC Deb 26 October 2021 c189
2 Ibid
3 Ibid, c195-201
4 Ibid, c201

rights of some of their most vulnerable people … reducing access to justice for those who have been badly treated by a public body".[5]

The Liberal Democrats were also opposed to the Bill, which was described by Wera Hobhouse as a "concerted effort to take power away from individuals and to stop them holding Governments to account".[6]

The Bill was given a second reading on division by 321 votes to 220.[7]

5 Ibid c208
6 Ibid, c214
7 HC Deb 26 October 2021, Division 96

# 2 Public Bill Committee

The Bill was considered by a Public Bill Committee over 11 sittings between 2-18 November 2021.

The only amendments agreed by the Committee were relatively minor changes to two of the criminal procedure clauses (and a related Schedule). The Committee agreed a number of minor Government amendments to clause 7 and Schedule 2, to correct drafting errors (these are not covered in this paper). The Committee also agreed a number of Government amendments to clause 9 (hearings in the absence of the defendant).

The Bill's clauses relating to employment tribunals were not subject to any significant debate and were not amended. They are not covered further in this paper.

There was lengthy debate of the clauses on judicial review, criminal procedure, online procedure, coroners and local justice areas. The Opposition pressed a number of amendments and new clauses to division, in each case unsuccessfully. There were also a number of divisions on clause stand part, all of which were won by the Government. Full details are set out below.

## 2.1 Judicial review

There are only two clauses in the judicial review part of the Bill. Both were approved by the Public Bill Committee on a division and without amendment.

### Clause 1: quashing orders

**Clause 1** would amend the Senior Courts Act 1981, inserting new section 29A. This new section confers explicit powers on courts to make two types of remedial order if legislation or a public body's act or omission is found – in judicial review or other proceedings – to have been unlawful.

Firstly, courts would have the power to make "suspended quashing orders". These would delay the legal effect of a decision to annul the unlawful act. This might (for example) provide Government with a window of opportunity to make regulations fixing a defect the court has identified. However, they would also prevent the claimant from securing an immediate remedy from the public body.

Secondly, courts would have the power to make a quashing order that is limited in its "retrospective effects". This means that a public body might not

be penalised for things that they did before a court's decision, even though they acted unlawfully. The claimants might only benefit from the judgment in relation to future dealings with the public body, with illegal acts being treated "as though" they were valid until the court said otherwise.

There is discretion about when the courts can use these powers, but it is not unlimited. Instead, clause 1 would create a "presumption in favour" of these types of remedy being used. This presumption can be rebutted, but experts disagree about how easy this would be in practice.

### Non-retrospective quashing orders

**Amendment 12** would have removed the explicit power of a court to make a quashing order with limited or no retrospective effects. Clause 1 would therefore have only been about the power to suspend a quashing order.

The Public Law Project, JUSTICE, and Liberty all argued in briefings on the Bill, and in evidence to the Public Bill Committee for this change to be made.[8] They identified a potential "chilling effect" that could arise, discouraging litigation even for well-founded legal complaints.

The Official Opposition spokesperson, Andy Slaughter, pointed out that the Independent Review on Administrative Law (IRAL) had only recommended recognising suspended quashing orders. It had not recommended powers to restrict the retrospective effects of such orders, only noting that the possibility had been raised by some of those who submitted evidence to it.[9]

The Government Minister, James Cartlidge, resisted the change, arguing that prospective-only remedies were an important flexibility for the courts. They would, he said, protect third parties who act in good faith according to the law as they understood it at the time from being penalised by the subsequent finding that a public body's act was unlawful. He also suggested that there were adequate safeguards in the Bill already, because under new section 29A(8)(c) of the Senior Courts Act 1981, the court would have to take into account the interests of those who would benefit from the striking down of the illegal act.[10]

The Committee rejected Amendment 12 on a division, meaning that the Bill still includes both types of quashing order.

8 Public Law Project, Judicial Review and Courts Bill: PLP Briefing for House of Commons Second Reading (586KB, PDF), 14 October 2021 paras 8-9 and 11-12; Liberty, Briefing on the Judicial Review and Courts Bill: for Second Reading in the House of Commons (279KB, PDF), October 2021, paras 11-15; JUSTICE, Judicial Review and Courts Bill (Part 1 – Judicial Review) House of Commons Second Reading Briefing (309KB, PDF), September 2021, paras 13-14

9 Judicial Review and Courts Bill Deb 4 November 2021 c94; Report of the Independent Review of Administrative Law (2.1MB, PDF), Appendix C, para 20

10 Judicial Review and Courts Bill Deb 4 November 2021 c113-114

### Collateral challenges

Judicial review is not the only context in which individuals challenge the legality of actions taken by public bodies. Sometimes it is argued during other types of court proceedings. For example, someone might claim they must not be prosecuted for a criminal offence under public health regulations because the regulations are themselves invalid (for whatever reason). These types of challenge are known as "collateral challenges".

The Public Law Project and others raised concerns that the effect of suspended and non-retrospective quashing orders would be to obstruct collateral challenges, as the legal effect of an act could, under one of the new quashing orders, be protected despite its invalidity. They argued for an amendment to the Bill explicitly to protect collateral challenges.[11]

**Amendment 15** (and related consequential amendments) would have done precisely that. A quashing order would not enable someone to be prosecuted under invalid regulations and would not prevent anyone from seeking damages or some other remedy in a case involving a collateral challenge.

The Government Minister, James Cartlidge, argued that explicit provision to this effect was unnecessary. A court contemplating making a suspended or non-retrospective quashing order would first have to have regard to the list of factors in new subsection s29A(8) of the Senior Courts Act 1981. This would include taking into account "the interests or expectations of persons who would benefit from the quashing of the impugned act" and "any other matter that appears to the court to be relevant".

These mandatory factors for consideration, he said, provided an adequate safeguard already: they would influence both whether, and to what extent, a court decided to suspend or limit a quashing order.[12]

Amendment 15 was rejected on a division by the Committee.

### Presumptive use of new powers or discretion?

The Bill does not just give judges new powers in relation to quashing orders. New subsection 29A(9) of the Senior Courts Act 1981 would create a presumption in favour of using those new powers. A court "must exercise" the powers, provided that the order would "offer adequate redress in relation to the relevant defect". This presumption can then only be rebutted if the court "sees good reason not to" make such an order.

Legal experts have expressed different views as to how this would work in practice. Some, in public briefing and in evidence to the Committee, considered that a presumption was, in principle, undesirable. They said it risked pushing courts towards using these powers where they would not

11 Public Law Project, Second Reading Briefing, paras 11-12; Liberty, Second Reading Briefing, paras 16 and 19; JUSTICE, Second Reading Briefing, paras 13-14

12 Judicial Review and Courts Bill Deb 4 November 2021 c135

otherwise have done so, to the detriment of victims of unlawful action.[13] Others have said that the presumption is "weak" or otherwise easily rebutted, because the courts would have considerable latitude on the meaning of both "adequate redress" and "good reasons" when applying the statutory test.[14]

The Official Opposition argued against there being a presumption. Andy Slaughter pointed out to the Committee that the Independent Review of Administrative Law had conceived of suspended quashing orders as a wholly discretionary remedy.[15] The Government had also accepted that most of the feedback to its follow-on consultation had been against legislating for a presumption.[16]

The Government argued, as it did in its consultation response, that its approach would better aid legal certainty. The presumption, and the associated factors to be taken into account, James Cartlidge said, would assist the judiciary to develop principles on the use of the remedies more quickly, while otherwise leaving the decision about when they should be used to a case-by-case evaluation.[17]

**Amendment 22**, defeated on a division, would have removed "the presumption" from the Bill completely. Courts would have had complete discretion, more along the lines of the suspended and non-retrospective quashing powers that exist in the context of the devolution settlements.

**Amendment 34**, debated at the same time but not formally moved, would have strengthened the requirement that a remedy would provide "adequate redress" to providing an "effective remedy to the claimant" as suggested by the Public Law Project.

### Other suggestions not debated

Professor Richard Ekins, in his paper How to Improve the Judicial Review and Courts Bill (PDF) for Policy Exchange's Judicial Power Project, suggested that the statutory language was too open-ended in places in clause 1 and could "give rise to unnecessary litigation". He suggested drawing a narrower and sharper distinction: that there would be a presumption in favour of suspended and/or prospective-only orders only where the illegal act was of a legislative character (eg a statutory instrument).[18]

13 Public Law Project, Judicial Review and Courts Bill: PLP Briefing for House of Commons Second Reading, 14 October 2021, para 10; Judicial Review and Courts Bill QQ10, 23, 65-67, 107, 120

14 Judicial Review and Courts Bill Q10; Sir Jonathan Jones QC, Twitter thread, 8:52am 22 July 2021

15 Judicial Review and Courts Bill Deb 4 November 2021 c139; Report of the Independent Review of Administrative Law, para 3.69

16 Ministry of Justice, Judicial Review Consultation: The Government Response (2.5MB, PDF), CP 477, 21 July 2021, para 12

17 ibid. and Judicial Review and Courts Bill Deb 4 November 2021 c127

18 Richard Ekins, How to Improve the Judicial Review and Courts Bill, Policy Exchange, 26 October 2021, pp8-9; Judicial Review and Courts Bill Q10

## Clause 2: *Cart* and *Eba* judicial reviews

**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* (in which the Supreme Court held that if a decision of the First-tier Tribunal was based on an error of law it should be amenable to review).

New section 11A of the 2007 Act would limit the supervisory jurisdiction of the High Court of England and Wales to review the decisions of the Upper Tribunal. 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.

### Further exceptions

Amendments 42, 43 and 44 would provide for further exceptions to the general rule that decisions of the Upper Tribunal are not reviewable.

Andy Slaughter put forward principled objections to ouster clauses, suggesting that they are "at odds with the rule of law", and expressed concern about the possibility of the Government introducing them in other areas.[19]

He tabled a number of probing amendments aimed at limiting the effect of clause 2.

**Amendment 42** would have amended new section 11A to provide a further exception where the First-tier Tribunal acted in bad faith or in breach of the principles of natural justice.[20]

**Amendments 43 and 44** would have provided that decisions of the Upper Tribunal to refuse permission to appeal could be reviewed in the following circumstances:[21]

- where the party refused permission was unrepresented, and legal aid was not available;
- the party refused permission was not of full age or capacity;
- the appeal was not an in-country appeal;
- the appeal was subject to any accelerated procedure;

19 PBC, 4th Sitting, c147
20 PBC, 4th Sitting, c146
21 PBC, 4th Sitting, c146-147

- the decision of the First-tier Tribunal was subject to a restriction in how to evaluate the credibility of the appellant or the evidence before it;
- the application to the Upper Tribunal raises a point of law concerning the interpretation of an international agreement

Responding, James Cartlidge said that amendments 43 and 44 would undermine the Government's objective of tackling inefficiencies, and that amendment 42 was unnecessary.[22]

Ultimately, the amendments were withdrawn and the Opposition voted that clause 2 should not stand part. They were defeated by 10 votes to 7 and clause 2 was ordered to stand part of the Bill.[23]

## Proposed new clauses

Sir John Hayes and Tom Hunt tabled seven new clauses at Committee stage relating to judicial review. All seven were taken from Professor Richard Ekins' Policy Exchange Paper How to Improve the Judicial Review and Courts Bill (PDF). Of the seven clauses, only two were selected and neither of those were pressed to a division, being described by their proposers as "probing" of the Government's future intentions.

### New Clause 3

One proposal advocated by the Judicial Power Project (JPP) was to legislate to overturn the UK Supreme Court's decision in *Privacy International v Investigatory Powers Tribunal*.[24] A majority of that panel had held that the High Court could consider a judicial review challenge against a decision of the Investigatory Powers Tribunal. This was despite the exclusion of a right of appeal in section 67 of the Regulation of Investigatory Powers Act 2000.

In the JPP's view, this case presented a very similar legal issue to that which arose with *Cart* and section 13 of the Tribunals, Courts and Enforcement Act 2007, and which the Bill already sought to address in clause 2. The JPP has urged for specific provision to be made clarifying that Parliament intends to oust the jurisdiction of the High Court in respect of IPT decisions.[25]

The Minister expressed sympathy with the clause's objectives, but said it was not suitable for inclusion in the current Bill, given its focus on the IRAL's recommendations. The Government was "already alive to" the issue and would give it "future consideration".

### New Clause 5

The JPP have also argued that the nature of proceedings in judicial review should be limited to "a narrow focus on particular public acts" and should not

22 PBC, 5th Sitting, c170
23 PBC. 5th Sitting , c198
24 [2019] UKSC 22
25 Richard Ekins, How to Improve the Judicial Review and Courts Bill, pp20-21

"become a free-ranging inquiry into government decision-making". To this end it suggested a clause that would:

1. Presume against oral hearings in judicial review proceedings;
2. Presume against requiring public authorities to disclose evidence in anticipation of or in the course of judicial review proceedings; and
3. Relieve public bodies of any evidential duty in judicial review proceedings unless and until it has been determined or accepted that the matters arising were justiciable.[26]

In the Committee's debate on the clause, Sir John Hayes suggested a measure like this would combat "fishing expeditions" where litigants pursue judicial review not in the expectation of winning a legal argument and remedy, but to compel disclosure of information that would not otherwise enter into the public domain.[27]

The second and third pillars of New Clause 5 might be seen as a dilution of the "duty of candour" in legal proceedings. The Minister indicated in his response that, while the Government was open to looking at this matter in the future, his "instinct" was that matters concerned with the duty of candour were better addressed otherwise than in legislation.[28]

### New clauses not selected

The following clauses, suggested by the JPP in its paper and tabled by Sir John Hayes and Tom Hunt, were not selected for debate:

- **New Clause 4** excluding judicial review of prorogation (to overturn the Miller/Cherry case of 2019)
- **New Clause 6** to reiterate in statute the Carltona principle (the principle that acts of a Government department are synonymous with those of the relevant Minister)
- **New Clause 7** re-iterating Parliamentary sovereignty (saying that nothing in the Constitutional Reform Act 2005 affects it)
- **New Clause 8** making infringements of parliamentary accountability non-justiciable (overriding some of the legal reasoning used to arrive at the decision in Miller/Cherry)
- **New Clause 9** affirming that the political constitution, including constitutional conventions, are non-justiciable

26 ibid. pp34-35
27 Judicial Review and Courts Bill Deb 23 November 2021 c416-418
28 ibid. c424

## Joint Committee on Human Rights Report

On 7 December, the Joint Committee on Human Rights (JCHR) published a legislative scrutiny report into Part 1 of the Bill. It raised concerns about several aspects of the two clauses.[29]

### Clause 1

The Committee said that the Bill's "presumption" in favour of suspended and/or prospective-only remedies was inconsistent with the Government's stated goal of providing greater judicial discretion:

> While generally a judge would remain free to choose whether to make a suspended and/or prospective-only quashing order, the Bill does nevertheless make them compulsory in certain circumstances. In this way, Clause 1 appears to be an attempt to weight the scales in favour of the defendant public authority over the claimant.[30]

The JCHR acknowledged that the statutory presumption could be rebutted for "good reason" or in cases of "inadequate redress", but it stressed that:

> The Bill does not… expressly prohibit the use of suspended or prospective-only quashing orders where their use would *not* offer adequate redress.[31]

It went on to say:

> Quashing orders with prospective-only effects pose a more significant risk of denying an effective remedy to claimants and allowing decisions and measures to have legal effect despite being found to be unlawful. Imposing any requirement to use these new remedies, rather than simply allowing the courts to use them where they consider it just, increases the risk that they will be used in a way that denies an effective remedy and undermines the enforcement of human rights.[32]

The JCHR recommended two amendments to clause 1. The first would remove the presumption in favour of suspended or prospective-only remedies. The second would put courts, whenever considering whether to make a suspended or prospective-only quashing order, under a specific obligation to take into account the Convention rights of affected parties. It made particular reference to the right to an "effective remedy" under Article 13 ECHR.

### Clause 2

The Committee argued that clause 2, abolishing *Cart* judicial reviews, should be left out of the Bill entirely, and proposed a third amendment to that effect. Abolition of this category of judicial review was described as a "nuclear option", and it said that other procedural reforms (e.g. around time limits)

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29 Joint Committee on Human Rights, Legislative Scrutiny: Judicial Review and Courts Bill, HC884, 7 December 2021

30 ibid. para 19

31 ibid. para 20

32 ibid. para 30

should be contemplated first, and their impact assessed. In defence of keeping *Cart* judicial reviews, it said:

> Judicial supervision of the Upper Tribunal protects against legal error. While only a small proportion of Cart judicial review applications are successful, those applications may prevent individuals being wrongly removed from the UK to face the most heinous human rights violations.[33]

Relatedly, the JCHR re-iterated its longstanding concerns about the use of ouster clauses, and the suggestion from the Government that the approach in clause 2 could be replicated in other settings:

> The extensive use of ouster clauses will diminish the ability of judicial review to challenge executive action and expose unlawfulness. This has the potential to undermine the rule of law, which is essential for the protection and enforcement of human rights.[34]

## Legal challenge

Several Government departments made separate submissions to IRAL. However, the Government refused the chair permission to publish those individual responses. Instead, the Government produced and published a separate document which it said summarised those different submissions.[35]

Several organisations, including the Law Society Gazette and the Public Law Project, submitted Freedom of Information requests to Government departments seeking the publication of the individual responses. Those requests were refused, the Government citing public policy exemptions.[36]

The Public Law Project (PLP) appealed the refusal of the Ministry of Justice to the Information Commissioner's Office (ICO). The ICO ruled that the individual responses did not have to be released under the Freedom of Information Act.

On Monday 20 December 2021, the PLP announced that it would appeal that decision to the First-tier Tribunal. It argues that the FOI exemptions that normally apply to internal policy memorandums should not apply to submissions made to an arm's length independent review.[37]

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33 ibid. para 41

34 ibid. para 48

35 Summary of government submissions to the Independent Review of Administrative Law (286KB, PDF), 6 April 2021

36 Monidipa Fouzder, Information Commissioner's Office challenged over Whitehall JR submissions, Law Gazette, 20 December 2021

37 Public Law Project, Twitter Post, 20 December 2021 [accessed 20/12/2021]

## 2.2 Criminal procedure

The criminal procedure clauses were considered by the Committee at its sixth and seventh sittings.

The Committee agreed a number of minor Government amendments to clause 7 and schedule 2, to correct drafting errors (these are not covered in this paper). The Committee also agreed several Government amendments to clause 9 (hearings in the absence of the defendant):

- One group of Government amendments extended the scope of clause 9 to cover plea before venue hearings as well as allocation hearings, to remove what the Minister James Cartlidge described as "a legislative roadblock".
- Another Government amendment dealt with what the Minister described as a "drafting error". It removed the requirement for a legal representative to be present at a hearing that is being conducted in the defendant's absence due to the defendant's disorderly behaviour. This requirement does not appear in the existing legislation that the Government intended clause 9 to replicate, and its inclusion in clause 9 had been a mistake.

The Committee also considered Opposition amendments aimed at introducing additional procedural safeguards for defendants and removing children from the scope of the proposed new procedures. The Opposition pressed four of these amendments to a division, in each case unsuccessfully. The Opposition also pressed clauses 3, 6, 8 and 13 to clause stand part divisions, again unsuccessfully.

### Clause 3: automatic online convictions

**Clause 3** would introduce a new statutory procedure for certain criminal cases to be dealt with via an automated online process. The procedure would enable defendants aged 18 or over to enter a guilty plea, be convicted, and accept a pre-determined penalty without any involvement by a magistrate.

The procedure would only be available for summary-only non-imprisonable offences, with the specific offences eligible for the process to be set out in secondary legislation.[38]

There were three divisions on clause 3: one on the clause stand part debate, and two on Opposition amendments. The Government won all three divisions.

[38] 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: Ministry of Justice, Delegated Powers Memorandum: Judicial Review and Courts Bill, para 25

### Statutory guidance for prosecutors

Alex Cunningham moved an amendment that would have required the Secretary of State to publish statutory guidance for prosecutors on how they should provide and explain information on the procedure to defendants.[39]

Speaking on the amendment, he said:

> The Bill's only criterion on which defendants are appropriate for the new procedure is that they are aged 18 when charged. Vulnerable individuals, especially those who might not understand the charge, any documents sent to them or the consequences of pleading guilty will therefore be placed at a disadvantage by that process.[40]

He argued that Government guidance to prosecutors would be one way of ensuring that prosecutors "are enabled and supported to engage in the procedure in a way that supports the defendant's rights and access to justice".

In response, James Cartlidge said that clause 3 already provided for guidance to be issued under the Criminal Procedure Rules to "set out the detail of how required documents should be served on a defendant offered the new automatic online procedure".

He said that defendants would be provided with details of the evidence against them, the potential consequences of choosing the automatic online conviction route, and full details of the prospective penalty. He noted that similar information is already provided to defendants as part of the existing single justice procedure, which he said is similar to what will be used in the new procedure.

Alex Cunningham pushed the amendment to a division. It was defeated by nine votes to five.[41]

### Relevant offences

Clause 3 currently provides that the new automatic online conviction procedure would only be available in respect of offences specified by the Lord Chancellor in regulations. An offence may not be specified in the regulations unless it is a summary offence that is not punishable with imprisonment.

Alex Cunningham moved an amendment that would have further restricted the automatic online conviction procedure to non-imprisonable summary offences that are also 'non-recordable'.

## 1 Recordable and non-recordable offences

39 PBC Deb 9 November 2021 c215
40 PBC Deb 9 November 2021 c218
41 PBC Deb 9 November 2021 c226

Generally speaking, an offence will be 'recordable' if it is capable of resulting in imprisonment, or if it has been specified as recordable in the Schedule to the National Police Records (Recordable Offences) Regulations 2000 (as amended).

The distinction between recordable and non-recordable offences is important as it has implications for criminal records disclosure. A person convicted, cautioned, warned or reprimanded for a recordable offence will have their details recorded on the Police National Computer. This information can subsequently be disclosed as part of a criminal records check. The criminal records charity Unlock has provided a brief overview on its website: see About criminal records: recordable offences.

Alex Cunningham noted that a wide range of summary non-imprisonable offences have been classed as 'recordable', including the following:

- failing to provide for the safety of children at entertainments (s12 of the Children and Young Persons Act 1933), or exposing children under 12 to the risk of burning (s11 of the 1933 Act)
- drunkenness in a public place (s91 of the Criminal Justice Act 1967)
- selling alcohol to a person who is drunk (s141(1) of the Licensing Act 2003) or to children (s146 of the 2003 Act)
- failing to comply with conditions imposed on a public procession (s12(5) of the Public Order Act 1986) or failing to comply with conditions imposed on a public assembly (s14(5) of the 1986 Act)
- various football offences, including the use of missiles and the chanting of racist language (Football Offences Act 1991)

He said he did not believe that "these sorts of offences are really appropriate for the new procedure", given that the consequences of conviction could still be "extremely serious" and the existence of a criminal record could have a range of far-reaching consequences on people's lives. He argued that limiting the new procedure to non-recordable offences only "would ensure that automated convictions are limited only to the most minor offences, which do not appear on most criminal record checks".[42]

In response, James Cartlidge said that the three offences that the Government initially intended the new procedure to cover - 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 – were all non-recordable offences. He went on:

> There is currently no intention to extend the procedure to any recordable offences. Once we have reviewed how it operates, we might consider extending to other similar non-recordable offences, such as certain road traffic

[42] PBC Deb 9 November 2021 c227

> offences—for example, low-level speeding and driving without insurance. Clause 3 enables us to do so.[43]

He said that for an offence to be deemed suitable for the procedure, it would have to be "relatively straightforward and simple to prove, with no complex grounds and a high degree of consistency in sentencing". He noted that any extension of the procedure to other offences would be subject to Parliament's approval by way of the affirmative procedure.

Alex Cunningham said he wanted to see that approach "nailed in legislation so that a future Government cannot start to introduce recordable offences". He therefore pressed the amendment to a division. It was defeated by eight votes to five.

### Clause stand part

During the clause stand part debate (on whether the clause should remain in the Bill), Damien Moore and Nick Fletcher set out their support for the clause. They argued it would help deal with low level cases more quickly, and would improve access to justice for people who might have practical difficulties accessing a physical court (e.g. self-employed people or those with childcare issues).

Andy Slaughter said the Opposition did not feel sufficiently reassured about clause 3. He acknowledged the convenience of the online procedure, but said the process of going to court was a "significant" one that framed the offence and made defendants think about the consequences of their actions. He also raised concerns about open justice. Alex Cunningham revisited the points he had already made about recordable offences and ensuring defendants have sufficient information to understand the process.

On division, the clause was ordered to stand part by seven votes to five.[44]

## Clause 6: written procedure for mode of trial

**Clause 6** of the Bill 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. These 'mode of trial' procedures involve two stages in the magistrates' court to decide whether an either-way offence should be tried in a magistrates' court or the Crown Court:

- the first stage is a 'plea before venue' hearing, at which the defendant will indicate whether they intend to plead guilty or not guilty.

43 PBC Deb 9 November 2021 c228

44 PBC Deb 9 November 2021 c232

- if a not guilty plea is indicated, or no plea indication is given, the second stage is an 'allocation' hearing where the court will decide whether the case should be tried in the magistrates' court or Crown court.[45]

Full background is set out in section 3.3 of Library Briefing Paper 9253 Judicial Review and Courts Bill 2021-22.

There were two divisions on clause 6: one on an Opposition amendment relating to legal representation, and one on the clause stand part debate. The Government won both divisions.

### Legal representation

Alex Cunningham moved an amendment that would have prevented the proposed new written plea before venue procedure from being used unless the court was satisfied that the defendant had engaged a legal representative. That legal representative would be responsible for responding to the charge and giving any written indication of plea.

He argued that mode of trial provisions "are among the most procedurally complex in the criminal justice system", and therefore defendants must have the opportunity to receive legal advice prior to engaging in these procedures. He noted that duty solicitors are able to assist in allocation decisions taken at court.

He welcomed the Government's clarification – as set out in the courts factsheet (PDF) accompanying the Bill – that defendants would in practice only be able to engage with the new written procedures if they are legally represented, as submissions would need to be made through the Common Platform.[46] However, he said the Opposition was concerned that the Bill itself provided no guarantees of access to legal advice, and considered that the Government's intention on this point should be set out in primary legislation.

In response, James Cartlidge said it was the Government's intention to ensure that defendants seek legal representation "at the earliest opportunity in all criminal proceedings". Defendants without legal representation would not be able to access the Common Platform and so would not be able to make use of the new written procedures.

Alex Cunningham pressed the amendment to a division. It was defeated by eight votes to five.

Clause 6 was subsequently ordered to stand part on division by eight votes to five.

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45 If the defendant indicates a guilty plea the court will proceed to conviction and sentencing, without the need for an allocation hearing

46 The Common Platform is a digital case management system that can only be accessed by the judiciary, court staff, and professional court users such as defence lawyers and Crown Prosecution staff – it cannot be accessed directly by members of the public

## Clause 8: children and written procedures

**Clause 8** of the Bill would add new sections 24ZA and 24ZB to the Magistrates' Courts Act 1980 to enable child defendants aged 10 to 17 to engage with the plea before venue and allocation procedures in writing, rather than in court (similar to clause 6 for adults).

Full background is set out in section 3.3 of Library Briefing Paper 9253 Judicial Review and Courts Bill 2021-22.

During the clause stand part debate, the Minister James Cartlidge said clause 8 would "help to avoid unnecessary hearings by giving children the option to provide an online indication of plea for offences that may require a subsequent trial allocation decision". He said that enabling case management of the pre-trial stage of cases to take place outside of a courtroom would mean that children would only need to attend court for trial and sentencing hearings.

He set out the various safeguards that would be in place, such as a requirement for courts to provide defendants (and, where appropriate, their parents or guardians) with information explaining the written procedure and its consequences. He noted that as is the case with clause 6, child defendants will only be able to access the written procedures in clause 8 if they have legal representation, as access will be via the Common Platform.

In response, Alex Cunningham said that the Opposition believed it was "wholly inappropriate for remote proceedings of this kind to be used in cases with child defendants". He argued that clause 8 would "exacerbate the existing issues" with the youth justice system rather than doing anything to improve them, and that it failed to make adequate provision to protect the rights of children in the justice system.

Janet Daby questioned whether children would be capable of fully understanding the seriousness of the online procedures:

> My concern about children above 10 years old being able to make an online plea is that when children use a computer and everything is very much virtual, it is a different level of interaction and can seem like a game. I agree with my hon. Friend's point that their understanding of the process or their experience of making an online plea will be of a less serious nature. I also support his view that children are more likely to say that they are guilty because they are used to apologising, or they want to get out of the situation quickly. This is not the appropriate way forward.[47]

Clause 8 was ordered to stand part on division by ten votes to five.

## Clause 9: hearings in absence of defendant

Existing provisions in the Magistrates' Courts Act 1980 enable allocation hearings to take place in the absence of the defendant for reasons relating to

[47] PBC Deb 16 November 2021 c259

the defendant's disorderly conduct, or where the defendant gives consent via their legal representative for proceedings to take place in their absence. Clause 9 would consolidate and expand these provisions to 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.

Full background is set out in section 3.3 of Library Briefing Paper 9253 Judicial Review and Courts Bill 2021-22.

The Committee agreed Government amendments to clause 9 dealing with plea before venue hearings and legal representatives. There was also a division on an Opposition amendment relating to children, which was defeated by ten votes to five.

### Plea before venue hearings and legal representatives (Government amendments)

Justice Minister James Cartlidge moved a number of amendments to clause 9, to correct what he described as "a legislative roadblock" and "a drafting error".

To address the "roadblock", the amendments extended clause 9 to cover plea before venue hearings, as well as allocation hearings. James Cartlidge said:

> As currently drafted, clause 9 does not afford the same extended set of circumstances to proceed in absence for the plea procedure as there will be for the subsequent allocation procedure. That will in effect act as a legislative roadblock that prevents the courts from being able to make use of the new powers that clause 9 provides. Therefore, these amendments will ensure that the court has the same powers to proceed in the absence of a defendant for both the plea and the allocation decision procedures. Where the court decides that it is in the interest of justice to proceed in a defendant's absence, it will be assumed that the defendant has pleaded not guilty, and the court will allocate the case for a trial.[48]

The "drafting error" was dealt with by another Government amendment. Section 18(3) of the Magistrates' Courts Act 1980 enables allocation proceedings to take place in the absence of the accused if the court considers that "by reason of his disorderly conduct before the court it is not practicable for the proceedings to be conducted in his presence". As introduced, clause 9

[48] PBC Deb 16 November 2021 c262

replicated this provision but with an additional requirement – not included in section 18(3) as currently in force – for a legal representative of the accused to be present at the hearing. James Cartlidge said the inclusion of this additional requirement in clause 9 was a mistake:

> A further amendment rectifies a drafting error in clause 9 to ensure that it remains consistent with current law, whereby there is no requirement for the presence of a legal representative when a court decides to proceed with allocation, having removed a disorderly defendant from the courtroom.[49]

For the Opposition, Alex Cunningham noted concerns expressed by the human rights charity Justice[50] that clause 9 might impair the ability of defendants to engage in their proceedings, and that it could remove the potential for any reduction in sentence that the defendant would have been entitled to for pleading guilty.[51] He said:

> The Opposition share Justice's concern that clause 9 as a whole—especially with the Government amendments—may remove essential safeguards put in place for the accused's effective participation in the proceedings, and instead prioritise alleged court efficiency over a defendant's right to a fair trial.[52]

He said the Opposition would not oppose the amendments at this stage. The amendments were agreed without a vote.

### Children

Alex Cunningham moved an amendment to remove subsection 9(4) from the Bill. Subsection 9(4) deals with allocation proceedings in the absence of child defendants aged 10 to 17.

Alex Cunningham said that the provision caused the Opposition "some considerable unease". He noted that children are considered "inherently vulnerable", and that while the Bill recognised their increased vulnerability and additional requirements it did not specify how their rights would be appropriately safeguarded.[53]

In response, James Cartlidge said that subsection 9(4) had been "specifically drafted for children" and that the allocation of children's cases in their absence was "far more limited":

> It takes into consideration that defendants under the age of 18 have an extremely limited role to play when it comes to allocation hearings, given that they do not have the same rights as adults to elect for a jury trial at the crown court. It recognises children's increased vulnerability in the criminal justice system and provides additional safeguards. For example, the additional new circumstances that will enable the allocation of children's cases in their

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49 Ibid

50 Justice, Judicial Review and Courts Bill (Part 2 – Criminal Procedure) House of Commons Committee Stage Briefing, November 2021

51 Under clause 9 hearings in absence would proceed on the assumption that the defendant intended to plead not guilty

52 PBC Deb 16 November 2021 c264

53 PBC Deb 16 November 2021 c270

> absence are far more limited than those provided for adults. In addition to the existing exception of disorderly conduct, the clause specifies that the court can only proceed to allocate in a child's absence where the child has been invited, but failed, to provide an online indication of plea and either the court is satisfied they were served with a notice of the hearing or the child has already appeared at court on a previous occasion to answer the charge. The court must consider whether there is an acceptable reason for the child's absence and must be satisfied it would not be contrary to the interests of justice for the hearing to proceed in the child's absence.[54]

He added that the provision should be viewed "in the context of existing safeguards in primary legislation", such as requirements for a parent or guardian to be notified when a child is arrested and held in police detention, and for summons and postal requisitions to be sent to parents and guardians.

This prompted Sir John Hayes to ask what consideration the Government had given to children in care, given what he described as the "compelling case" the Minister had made for parents and guardians having a role.[55] James Cartlidge said it was "difficult to have specific clauses for children in care in that sense" but that he would give the point further consideration.

Alex Cunningham said he remained concerned that the impacts of subsection 9(4) on different groups of vulnerable children "have not been fully thought through". He therefore pressed the amendment to a division but it was defeated by ten votes to five.

## Clause 13: involvement of parents or guardians

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 amend section 34A by adding a 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 the new procedures in the Bill.

James Cartlidge said clause 13 would ensure that the existing "important safeguard" of parent or guardian involvement in section 34A would also apply to the new written and online procedures in the Bill.

Alex Cunningham said the Opposition was minded to oppose clause 13 given its position on "the need for full and proper safeguards for child defendants involved in the criminal process".[56] He said the Bar Council was concerned that engaging with parents and guardians in writing was an "insufficient safeguard" given that many parents of children involved in the criminal justice system have their own literacy issues and vulnerabilities.[57]

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54 Ibid

55 PBC Deb 16 November 2021 c271

56 PBC Deb 16 November 2021 c279

57 Ibid

Clause 13 was ordered to stand part on division by ten votes to five.

## 2.3 Online procedure

Part 2 Chapter 2 of the Bill enables civil, family and tribunal proceedings to be governed by a set of Online Procedure Rules, to be made by a new Online Procedure Rule Committee (OPRC), instead of by the Civil, Family or Tribunal Procedure Rules. This is part of a move to enable and require more court and tribunal work to be conducted by digital and remote means instead of via in-person physical court proceedings.

In Public Bill Committee, the main debate concerned:

- statutory safeguards for those who would find it difficult to engage in court proceedings by digital means; and
- the proposed size and composition of the Online Procedure Rule Committee.

No amendments were pressed to a division.

### Safeguards on participation in online proceedings

#### Nature of digital exclusion and HMCTS support

**Clauses 18 and 24** of the Bill as drafted require the Online Procedure Rules to "have regard for the needs of persons who require online procedural assistance". Such persons are defined as those who:

> because of difficulties in accessing or using electronic equipment, require assistance in order to initiate, conduct, progress or participate in proceedings by electronic means in accordance with Online Procedure Rules.[58]

The Official Opposition suggested that this statutory language was "a little on the soft side".[59] It proposed, in **amendments 86-89**, a broader definition for the duty. It would instead apply to persons who were "digitally excluded". This would encompass people who:

> for reasons including their inability to access the internet or digital devices, lack of basic digital skills, or problems with confidence and motivation, experience difficulty in engaging with computers or online processes.

It also proposed **New Clause 2** to the Bill, which would have set out more exhaustively what support for those who require online procedural assistance would involve.

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58 clause 31

59 Judicial Review and Courts Bill Deb 16 November 2021 c291

The Government resisted these changes to the Bill. The Minister described the changes to terminology as unnecessary, and stressed that the support that HMCTS would be providing, on a non-statutory basis, was already extensive.[60]

### Online hearings and choice not to participate electronically

Under subsection 18(7) of the Bill as drafted, the Online Procedure Rules could be used to "require" someone to participate in a court or tribunal hearing by electronic means (eg, over video link). However, the Rules must also allow a court or tribunal to decide (by whatever process) that a party can participate by non-electronic means instead (ie, in person).

The Official Opposition moved **amendment 59**. This would have given participants in proceedings a statutory right to take part by non-electronic means. This was debated alongside amendment 90, which would have required non-electronic participation in certain circumstances following a physical or mental health assessment.

The Government urged that the amendments should not be pressed to a vote, as in practice, it claimed, "there will always be a choice" for a litigant not to participate in a hearing electronically.[61]

## Size and composition of the OPRC

### Government's proposed membership of the Committee

As drafted, the Bill says the OPRC would have six members, including:

- three judges (one will chair the OPRC);
- one member of the legal professions (barrister, solicitor or chartered legal executive);
- one person with experience of the lay advice sector; and
- one person with experience of end-user IT/internet portals.

### Proposals for additional Committee members

The Committee considered, via debate on amendments to **clause 21**, whether the following should additionally be appointed to the OPRC:

- an individual with specific experience of the Scottish legal system;
- an extra IT expert;
- an authorised court and tribunal staff member;[62]
- an individual representing the digitally excluded;
- an expert in accessible service design.

The Government's view was that six members was sufficient for the OPRC, initially at least, to begin its work. If additional relevant expertise was later

60 Judicial Review and Courts Bill Deb 16 November 2021 cc287-288

61 Judicial Review and Courts Bill Deb 16 November 2021 c298

62 These are HMCTS staff to whom judicial case management functions may be delegated under the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018.

necessary or desirable, the Minister pointed out that clause 23 of the Bill would already allow the Committee to be expanded by using a statutory instrument. Expertise could also be drawn on, he insisted, without necessarily having to appoint additional Committee members. Its structure was deliberately different from other Procedure Rule Committees, he said, because it was designed to be small and "agile".[63]

### Scrutiny of clause 23 regulations

The Opposition moved **amendment 92**, which would have changed the type of Parliamentary scrutiny that applies to **clause 23** regulations (altering the membership of the OPRC). Instead of being made subject to annulment (the negative procedure) approval from both Houses would first be required (the draft affirmative procedure).

The Government resisted this amendment, pointing out that it would place a greater burden on changes to this Procedure Rule Committee than the existing ones. It also emphasised that changes could only be made with the agreement of the Lord Chief Justice and Senior President of Tribunals, and after having consulted other members of the senior judiciary. This, it said, was a sufficient safeguard.[64]

### Diversity of appointments

**Amendment 64** would have required the Lord Chancellor and Lord Chief Justice, when appointing OPRC members, to have regard to its gender and ethnicity balance (or lack of).

The Minister, James Cartledge, while generally supportive of diversity in public institutions, said he thought a specific statutory duty in this instance was unnecessary.[65]

## 2.4 Coroners

### Clause 37: Discontinuance of investigation when cause of death becomes clear

**Clause 37** would amend section 4 of the Coroners and Justice Act 2009 (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.

63 Judicial Review and Courts Bill Deb 16 November 2021 cc307-308
64 Judicial Review and Courts Bill Deb 16 November 2021 c314
65 Judicial Review and Courts Bill Deb 16 November 2021 c308

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

### Debate on clause 37

Andy Slaughter moved **Amendment 69** which was intended to ensure that certain safeguards were met before a coroner could discontinue an investigation into a death. He also spoke to three other amendments with the intention of ensuring that:

- the coroner should provide family members and personal representatives of the deceased with their provisional reasons for considering the investigation should be discontinued, so that family members could make an informed decision about whether to consent to the discontinuation (Amendment 70);
- family members were informed in writing for the reasons for a discontinuation of an investigation, without being required to request this information (Amendment 71);
- the Lord Chancellor establish an appeal process for families who disagreed with the decision to discontinue an investigation (Amendment 72).[66]

Andy Slaughter said the proposed increase in discretion for the coroner to discontinue investigations risked important evidence not being tested and complex cases not being publicly scrutinised. He was concerned at the lack of evidence to support the Government argument that the measures dealing with coroners were needed to address the backlog of cases in coroners' courts caused by Covid-19.

He considered clauses 37 and 38 would "further entrench levels of coronial discretion and inconsistency, adding yet more challenges for bereaved families forced to navigate the inquest system".[67]

Andy Slaughter said his amendment should ensure that investigations would not be terminated prematurely "where there may be evidence that could change once tested", or before the coroner had considered whether Article 2 of the European Convention on Human Rights was engaged and was satisfied that it was not.[68] He said Amendment 69 would also ensure the family would have "an ultimate veto on the decision to discontinue". He also argued for an "easily accessible appeal process for families who want an investigation to continue".[69]

James Cartlidge did not consider it necessary to introduce the safeguards proposed by Andy Slaughter. He said Section 4 of 2009 Act already deals with when the coroner may not discontinue an investigation, including where the

66 PBC Deb 18 November 2021 cc 331-344

67 PBC Deb 18 November 2021 c 333

68 Another Library briefing paper provides information about Article 2 inquests, Reforms to the coroner service in England and Wales, CBP 09328, pp7-8

69 PBC Deb 18 November 2021 cc 335-6

death was violent or unnatural, or occurred in custody or other state detention.[70] The junior Minister also considered the impact of the proposed amendment on judicial independence. He said that as coroners are independent judicial officer holders, how they carry out inquests and investigations "is a matter for them":

> Introducing a requirement for the coroner to seek consent from interested persons before making judicial decisions would be not only fettering their discretion but would, in effect, remove the decision from the coroner—that is, the judge, which is what they ultimately are—into the hands of an interested person or a number of interested persons. That is at odds with the most fundamental principle of judicial proceedings, which is that only the judge or the jury makes the decisions, having listened to all the arguments without fear or favour. We must be mindful that while interested persons have certain rights at the inquest, they do not control the inquest process or its investigations. That is for the coroner alone to determine, as a judicial office holder.[71]

James Cartlidge also pointed out that section 4 of the 2009 Act already provides that a senior coroner must, on request, provide an explanation for the discontinuance of an investigation. He said section 4 has a narrow remit: "to permit the discontinuance of an investigation where natural causes are found to be the reason for the death, and not in any other instances".[72] He considered section 4 ensures that only family members who require an explanation do receive it, and that additional work was not required of the coroner when it was not needed. The measures in the Bill, he said, were "streamlining measures" and the Government's intention was "to reduce unnecessary procedures in coroners' courts and unnecessary distress to bereaved families".[73]

On the issue of establishing a separate appeals process for bereaved families to challenge a coroner's decision to discontinue an investigation, James Cartlidge pointed to the existing ways a coroner's decision might be challenged.[74]

Andy Slaughter pressed for a vote on Amendments 69 and 72. Each was defeated by seven votes to five.

## Clause 38: Power to conduct non-contentious inquests in writing

**Clause 38** would insert a new section 9C into the 2009 Act which would enable a coroner to decide to hold a non-jury inquest in writing if they decide that a hearing is unnecessary. A coroner would not be able to decide that a

70 PBC Deb 18 November 2021 c 340
71 Ibid
72 PBC Deb 18 November 2021 c 341
73 PBC Deb 18 November 2021 c 341
74 PBC Deb 18 November 2021 cc 341-2

hearing is unnecessary unless the conditions set out in the clause are satisfied.

### Debate on clause 38

Andy Slaughter moved **Amendment 73** with the intention of ensuring that an inquest would not be held without a hearing if that was against the wishes of the deceased's family.

Andy Slaughter said his key concern with clause 38 was that there might be circumstances in which the bereaved family wanted an inquest with a hearing, but a coroner deemed one unnecessary. Holding an inquest in writing in this context "could deprive the family of the opportunity to explore all available evidence and limit their ability to scrutinise the account provided by relevant authorities, including by hearing oral evidence and questioning key witnesses".[75] He said the safeguards in clause 38 were insufficient.[76]

Andy Slaughter said a family invited to make representations to the coroner on whether or not an inquest should be held in writing would not necessarily have legal representation to support them in making their views heard. This, he said, would put them at a disadvantage in comparison with other interested persons who did have legal representation.

James Cartlidge resisted the amendment. He said the intention of clause 38 was to allow coroners flexibility to hold cases without a hearing where they determined there was no requirement to hold one. He said:

> The clause is focused on non-contentious cases, and while it will be for the coroner to determine what constitutes a non-contentious case, we expect that these will be cases in which the bereaved family is content not to attend a hearing.

James Cartlidge spoke of the safeguards included in clause 38(2). He reiterated that, as independent judicial office holders, it was for coroners to decide how to conduct their investigations and inquests and that introducing the concept of consent into the coroner's decision-making process would be "tantamount to fettering a coroner's discretion". James Cartlidge also noted that Amendment 73 did not address "the entirely possible eventuality that consent may be unreasonably withheld".[77]

Andy Slaughter withdrew the amendment.

## Clause 39: Use of audio or video links at inquests

**Clause 39** would amend section 45 of the 2009 Act (on Coroners rules) to add a new category to 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

75 PBC Deb 18 November 2021 c345
76 Ibid
77 PBC Deb 18 November 2021 c357

the coroner, to participate remotely in pre-inquest reviews and inquests. 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.

### Debate on clause 39

Andy Slaughter moved **Amendment 74** with the purpose of preventing an inquest from being conducted by telephone or other means which are audio only.[78] He said, "Given the way in which the clause is drafted, I have significant concerns about accessibility, transparency, participation and open justice with remote hearings".[79] He agreed there was a place for remote hearings but considered it inappropriate for an inquest to be conducted by audio only:

> It can be vital to see a witness who is being questioned during the inquest; otherwise it is impossible to know whether that person is being prompted on what to say by someone else, for example. Furthermore, if a hearing is audio only, neither the coroner nor anyone else will be able to get a sense of the body language of the witness, which could help to establish credibility.[80]

Andy Slaughter also spoke to other amendments relating to remote hearings:

- **Amendment 75** would have ensured that family agreement was secured before an inquest could be conducted remotely. Andy Slaughter said some families might not have internet access, or an internet connection that is good enough to allow them to take part in an online hearing. He considered it might be helpful for some families to be physically in court. He said the nature of an inquest meant that the position was not the same as in civil courts and the question of whether a remote inquest might be appropriate would depend on a case's circumstances.[81]
- **Amendment 76** would have ensured that certain safeguards were met before a remote inquest hearing was held.
- **Amendment 77** was intended to ensure that interested persons were provided with the reasons for any remote inquest hearings.
  Andy Slaughter said this would, if necessary, provide them with a basis on which to contest a decision to hold an inquest remotely.[82]
- **Amendment 78** was intended to ensure that remote inquest hearings and pre-inquest hearings were still held in a manner accessible to the public. Andy Slaughter considered the Bill to be unclear on the precise circumstances in which inquests would be held remotely, and that it did not provide for how interested persons and the wider public would be able to access hearings. He added: "As a result, there is a risk that these measures will crystallise the gradual process towards reduced access, rather than being motivated by the opportunities of new technologies to increase it".[83]

78 PBC Deb 18 November 2021 c361
79 PBC Deb 18 November 2021 c362
80 Ibid
81 PBC Deb 18 November 2021 c363
82 PBC Deb 18 November 2021 c363
83 PBC Deb 18 November 2021 c364

- **Amendment 79** would have required a review, including a consultation, of the potential impact of remote inquest hearings, before clause 39 came into effect.[84]

James Cartlidge said almost every measure in the Bill was, "in one way or another, streamlining, and therefore about efficiency, but it is not efficiency for efficiency's sake".[85] He reiterated the intent of clause 39:

> The clause is intended to bring coroners' courts in line with other jurisdictions. I would like to assure members of the Committee that we introduced the clause with bereaved families in mind. Giving coroners flexibility on how they hold their inquest hearings will ensure the timely hearing of cases and help to reduce unnecessary distress to families, not least by reducing delay.[86]

Addressing each proposed amendment in turn he said:

- In connection with Amendment 74, it was important that coroners have the flexibility to conduct hearings by audio, as there might be occasions where that is the only way participation is possible. James Cartlidge considered that overall, digital remote access enhanced access to justice:

> Holding remote inquest hearings will help bereaved families participate in the process, as they will not need to make long, costly journeys to courtrooms to attend inquest hearings, if they can be heard in the comfort of their homes. We understand that some bereaved families will prefer to attend in-person inquest hearings, and I expect coroners will work sensitively with bereaved families to ensure that any concerns are addressed. Equally, some bereaved families will prefer to use audio links only, and that should remain an option.[87]

- In connection with Amendment 75, it was for coroners, as independent judicial office holders, to decide how to conduct an inquest. James Cartlidge said it was expected that the rules to govern remote inquest hearings would provide that coroners should seek views from interested persons and take those into consideration as part of their decision making.[88]
- Detailed rules would govern the conduct of remote hearings, so James Cartlidge was not convinced that Amendments 76 and 77 were necessary.[89]
- Amendment 78 was also unnecessary. James Cartlidge said clause 39 should be read in conjunction with clause 167 of the Police, Crime, Sentencing and Courts Bill[90] which is currently before Parliament and would, "ensure that justice remains open and accessible to the public

84 PBC Deb 18 November 2021 c362
85 PBC Deb 18 November 2021 c367
86 PBC Deb 18 November 2021 c367
87 PBC Deb 18 November 2021 c369
88 PBC Deb 18 November 2021 c370
89 Ibid
90 Now (as amended) Clause 196 of the Bill as amended at House of Lords Report stage, HL Bill 95 2021-22

regardless of how the hearing is conducted".[91] He also said that the Chief Coroner would provide additional guidance on any law changes.

- In connection with Amendment 79, the Coroners (Inquests) Rules 2013 would need to be revised to set out the detail of how remote hearings would operate in practice, and the Government would seek "stakeholder input, including from the Chief Coroner, coroners and the Ministry of Justice-chaired stakeholder forum to ensure that the rules are appropriate".[92]

Andy Slaughter withdrew Amendment 74 but pressed for a vote on Amendments 75 and 79.[93]

Each amendment was defeated by eight votes to five.

In the clause stand part debate, James Cartlidge reiterated that clause 39 would bring coroners' courts into line with "mainstream courts and tribunals" where wholly remote hearings are already allowed.[94] He said this provision would provide coroners with additional capacity "as they mitigate the impact of Covid-19 and implement their recovery plans", including addressing a backlog of complex and non-complex jury cases. This, he continued, would relieve some of the stress and anxiety for families.[95]

Andy Slaughter spoke of the necessary balancing exercise:

> None of us is against speeding things up, making things more efficient or allowing more options for the ways in which proceedings can be dealt with, but the corollary has to be that we provide protections and avoid unintended consequences that may be harmful to participants and may mean that justice is not done.
>
> (...)
>
> This clause fails to adequately address the needs of bereaved family members; does not provide a guarantee that remote inquest hearings will continue to be in public; and has been introduced with insufficient research and evaluation.[96]

On introducing remote juries to inquest hearings, Andy Slaughter said there would be an additional challenge for families in being unable to witness a jury's reaction to evidence being heard. He said he was not against the further introduction of new technology and that "in some circumstances, such as pre-inquest hearings, it clearly seems appropriate". However, Andy Slaughter was concerned that the Government had not offered mitigations against the possible harmful effects of remote hearings: "They are

91 PBC Deb 18 November 2021 c370
92 PBC Deb 18 November 2021 c371
93 PBC Deb 18 November 2021 c373
94 PBC Deb 18 November 2021 c374
95 Ibid
96 PBC Deb 18 November 2021 c375

putting all matters into the hands of the coroner. Of course, there must be judicial discretion, but they need to go further".[97]

A vote on whether clause 39 should stand part of the Bill was agreed by eight votes to four.

## Legal aid for representation at inquests

Amendment 73[98] was considered at the same time as three new clauses dealing with legal aid:

- **New clause 10** which was intended to ensure that bereaved people (such as family members) would be entitled to publicly funded legal representation at inquests where public bodies (such as the police or a hospital trust) were legally represented.
- **New clause 11** aimed to remove the means test for legal aid applications for legal help for bereaved people before an inquest hearing. Andy Slaughter described this as being complementary to new clause 10 and said that legal help is important, "because as soon as a death occurs, complex legal processes are triggered involving multiple interested persons and agencies". He said families often needed expert advice on a range of matters.[99]
- **New clause 12,** which was intended to bring the definition of family in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) in line with the wider definition used in the 2009 Act. Andy Slaughter said this change would have "the common-sense advantage of making the legal aid eligibility under LASPO consistent with the 2009 Act". [100]

Andy Slaughter spoke of the inequality of arms when inquests consider deaths such as in police custody, prison cells, health or social care settings, and in major disasters such as Hillsborough and Grenfell:

> Inquests following state-related deaths are intended to seek the truth and to expose unsafe practices and abuses of state power. However, the preventative potential of inquests is undermined by the pitting of unrepresented families against multiple expert legal teams defending the interests and reputations of state and corporate bodies. What is more, bereaved families often struggle for legal representation, while public authorities have unlimited access to lawyers at the taxpayer's expense.[101]

Andy Slaughter pointed out that legal aid is granted under the Government's exceptional funding scheme only if it is considered that there is a wider public interest in the inquest or if it is an Article 2 inquest, (in relation to a death in state custody, or where it can be argued that the state failed to protect someone's right to life). Unless the family has legal representation through a conditional fee agreement linked to a separate civil claim for compensation,

97 PBC Deb 18 November 2021 c376

98 See above, Clause 38: Power to conduct non-contentious inquests in writing

99 PBC Deb 18 November 2021 c356

100 PBC Deb 18 November 2021 cc344-359

101 PBC Deb 18 November 2021 c346

or it is provided free of charge by a lawyer, Andy Slaughter said a family has to fund its own representation, which is unaffordable for many, if not most.[102]

Andy Slaughter acknowledged that the Government had indicated its intention to remove the means test for exceptional case funding and for legal help in cases where exceptional case funding is granted.[103] However, he said this policy reform, while welcome, did not go "nearly far enough", was unlikely to benefit many families, and did not satisfy the requirements "set out in recommendations made by countless reviews".[104]

Andy Slaughter considered the Government's view of inquests to be a myth:

> I am concerned by the Ministry of Justice's suggestion that inquests are inquisitorial, informal processes in which families can either represent themselves and ask questions about the death of their relative, or ask others to answer their questions. That is simply a myth. The reality is that an unrepresented family is confronted by a bank of lawyers who represent other interested persons at the inquest, with a heavy focus on damage limitation for the organisation at hand. The process is much more adversarial than inquisitorial, and as such the inquest process requires specialist knowledge of organisational policies, procedures and the law.[105]

Andy Slaughter said "countless authoritative reviews and inquiries" had all concluded that the current funding arrangements for inquest representation needed fundamental reform. He considered the momentum for change was overwhelming.[106] He said although many key findings on the conduct of state bodies arose from cases falling within Article 2 which were eligible for exceptional case funding, such findings also arose in other cases as well.[107]

Andy Slaughter said wider benefits accrued from legal representation for bereaved families:

> Properly conducted inquests in which families are legally represented can help to ensure scrutiny and examine and address the systems and practices that are meant to ensure safety and prevent deaths.
>
> [...]
>
> Inquests can help to save lives by exposing unsafe systems of care and holding public and private services to account. Funding for families therefore has a wider public benefit, far beyond individual rights and interests.[108]

James Cartlidge resisted all three new clauses. He reiterated the Government's view that "the coroner's investigation, including the inquest, is

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102 PBC Deb 18 November 2021 c347

103 The Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2021, SI 2021/1423 came into force on 12 January 2022

104 PBC Deb 18 November 2021 c348

105 PBC Deb 18 November 2021 c349

106 Ibid

107 PBC Deb 18 November 2021 c350

108 PBC Deb 18 November 2021 c352

generally an inquisitorial, fact-finding process; a narrow-scope inquiry to determine who the deceased was and how, when and where they died".

This means, he said, "for the vast majority of inquests, legal representation and legal aid are not necessary".[109] James Cartlidge considered there was a risk that additional lawyers at an inquest could have the unintended consequence "of turning an inquisitorial event into a complex defensive case, which could prolong the distress of a bereaved family".[110]

James Cartlidge outlined work the Government had undertaken to make inquests more sympathetic to the needs of bereaved people.[111] He said advice and assistance is always available under the legal aid scheme for bereaved families who need legal help, subject to a means and merits test. This, he added, could help preparation for an inquest, including help for families to decide what questions to ask.

James Cartlidge confirmed that a review of the legal aid means test "as a whole" was underway and that it would be published shortly.[112]

New clause 10 was unsuccessful by ten votes to four.[113] New clauses 11 and 12 were not called.

## 2.5 Local justice areas

**Clause 42** would abolish local justice areas. These 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.

Full background is set out in section 7.1 of Library briefing, Judicial Review and Courts Bill 2021-22.

The Committee considered an Opposition amendment that would have required the Secretary of State to consult with relevant stakeholders on the impact of the proposals before implementing clause 42.

Speaking to the amendment, Shadow Minister for Courts and Sentencing Alex Cunningham noted that the proposal had not been publicly consulted on, and that the original proposal stemmed from recommendations made in 2001.[114] He asked the Government why it would want to rely on a proposal that was 20 years old, has not been updated, and is not supported by any additional

109 PBC Deb 18 November 2021 c357
110 Ibid
111 PBC Deb 18 November 2021 c358
112 PBC Deb 18 November 2021 c359
113 PBC Deb 23 November 2021 c426
114 By Lord Justice Auld in his 2001 Review of the Criminal Courts of England and Wales

research. He said the Opposition was "worried about the impact of a curtailment of local justice".[115]

In response, the Minister James Cartlidge said the Lord Chancellor and Lord Chief Justice already had a statutory duty[116] to ascertain the views of lay magistrates on matters affecting them. He went on:

> Magistrates will still be assigned to a home court (...) and ensuring that that court is as close to where they live as possible will remain an important consideration under the new arrangements. However, they will have the flexibility to work in other courts, should they wish to do so.[117]

He said: "such changes have always been made in consultation with local criminal justice partners, including magistrates, and that will continue to be the case".[118]

Alex Cunningham withdrew the amendment.

115 PBC Deb 18 November 2021 c380

116 Under section 21 of the Courts Act 2003

117 PBC Deb 18 November 2021 c383

118 Ibid

# Annex: Public Bill Committee details

## Committee membership

Chairs: Sir Mark Hendrick, Andrew Rosindell

Barker, Paula (Liverpool, Wavertree) (Lab)

Cartlidge, James (Parliamentary Under-Secretary of State for Justice)

Crawley, Angela (Lanark and Hamilton East) (SNP)

Cunningham, Alex (Stockton North) (Lab)

Daby, Janet (Lewisham East) (Lab)

Fletcher, Nick (Don Valley) (Con)

Hayes, Sir John (South Holland and The Deepings) (Con)

Higginbotham, Antony (Burnley) (Con)

Hunt, Tom (Ipswich) (Con)

Johnson, Dr Caroline (Sleaford and North Hykeham) (Con)

Longhi, Marco (Dudley North) (Con)

McLaughlin, Anne (Glasgow North East) (SNP)

Mann, Scott (Lord Commissioner of Her Majesty's Treasury)

Marson, Julie (Hertford and Stortford) (Con)

Moore, Damien (Southport) (Con)

Slaughter, Andy (Hammersmith) (Lab)

Twist, Liz (Blaydon) (Lab)

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