Prisons and Courts Bill

House of Commons
Second Reading Briefing

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.

2. This briefing addresses our initial concerns over the written and online processes created by Part 2, and the changes proposed to the judiciary and the Judicial Appointments Commission in Parts 3 and 4. We will provide more detailed briefing explaining these concerns and proposing amendments at the Committee Stage of the Bill.

3. JUSTICE is not against the alternative procedure proposed, where progress can be made either on the papers, over a phone or video link or online. Indeed, the last three working parties of our members recommended greater recourse to these alternatives for civil procedures in *Justice in Times of Austerity* (2015)[1] and criminal procedures in *Complex and Lengthy Criminal Trials* (2016)[2], and across justice spaces in *What is a Court?* (2016).[3] Using more flexible processes can bring important efficiencies that reduce the length of time waiting for a case to be decided and improve access to justice for those who find getting to and being at court a difficult and stressful process.

4. However, their use must be carefully prescribed according to agreed principles that recognise the distinct difference not attending court will make for court users. For legal practitioners and judges, deciding preliminary matters without having to travel to multiple court venues will make it more possible to keep responsibility for cases, and therefore progress them properly and efficiently. For court users, not having to take a day off work or find a way to get to a court some distance away will be very attractive. However, it does not automatically follow that a paper or online procedure will be easy to understand, or reflect the solemnity of the process.

[1] Available at https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2015/04/JUSTICE-working-party-report-Delivering-Justice-in-an-Age-of-Austerity.pdf.

[2] Available at https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/03/CLT-FINAL-ONLINE.pdf.

[3] https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/05/JUSTICE-What-is-a-Court-Report-2016.pdf.

5. The time is long overdue for the legal system to embrace technology in the way that other industries have. We can do justice on our smart phones. But we must ensure that it is done carefully and without generating more confusion or distress around the process.

6. There are a number of principles that we consider must be included in primary legislation to ensure that written and online processes are undertaken appropriately, yet these are missing from the Bill. It leaves important detail to be decided by secondary legislation, or procedural rules without setting out the crucial parameters for effective and fair operation. JUSTICE urges Parliament to set out clear principles to guide the future of online court procedures, and modernisation of the courts more generally.

7. Part 3 of the Bill delegates judicial functions, but leaves the qualifications and functions to be specified in subsequent rules. These functions ought to be more clearly delineated in primary legislation.

8. We wholly support measures to diversify the judiciary and will make specific recommendations once our working party on *Judicial Diversity* has reported in April.

9. JUSTICE focuses this briefing on areas where we can offer particular expertise. A lack of comment on a clause should not be taken as endorsement of it.

Part 2
Criminal justice – written and online procedures

Clauses 23 - 33

10. These provisions leave almost all the processes regarding the use of written or online procedures in replacement of hearings at court to the Criminal Procedure Rules. While this is necessary for the detail of these procedures, there are no principles set out to guide the process. The *Transforming our Justice System* Consultation Government response,[4] which paves the way for digital processes, acknowledged that clear sign posting would be required to ensure that people understand the procedures and their

[4] Ministry of Justice, *Transforming our justice system: assisted digital strategy, automatic online conviction and statutory penalty, and panel composition in tribunals*, Government response, February 2017, available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/590391/transforming-our-justice-system-government-response.pdf.

consequences, and to ensure that guilty pleas are not incentivised due to the ease of simply responding to written options.[5] This legislation paves the way for radical change to the criminal justice system. It will allow almost all preliminary and enforcement proceedings to take place on paper/online through the Common Platform prior to and post-trial. It also provides the principle for all summary and non-imprisonable offences to be automated through an online plea, conviction and penalty website.

11. The opportunity for legal advice and assistance is particularly crucial for decisions concerning whether to indicate a plea before venue and deciding where the case should be heard, either in a magistrates' court or the Crown court (the mode of trial procedure). These decisions can currently be taken at court with the assistance of the duty solicitor. As we explained in our consultation response,[6] a network of informal assistance is available to people at court that explains procedure and guides towards legal assistance where necessary – from the usher, to the justice's clerk, to the barrister waiting for their case to be called, to the magistrate that the case appears before. This must all be replicated in a written procedure, and with the option to stop and seek legal advice at each stage.[7] Innovative steps can be taken to do so, with decisions trees for automatic online conviction, but this Bill must ensure that the right principles are followed. If not, a defendant can have reached the sentencing stage of their case before even seeing a judge or magistrate. This risks convictions that should never have been entered, and a greater burden on the courts to ensure there are no miscarriages of justice.

12. In light of the current working party of our members and other experts on *Mental Health and Fair Trial* we are particularly concerned that the process is not used in cases where the person will be unable to follow it because of their particular needs. Many people in the criminal justice system lead chaotic lives, due to a multitude of difficult reasons. Some are battling alcohol and drug addiction. Many have complex mental health needs. Others are partially or wholly illiterate. Clause 23 indicates that the Criminal Procedure Rules may include provision authorising or requiring the police, a relevant prosecutor or a court to give information about the procedure. We consider that the clause should specify further that the official who notifies of the written procedure must determine

[5] Ibid, p.12.

[6] JUSTICE, Response to Consultation on Transforming our Justice System, November 2016, pp.16-17, available online at https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/11/JUSTICE-Transforming-Our-Justice-System-consultation-response.pdf.

[7] For example, it may be that an online duty solicitor scheme could be made available to interact effectively with the online process, so that people are not deterred by confusion over where to seek legal help.

whether it is appropriate in *all the circumstances of the case* to instigate it, or whether the ordinary court process should be followed.

13. Moreover, the Police and Criminal Evidence Act (PACE) and Code C of the PACE codes of practice should specify the responsibility of the police upon charge, rather than Criminal Procedure Rules, which do not apply at that stage. The police need clear guidance in legislation to enable them to make an appropriate decision.

14. We consider that the legislation must enshrine:
    a. the need to ensure people clearly understand their right to legal assistance prior to making a decision, and that this will be made available in a user friendly way;
    b. that people must be notified in clear and simple language what their options are prior to deciding to follow the online process, not just that they should be given information;
    c. that steps are taken at the earliest opportunity by the person notifying the defendant (the relevant prosecutor, which could be any law enforcement agency or the CPS) to identify whether a written procedure or automatic online penalty is suitable for the person, not just whether the offence or the case is.

15. More specifically, clause 36 requires that "relevant documents" be served prior to an online conviction being made (pursuant to new section 16H to the Magistrates' Courts Act 1980). The relevant documents are defined to include the written notice of charge and notice about the written and online procedures, and then any documents specified by Criminal Procedure Rules. The clause should also specify the evidence that the prosecution intends to rely upon (the initial details of the prosecution case), in order to provide the same information that would be made available at court.

Clause 34 and Schedule 6 – public participation in proceedings by video and audio link

16. This provision allows for any proceedings in criminal, civil or family proceedings that take place wholly by video or audio link to be broadcast under the direction of the presiding judge at the hearing. No further information is provided about the manner in which the proceedings may be broadcast. Given that it is currently only the practice to broadcast Supreme Court hearings, certain Court of Appeal judgments and Crown Court

sentencing remarks,[8] we consider it to be a significant step to allow by legislation all hearings across all court jurisdictions to be broadcast. This is particularly so since the contempt provisions that follow in clause 34 refer to the use of *designated live streaming premises.* Judges require far more assistance to determine when it would be appropriate to order a proceeding to be broadcast and Parliament must delineate the parameters of any such broadcast to ensure it is appropriate in the circumstances of the case.

Clause 47 – Prohibition of cross-examination in family proceedings.

17. Clause 47 attempts to respond to concerns raised by Parliamentarians,[9] the judiciary[10] and interest groups[11] that with an increasing number of litigants in person in the family courts, it is often possible for the perpetrator of a domestic violence offence to cross-examine the victim of their abuse during the course of family proceedings, either related to that abuse or in some other way connected to it (for example, during injunction proceedings, or in an assessment of responsibility or contact for a child).

[8] Section 9, Contempt of Court Act 1981 forbids (a) bringing to court any tape recorder or instrument for recording sound, and (b) publishing a recording of a legal proceeding using such an instrument; however, note Section 9(1A) which excludes the Supreme Court from provision (b) (See also section 41 Criminal Justice Act 1925). Under section 32(1) Crime and Courts Act 2013, the Lord Chancellor and Lord Chief Justice can determine that these two acts do not apply in relation to recordings, if certain conditions are met and all parties agree (s.31(1)). There are further, more explicit, exceptions in The Court of Appeal (Recording and Broadcasting) Order 2013 – where appeal hearings can be broadcasted following written consent by Lord Chancellor. However, in Court of Appeal hearings, as per article 6(2), if a party is not legally represented, broadcasting can only take place of the court giving judgment. Note also The Crown Court (Recording) Order 2016, only sentencing remarks can be broadcasted with consent of a qualifying judge (see art. 6) sitting in the matter.

[9] All Parliamentary Group on Domestic Violence Parliamentary Briefing, Domestic Abuse, *Child Contact and the Family Courts*, p.14, available online at https://1q7dqy2unor827bqjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2015/11/APPG-Inquiry-report-domestic-abuse-child-contact-and-the-family-courts.pdf [accessed 17 March 2017].

[10] See Statement from President of the Family Division, Sir James Munby: Cross-examination of vulnerable people, December 2016, available online at https://www.judiciary.gov.uk/announcements/president-of-the-family-division-sir-james-munby-cross-examination-of-vulnerable-witnesses-in-the-family-court/.

[11] See S. Laville, O. Bowcott, *Truss orders review to ban abusers tormenting victims in family courts*, available online at https://www.theguardian.com/society/2017/jan/04/truss-orders-review-to-ban-abusers-tormenting-victims-in-family-courts [accessed 17 March 2017]: "I speak to hundreds of women who have been subjected to cross-examination by a perpetrator of violence and abuse … this is now a massive problem. The family court processes currently facilitate abuse as opposed to helping the very people it should be helping. The courts also seem to be ignoring the practice direction 12J issued with regards to how the court should deal with domestic abuse cases", Zoe Dronefield, not for profit organisation I Want My Mummy.

18. The clause provides for a ban on cross-examination where the perpetrator has been convicted of an offence or an on-notice injunction against them has been made. However, in any other circumstance, it is left to the discretion of the judge whether cross-examination will be allowed or not, according to whether the quality of the evidence will be diminished or cross-examination would cause significant distress.

19. This distinction is not reflected in the only existing regime banning cross-examination by the defendant in criminal proceedings. In section 34 of the Youth Justice and Criminal Evidence Act 1999 cross-examination of a complainant by a defendant is prohibited where they are *charged* with a sexual offence, and the proceedings are to determine the facts as to these allegations.

20. In our view, if allegations of domestic abuse are made in family proceedings, it is wholly inappropriate to allow the alleged perpetrator to examine the victim at all. We cannot envisage any circumstances where this is an acceptable way of taking evidence, a concern reflected in the evidence cited above, and should not be left to the judge's discretion. Such an option can only lead to distress and poor quality evidence. Rather than require the judge to make an assessment, which research shows judges feel uncomfortable and ill equipped to do,[12] Parliament should remove the opportunity entirely.

Civil Courts and tribunals – online procedure

Clauses 37 - 45 and Clause 50

21. In respect of clauses 37-45, we repeat the concerns outlined above at paragraphs 8, 10 and 12.

Clause 39 The Online Procedure Rule Committee and its powers

22. Clause 39 sets out the number and categories of persons that are to make up the Online Procedure Rule Committee:

[12] Ministry of Justice, *Alleged perpetrators of abuse as litigants in person in private family law*, February 2017, pp.35-36, available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/592873/alleged-perpetrators-of-abuse-as-litigants-in-person.PDF.

- a judge of the Senior Courts, a Circuit Judge or a district judge;
- a Tribunal judge;
- a barrister or solicitor (England and Wales);
- a representative of the lay advice sector; and
- an IT expert.

23. This is far too small a constituency to discharge its burden competently. By contrast, all three other procedure rule committees set up by the Courts Act 2003 contain around 17 members.[13] the Tribunal Procedure Committee, for instance, must consist of:

    - the Senior President of Tribunals or a person nominated by him;
    - three persons nominated by the Lord Chancellor with experience of practice in tribunals, or advising persons involved in tribunal proceedings;
    - two judges and one further member from the First-tier and Upper Tribunals appointed by the Lord Chief Justice;
    - one person with experience in and knowledge of the Scottish legal system appointed by the Lord President of the Court of Session; and
    - any other persons, subject to a maximum of four persons, at the request of the Senior President of Tribunals.[14]

24. Given the wide remit of the Online Procedure Rule Committee, covering civil, family and all tribunals, we consider that, at the very least, a judge and a barrister or solicitor practising in each of those three jurisdictions are necessary constituents of the Committee. Further, there should be an explicit power to add a fixed number of additional members with relevant experience, after consultation with the Lord Chancellor, at the request of either the Lord Chief Justice, the Senior President of Tribunals or the Lord President of the Court of Session.

[13] s. 70 of the Courts Act 2003 provides for 18 members of the Criminal Procedure Rules Committee; s. 77 for 17 members of the Family Procedure Rules Committee; and s. 2 of the Civil Procedure Act 1997 (as amended by the Courts At 2003) for 15 members of the Civil Procedure Rules Committee (which currently has 17 with ex officio appointments).

[14] Paragraph 20 of Schedule 5 of the Tribunals, Courts and Enforcement Act 2007.

Part 3

Organisation and functions of courts and tribunals

Clause 50 - Schedule 11 - Court and tribunal staff: legal advice and judicial functions

25. Schedule 11, amongst other provisions, enables the delegation of judicial functions to other court staff, in particular "*to exercise the functions of courts, judges and tribunals"* in cases where the Rules so provide. We anticipate that the purpose of this is to free up judicial time to focus on core judicial functions and enable more routine administrative matters to be conducted by court staff. The Bill also purports to allow more staff with legal training or supervision by a judge to undertake more complex legal tasks (e.g. giving legal advice to "lay" justices: see para. 22, sch. 11).The "factsheet" accompanying the Bill states that the government expects "*[b]y and large these functions will be characterised as interlocutory or preparatory in nature*", but no such limitations are currently clearly stated in Schedule 11.[15]

26. JUSTICE is concerned that important matters are being left to Rule Committees and regulations - details about, for example, precisely which judicial functions courts and tribunal staff will be authorised to exercise, and what qualifications or experience they will need to be qualified to exercise these functions.

27. In JUSTICE's report *Delivering Justice in an Age of Austerity*[16] our working party recommended greater use of "**legally qualified and suitably trained registrars**". Registrars would undertake active case management and dispute resolution functions. The working party stressed that these staff would need proper training, but in the long term they would save time and money. Registrars would free up judicial time, so that judges could focus on hearings. Crucially, our working party stated that all registrars' decisions **"should be subject to a right of appeal to a judge".**

28. JUSTICE urges Parliament to consider our report, and the *Final Civil Courts Structure Review* (2016) by Lord Justice Briggs.[17] Lord Justice Briggs also advocated greater use of what he called "Case Officers", which were very similar to JUSTICE's proposals for "Registrars". They would: assist with *certain* judicial functions e.g. uncontentious

[15] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/594722/fact-sheet-power-to-assign-court-and-tribunal-staff.pdf
[16] See note 1 above.
[17] See https://www.judiciary.gov.uk/civil-courts-structure-review/civil-courts-structure-review-ccsr-final-report-published/

matters, and they would be trained and supervised by judges. Lord Justice Briggs also recommended that the decisions of Case Officers could be subject to reconsideration by judges on request by a party.

29. There is insufficient detail as to the qualifications, functions and review routes from the expanded roles of these non-judicial officers, which should be clarified in the Bill.

Part 4

The Judiciary and the JAC

30. In 2016, JUSTICE established a working party of experts looking closely at how to improve the diversity of our senior judiciary (the UK Supreme Court and, in England and Wales, the Circuit bench, High Court and Court of Appeal). Membership is drawn from practitioners, academia, former judges and the civil service. They have consulted widely, including with policy-makers and members of the senior judiciary.[18]

31. Our Working Party is now drawing to a close and its Report will formally be launched on 25th April 2017. JUSTICE intends to propose amendments to this Bill at Committee Stage that would give effect to some of the exciting and innovative reforms proposed in this report.

32. In addition, in November 2016 JUSTICE responded in our own capacity to the Government's consultation on *Modernising judicial terms and conditions*.[19] In this response, JUSTICE supported proposals for fixed-term appointments for leadership judges, Recorders, and Deputy High Court judges. JUSTICE also made clear, however, that fixed terms *must* be situated in the context of wider reforms to solve the judiciary's pressing diversity crisis.

33. In its response to the consultation, the Government indicated that it will only pursue fixed terms for leadership posts at this time (and, in addition, temporary "leadership

[18] https://justice.org.uk/our-work/areas-of-work/judicial-diversity/

[19] https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/11/JUSTICE-Modernising-Judicial-Terms-and-Conditions-29-Nov-16-final.pdf

allowances", on which JUSTICE makes no comment),[20] which we consider to be insufficient.

Clause 56 and Schedule 15 - Judges with roles in the leadership of the judiciary

34. We are fully supportive of the Lord Chief Justice of England and Wales, the Senior President of Tribunals, and the Lord Chancellor in their desire to reform and modernise the judiciary, including leadership positions.

35. Schedule 15, Part 1 enables the posts of Lord Chief Justice and Heads of Division to be granted on a fixed-term basis (by amending the Senior Courts Act 1981). JUSTICE supports the policy objective underlying these draft provisions. We believe that these posts are crucial in enhancing the careers of those who attain them, and increasing turnover will provide greater opportunities for judges now progressing through the ranks. We note that the junior levels of the judiciary are more diverse than the senior levels. Furthermore, we note with concern that at the time of writing, only one woman has ever held one of the five senior leadership roles[21] within the judiciary of England and Wales. Every judge to hold one of these positions has been white.

36. However, the term of each appointment is not specified. JUSTICE considers that the length of the fixed term(s) in question should be specified in primary legislation. The Government's consultation response stated that "*the Lord Chancellor will consult with the judiciary to determine how long the term should last.*" The results of this consultation ought to be published at the earliest opportunity, in order to assist Parliament in considering the full implications of this legislation. JUSTICE notes that the recent advertisement for the position of Lord Chief Justice requires that the successful applicant should be able to offer at least four years of service before retirement.[22]

37. Although the diversity crisis is most acute within the senior judiciary, we consider that the same concerns are raised in the proposals for fixed-term appointments for other leadership posts in the Tribunals and Senior Courts.

[20] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/590426/modernising-judicial-terms-and-conditions-government-response.pdf

[21] Lord Chief Justice, Master of the Rolls, President of the Queen's Bench Division, Chancellor and President of the Family Division.

[22] https://jac.judiciary.gov.uk/vacancies/LCJ2017

Clause 57 – Deployment of judges

38. Clause 57 of the Bill provides for more flexible deployment of Recorders, Deputy High Court judges (DHCJs) and judge-arbitrators. JUSTICE supports the efficient use of judicial resources, and the modernisation of the judiciary generally.

39. In our consultation response to *Modernising judicial terms and conditions* we explained the benefits of moving further towards the concept of a judicial career path. This should include, for example, the possibility of Tribunal judges working their way up to the senior judiciary. Introducing fixed-terms for leadership positions, and increasing opportunities for deployment, will enable a wider range of judges to enjoy these career-enhancing opportunities.

40. Again, we consider that the Government should publish the internal analyses on which its proposals for fixed-term appointments for Recorders and DHCJs were based. JUSTICE would welcome a transparent, robust and evidence-based analysis that focuses on Recorders and Deputies specifically; the government's consultation paper indicated, for example, that Recorders currently average 21 years in office. The effects on diversity are obvious.

Clause 60 – the Judicial Appointments Commission

41. While we note that the Government's triennial review identified that the JAC has useful expertise that could be deployed for non-judicial appointments,[23] we recall that the JAC's core function must remain the independent selection of future judges. JUSTICE is concerned that these amendments may divert attention from the JAC's important activities and we suggest that Parliament enquires as to whether the JAC can appropriately administer broader functions.

42. On the necessary changes to improve diversity, JUSTICE will invite consideration of its current Working Party's recommendations in our Committee Stage briefing.

JUSTICE

17th March 2016

[23] See Explanatory Notes to the Bill, para. 64.