

## **Courts and Tribunals (Online Procedure) Bill [HL]**

### **HL Bill 176 of 2017–19**

#### **Summary**

The [Courts and Tribunals \(Online Procedure\) Bill \[HL\]](#) is a government bill that would establish an Online Procedure Rule Committee (OPRC) tasked with producing an online procedure rules framework for use in certain civil, tribunal and family proceedings. The framework would enable parties to specified kinds of proceedings to use the online procedure. The Government intends the OPRC to have expertise in the delivery of legal services through IT and for the rules to use a “mix of technology” to provide a quick and simple dispute resolution process. It explained:

The new rule committee will have expertise in the law and the provision of lay advice, IT and other relevant experience which will enable it to produce court rules to support the online procedure. The online procedure will be a new digital procedure governed by a new set of rules separate to current processes. It will use a mix of technology, conciliation and judicial resolution to provide a simple and quick dispute resolution process.<sup>1</sup>

The Government expects the new rules to be “simple” and “intelligible to, and easily navigable by, all people who rely on our courts system”.

The bill is due to receive its second reading on 14 May 2019. It was introduced in the House of Lords on 1 May 2019 by the HM Advocate General for Scotland and Ministry of Justice spokesperson for the Lords, Lord Keen of Elie.

The proposed bill forms part of the Government’s courts and tribunals modernisation programme launched in 2016.<sup>2</sup> Similar provisions to those in the bill were initially included in the Prisons and Courts Bill in the 2016–17 session, which fell at the end of that session due to the calling of the 2017 general election.

#### **Provisions**

The bill is formed of 14 clauses and two schedules.

Clause 1 would require there to be online procedure rules established for proceedings of a ‘specified kind’. The Lord Chancellor or the Secretary of State would specify the types of proceeding through regulations made under clause 2 of the bill, which could apply to civil proceedings, family proceedings and certain tribunals (including various employment tribunals). Relevant factors that could be used to determine whether they should be designated as specified proceedings would include the legal basis and factual basis of the proceedings, and the value of the matter at issue.

The online procedure rules may allow for different parts of the proceedings to be conducted online (referred to as “via electronic means” in the bill), including starting or defending proceedings and participating in hearings.<sup>3</sup> Different rules could also be made for different kinds of proceedings.

Clause 1(3) states that the rules should ensure:

- (a) that practice and procedure under the rules are accessible and fair;
- (b) that the rules are both simple and simply expressed;
- (c) that disputes may be resolved quickly and efficiently under the rules; and
- (d) that the rules support the use of innovative methods of resolving disputes.

In addition, clause 1 states that the online procedure rules could provide for circumstances where the rules would not apply or would cease to apply (such as particularly complex cases) or for alternative procedures to be utilised. These circumstances would be provided for by regulations made under clause 3 of the bill.

Schedule 1, which is linked to clause 1, also allows the issue of practice directions in connection to the online procedure rules. Practice directions are those “given by judges on matters of court practice and procedure”.<sup>4</sup>

Clauses 4 and 5 would provide for the membership and powers of the OPRC and the procedure for appointing members. Clause 4(2) states that the committee must consist of:

- one person who is a judge of the senior courts of England and Wales;
- one person who is either: a judge of the senior courts of England and Wales, a circuit judge or a district judge; or a judge of the First-tier Tribunal, a judge of the Upper Tribunal, an employment judge or a judge of the Employment Appeal Tribunal;
- one person who is either a barrister in England and Wales, a solicitor in the senior courts of England and Wales or a legal executive;
- one person with knowledge of the lay advice sector; and
- one person with IT experience and knowledge relating to end-users’ experience of internet portals.

The committee would have the same rule-making powers as are available to the Civil Procedure Rule Committee, the Family Procedure Rule Committee and the Tribunal Procedure, and may also apply other procedural rules.

Clause 6 would grant the Lord Chancellor powers to make changes to the composition of the OPRC, subject to certain conditions. The changes would have to be made by regulations, and would first need agreement from the Secretary of State, Lord Chief Justice and the Senior President of Tribunals. It would also require consultation with the Head of Civil Justice (and deputy head, if there is one) and the President of the Family Division.

Clause 7 sets out the process for making the online procedure rules. The process is summarised in the explanatory notes as follows:

Before making or amending rules, the committee must hold a meeting (unless it is inexpedient to

do so) whether in person or otherwise, and consult any appropriate persons, which allows the committee to call on the expertise of non-committee members to inform discussion about any proposed rule changes. Any rules drafted by the committee must be signed by at least three members before being submitted to the appropriate minister who may allow or disallow the rules. Where a rule is disallowed the appropriate minister must give the committee written reasons for doing so. Rules come into force on such a date as the appropriate minister decides and are to be contained in a statutory instrument subject to the negative resolution procedure.<sup>5</sup>

In addition, clause 8 states that, if the appropriate minister writes to the OPRC requesting a provision to be added to the rules to achieve a specified purpose, the committee must make the appropriate rules within a reasonable period. The explanatory notes explain that it is rare for a minister to need to write to a rules committee, but that it may be required in situations of urgency.<sup>6</sup>

Clause 9 would give the Lord Chancellor powers to amend primary or secondary legislation to reflect the introduction of online procedure rules. This must be done through regulations, and would also require prior consultation with the Lord Chief Justice and the Senior President of the Tribunals. The explanatory notes state that it is “anticipated that this will be used to make minor revisions to legislation in order, for example, to regularise and modernise terminology to match that in new rules”.<sup>7</sup>

Clauses 10 and 11 provide powers for additional regulations to be made in respect of the bill (such as for consequential or transitional provisions) and provides for amendments to other legislation as set out in schedule 2. Clause 12 would set out the requirements for making regulations under the legislation, including the process for regulations requiring prior consultation. Clause 13 provides for definitions and interpretation of the terms of the bill and clause 14 sets out provisions on commencement and territorial extent. The majority of the provisions in the bill would require regulations be made setting out their commencement. The bill’s provisions would mainly apply to England and Wales, but with provisions relating to specific tribunals also applying to Scotland and/or Northern Ireland.

## **Background and Commentary**

### **Online Court**

The idea of an ‘online court’ to handle low value civil cases was recommended by Lord Justice Briggs in his 2016 review of civil court structures.<sup>8</sup> He believed it could improve access to justice for individuals and small businesses, who may currently be put off making legal claims by excessive costs and “lawyerish culture and procedure of the civil courts”.<sup>9</sup> He suggested it could offer a “radically new and different procedural and cultural approach to the resolution of civil disputes”, which might then be extended beyond an initial application to low value civil cases. He also considered potential issues with the idea, including:<sup>10</sup>

- barriers caused by court users’ low understanding of or access to IT;
- difficulties with the IT systems themselves;
- exclusion of lawyers in the process may create injustices; and
- concerns it may lead to “second class justice” for those “wrongly viewed as having less important claims”.

Full details on Lord Justice Briggs’s views on these issues can be seen in chapter six of his report.

### ***Programme to Modernise Courts and Tribunals***

In September 2016, the Government launched a £1 billion programme to reform HM Courts and Tribunals Service (HMCTS) that emphasised the importance of providing new online services and utilising other modern technology.<sup>11</sup> The Government stated that HMCTS systems and processes had not kept up with change, and it committed to building a modern system for administering justice that would be easier to use and more efficient.

Under the HMCTS reform programme, several online services have already been piloted, including a system for making divorce applications online and an online civil money claims service.<sup>12</sup> The Government recently suggested these pilots were successful:

More than 35,000 applications for divorce have already been made online since the system was launched in May 2018, reducing errors in applications from 40% to less than 1%. In addition, almost 60,000 applications were made to HMCTS' online civil money claims service during the past year with claims now taking, on average, 10 minutes to issue—down from 15 days using the former paper-based service.

Lucy Frazer, Parliamentary Under Secretary of State at the Ministry of Justice, has reported positive feedback from users of online justice services. In answer to a written question on 30 April 2019, she said:

More than 150,000 people used online justice services in 2018, taking the total number to over 300,000 in the past four years. Public feedback has been extremely positive with 82% user satisfaction rates for the online divorce service, 87% for civil money claims, 93% for make a plea and 92% for probate.<sup>13</sup>

### ***Prisons and Courts Bill 2016–17***

In February 2017, the Government included provisions for online procedure rules, similar to those in the current bill, in the [Prisons and Courts Bill](#), introduced in the 2016–17 session. The bill fell at committee stage in the House of Commons due to the calling of the 2017 general election.

During evidence given to the public bill committee, Professor Susskind (who served as IT adviser to the Lord Chief Justice) sought to address some of the concerns raised about the online process, particularly its impact on the legal profession and whether it would result in a “second-class system”.<sup>14</sup> Regarding the latter point, he believed it would be a more accessible and efficient system for some claims compared to the traditional courts system:

Our group—and, I believe, the Government—anticipates a system that is more accessible, more proportionate, quicker, easier to use and does not require people to take a day off work or pore through thousands of pages of rules, which seems to me to be a first-class service rather than a second-class service. It may be that, from a purist's point of view, one can see advantages in the traditional system—I am a great believer in the traditions of the law—but for small, low-value claims, I think what is proposed here will be a great improvement rather than some pale substitute for the traditional system.<sup>15</sup>

As to the effect on the legal profession, he stated that many of the people who would benefit would not have been using lawyers anyway. They may be litigants in person or may have simply avoided making a claim. He also emphasised that lawyers would likely still be involved:

As for the cases—they will probably be slightly higher value cases—that lawyers currently undertake, it is wrong to suggest that lawyers will be excluded from the process. There is a misunderstanding and ongoing debate about this. It has never been anyone’s intention that lawyers should not be allowed to participate; the intention is that this should be a system that people can use without the assistance of lawyers.<sup>16</sup>

### **Public Accounts Committee**

The House of Commons Public Accounts Committee has expressed concerns about the scale and pace of the changes. On 20 July 2018, the committee stated in a report that:<sup>17</sup>

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

The committee specifically mentioned digital procedures for access to justice, believing the online system was untested and that users were already being impacted negatively by court closures:

We are concerned that the reforms are being pursued at the possible expense of people’s access to fair justice. HMCTS has already closed 258 courts between 2010–11 and December 2017. These courts have been closed before moving services online, meaning that many people are having to travel further to access justice. This can cause many people severe difficulties, particularly for those who rely on public transport or have caring responsibilities. More closures are underway, yet HMCTS has undertaken limited work to review the impact of the closures on users or how demand for court time has been affected. HMCTS has not properly tested the use of new technology in accessing justice. Although HMCTS assured us that it is testing digital services, like online forms, with users, this does not amount to a proper evaluation of the wider impacts of the changes in the real world. We are concerned that HMCTS told us a great deal about processes and products and not enough about how the changes might affect people. Moving services online without assessing the impact could have serious implications for users of the justice system.<sup>18</sup>

The committee suggested there was a lot of uncertainty about how the new system would look and also how its effectiveness would be assessed. It contrasted user satisfaction ratings with evaluations of access to justice and equity:

[The departments] were not able to be more concrete about how they would measure this or determine whether the programme had been a success. HMCTS cited examples of user satisfaction scores from digital services but not how it would measure how the reforms affected access to justice or the fairness with which it is administered.<sup>19</sup>

In addition, the committee flagged up concerns from some witnesses (such as the Law Society) that if people did not have access to legal advice before submitting a claim, it could lead to the system being “clogged” up by invalid cases.

In its response, the Government acknowledged the committee’s concerns, setting out details on how it was intending to evaluate the changes. It stated there would be an overarching evaluation, supported by the evaluation of individual projects and the ongoing monitoring of higher profile reforms.<sup>20</sup>

The response also set out how the Government sought to help those who may have difficulty using the digital services. This included initial user testing, engagement with other government departments who provide digital services and improved support services:

We recognise that not everyone who needs to use the courts and tribunals will want to access digital services, and that others may need some help and support to do so. To support those in this position, we are improving our non-digital channels such as paper and telephone services, and have piloted an in-person Assisted Digital Service. Assisted Digital provides in-person support for those who wish to use the digital service, but lack the skills, facilities or confidence to do so [...]

All of our services (including assisted digital services) are informed by extensive user research and user testing by real end users of every transformed service. We have also engaged extensively with other government departments offering similar assisted digital support; this has proved invaluable in understanding lessons learnt which we have considered in the development of our own services.<sup>21</sup>

However, in a written question in April 2019, Yasmin Qureshi, the Shadow Justice Minister, referred to reports that only fourteen people had used the face-to-face assisted digital support scheme in pilot areas so far, and asked how the Government would increase uptake. Responding, Lucy Frazer stated that the Government was aware of the importance of offering appropriate support and would continue to look at ways to improve awareness. She also gave details on the extent of the programme:

HMCTS is piloting face to face digital support in 18 locations. Paper forms will also remain for those who choose to use them and improvements are also being made to paper forms. We recognise that we need to look further at how we support those who need help with the digital process. HMCTS is continuing to raise awareness of the support on offer to ensure those who require help in these pilot areas can access it. Community engagement in pilot locations is increasing the number of referrals and seven sites will be added to the face-to-face pilot in May.

Pilot face-to-face centres are able to identify and refer people who need digital support to use HMCTS services in their communities. Since starting this process in January 2019, take up of the service has increased week on week with 41 people now having had successful appointments.<sup>22</sup>

Overall, the Government hoped its response to the committee would alleviate its concerns about the programme, both by demonstrating it was taking the issue of access to justice seriously and that it was “alive” to concerns about the potential impact of the reforms.<sup>23</sup>

## Further Information

- Ministry of Justice, [Courts and Tribunals \(Online Procedure\) Bill: Impact Assessment](#), 24 April 2019
- HM Courts and Tribunals Service, [‘The HMCTS Reform Programme’](#), accessed 3 May 2019

---

<sup>1</sup> [Explanatory Notes](#), p 2.

<sup>2</sup> HM Courts and Tribunals Service, [‘The HMCTS Reform Programme’](#), accessed 3 May 2019.

<sup>3</sup> [Explanatory Notes](#), p 5.

<sup>4</sup> Inner Temple Library, [‘Glossary of Legal Terms and Phrases’](#), accessed 3 May 2019.

<sup>5</sup> *ibid*, p 6.

<sup>6</sup> *ibid*.

<sup>7</sup> *ibid*.

<sup>8</sup> Judiciary of England and Wales, [Civil Courts Structure Review: Final Report](#), July 2016.

<sup>9</sup> *ibid*, p 115.

<sup>10</sup> *ibid*, p 37.

<sup>11</sup> HM Courts and Tribunals Service, [‘The HMCTS Reform Programme’](#), accessed 3 May 2019.

<sup>12</sup> HM Courts and Tribunals Service, [‘Even More People Set to Benefit from Online Court Reform’](#), 1 May 2019.

<sup>13</sup> House of Commons, [‘Written Question: Courts: Modernisation’](#), 30 April 2019, 245829.

<sup>14</sup> House of Commons Public Bill Committee, [‘Prisons and Courts Bill \(Second Sitting\)’](#), 28 March 2017.

<sup>15</sup> *ibid*, col 3.

<sup>16</sup> *ibid*.

<sup>17</sup> House of Commons Public Accounts Committee, [Transforming Courts and Tribunals](#), 20 July 2018, HC 976 of session 2017–19, pp 5–6.

<sup>18</sup> *ibid*, p 6.

<sup>19</sup> *ibid*, p 11.

<sup>20</sup> Ministry of Justice, [Evaluating Our Reforms: Response to PAC Recommendation 4](#), January 2019, p 2.

<sup>21</sup> *ibid*, p 5.

<sup>22</sup> House of Commons, [‘Written Question: Courts: Digital Technology’](#), 11 April 2019, 239221.

<sup>23</sup> *ibid*, p 7

---

House of Lords Library briefings are compiled for the benefit of Members of the House of Lords and their personal staff, to provide impartial, politically balanced briefing on subjects likely to be of interest to Members of the Lords. Authors are available to discuss the contents of the briefings with the Members and their staff but cannot advise members of the general public.

**Any comments on briefings should be sent to the Head of Research Services, House of Lords Library, London SW1A 0PW or emailed to [purvism@parliament.uk](mailto:purvism@parliament.uk).**