



Courts and Tribunals (Online Procedure) Bill

House of Lords

Committee Stage

Briefing and Suggested Amendments

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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 the Courts and Tribunals (Online Procedure) Bill (“the Bill”),¹ ahead of Committee Stage in the House of Lords on 10 June 2019.
3. JUSTICE is broadly supportive of the Bill. In particular, we are encouraged that Clause 1(3) makes clear that the power to make Online Procedure Rules is to be exercised with a view to supporting accessibility, simplicity, efficiency in the resolution of disputes, as well as the use of innovative methods of resolving disputes.
4. This briefing proposes moderate changes to the Bill. These are aimed at: i.) ensuring that the Online Procedure Rules Committee (“OPRC”) includes membership of all judicial staff applying the relevant rules, and ii.) placing greater emphasis on access to justice more generally.

Clause 1 – Requirement for mandatory initiation of proceedings by electronic means

5. As currently drafted, the Bill provides that online procedural rules would mandate that proceedings must be initiated by electronic means. JUSTICE recognises that one intention of the Bill is to facilitate the introduction of court processes that are, from initiating to adjudication, entirely online. However, we are concerned that mandating the online initiation of claims would preclude “digitally excluded”² cohorts from accessing the justice system.
6. Digital exclusion was an issue that Lord Briggs explicitly acknowledged in the *Civil Courts*

¹ Courts and Tribunals (Online Procedure) Bill [HL] (2017-19).

² The 2018 JUSTICE Working Party, *Preventing Digital Exclusion from Online Justice* (“*Preventing Digital Exclusion*”), used the term “digitally excluded” to describe people who for reasons such as an “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 and online processes. Available at <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/Preventing-Digital-Exclusion-from-Online-Justice.pdf>

Structure Review.³ In the White Paper accompanying the Reform Programme, the Ministry of Justice recognised the extent to which digital exclusion across England and Wales was likely to be a challenge for the modernisation of court processes.⁴ In recognition that the mandatory imposition of online processes has the potential to frustrate access to justice, HMCTS has committed to the retention of paper-based channels.⁵ Given this policy commitment, the Bill cannot require all claims to be initiated online and ought to acknowledge the importance of the retention of paper based channels.

7. Clauses 1(b) and (c) are couched in discretionary language, and we see no reason why 1(a) should not be drafted in the same terms. Replacing the word “must” with the word “may” would recognise that mandating the initiation of claims online has the potential to frustrate access to justice for digitally excluded cohorts while allowing the OPRC to maintain discretion to retain paper based channels as an alternative. We would therefore propose the following amendment:

Page 1, line 4, leave out “must” and insert “may”

Clause 1 – Legal and technical assistance

8. JUSTICE welcomes the emphasis on accessibility and fairness in Clause 1(3)(a). However, we consider that more could be done to emphasise the necessity for easily accessible technical and legal assistance for those accessing online justice services.⁶ This will go to ensuring that a court user can understand what is happening in their case.
9. Our recent Working Party report *Understanding Courts* recommended that legal professionals should have as a primary consideration the effective participation of lay

³ Lord Briggs used the term “computer challenged”: Briggs LJ, *Civil Courts Structure Review: Final Report* (2016), p. 38, para 6.17, available at <https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> At para 6.5.2, Briggs LJ described “difficulties of various kinds with computers” as one of the “main criticisms” of his Online Solutions Court.

⁴The White Paper estimated that 70% of the UK population may be either “digital with assistance” or “digitally excluded”. See Ministry of Justice (“MoJ”), *Transforming our justice system: summary of reforms and consultation* (Cm 9321, 2016) p. 13 para 7.13, available at https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/supporting_documents/consultationpaper.pdf

⁵ See HMCTS, ‘Helping people access our services online’ (12 October 2017), available at <https://insidehmcts.blog.gov.uk/2017/10/12/helping-people-access-our-services-online/>

⁶ JUSTICE (2018), see note 2 above. The Working Party used the term “online justice services” as a portmanteau, to describe “everything from applying for a divorce or probate online, to a fully-fledged Online Court”,

users; in other words, that professionals adapt proceedings to ensure lay users comprehend the process.⁷ Our amendment below would reflect the overriding objective set out in each of the Tribunal Procedure Rules to enable effective participation. Given that the Online Court – like the tribunal system – is designed for litigants in person, we suggest that this would be an appropriate inclusion.

10. Effective participation of lay users may require assistance in navigating online processes. Indeed, during the evidence gathering process for our Working Party report *Preventing Digital Exclusion from Online Justice*, individuals and organisations repeatedly emphasised the need for assistance with both the substantive legal element and the digital element of the Online Court.

11. We would therefore suggest the following amendments to Clause 1(3):

Page 1, line 21, at end insert –

() so far as practicable that the parties are able to participate fully in the proceedings.

Page 1, line 19, at end insert “, with assistance if necessary,”

12. Further, JUSTICE remains concerned about the lack of signposting to sources of legal advice in the current iteration of the Online Court. JUSTICE was supportive of Lord Briggs’ original vision for an online court “equally accessible to both lawyers and litigants in person”.⁸ The multi-tiered online court envisaged by Lord Briggs included stages featuring pathways to sources of affordable/free legal advice.

13. However, the current iterations of online justice services for money claims,⁹ divorce¹⁰ and probate¹¹ provide only basic information. They do not signpost users to sources of

⁷ JUSTICE Working Party, *Understanding Courts* (2019), Recommendation 9, available at <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2019/01/Understanding-Courts.pdf>

⁸ Briggs LJ (2016), see note 3, chapter 6.

⁹ MoJ, ‘Make a money claim online’, available at <https://www.gov.uk/make-money-claim>

¹⁰ MoJ, ‘Get a divorce’, available at <https://www.gov.uk/divorce/file-for-divorce>

¹¹ MoJ, ‘Wills, probate and inheritance’, available at <https://www.gov.uk/wills-probate-inheritance>

affordable, discrete or free legal information or advice such as Citizens Advice and Advicenow that could assist users in understanding what claim to make and how to articulate their claim. This setup can be contrasted with comparable online justice services in other jurisdictions. For example, in British Columbia the Civil Resolution Tribunal is accessible to a user only after they have completed the “Solution Explorer”, which provides the user with information, draft documentation (such as a letter to send to the respondent) and information on where to find further advice.¹²

14. While JUSTICE recognises that the primary intention of this Bill is to establish the OPRC, we would nonetheless draw attention to this deficiency in the current online processes. The Online Court – governed by the new Online Procedure Rules – must facilitate access to any legal advice such as a user of that court may be entitled to. We would therefore ask Government to confirm that such signposting is to be introduced within the Online Court.

Clause 4 – Composition and size of the Online Procedure Rules Committee

15. Clause 4 of the Bill establishes a new OPRC made up of five members. JUSTICE has previously suggested that a procedural rule committee constituted of too few members would potentially run the risk “of not discharging its burden competently”.¹³
16. The OPRC must ensure that the rules are not written with only lawyers in mind and we particularly welcome the technical and NGO positions that have been proposed, given the intention that online justice services will be accessible for litigants in person.
17. That said, we think it is essential that the OPRC should feature an “authorised court and tribunal staff” member as that term is defined in the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 (“the Act”).¹⁴ The effect of that legislation is to allow individual

¹² See Civil Resolution Tribunal, ‘How the CRT Works’ available at <https://civilresolutionbc.ca/how-the-crt-works/>

¹³ JUSTICE, ‘Prisons and Courts Bill: House of Commons Second Reading Briefing’ (2017), para 23 available at <https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2017/04/JUSTICE-briefing-Prison-and-Courts-Bill.pdf>

¹⁴ A 2015 JUSTICE Working Party report recommended greater use of legally qualified and suitably trained registrars within civil dispute resolution, which was adopted by the Act. See JUSTICE Working Party, *Delivering Justice in an Age of Austerity* (2015), para 2.2, available at <http://2bqk8cdew6192tsu41lay8t-wpengine.netdna-cdn.com/wp-content/uploads/2015/04/JUSTICE-working-party-report-Delivering-Justice-in-an-Age-of-Austerity.pdf>

rule committees to delegate functions that were traditionally judicial in nature to non-judicial court staff.

18. For instance, in the context of the Online Court, we understand from HMCTS that the pilot of “Legal Advisors” within that service will allow them to make various procedural determinations including case progression directions for defending claims.
19. Given the extent to which procedural functions in “online courts” are to be delegated to authorised court and tribunal staff – and the concomitant need for those staff to understand and apply relevant procedural rules – JUSTICE thinks that it would be prudent to include their voice in the drafting of the relevant rules. For the purposes of balance, we would propose that a representative “authorised court and tribunal staff member” ought to be appointed to the OPRC by the Lord Chief Justice.
20. We would propose the following amendments be made to Clause 4(2):

Page 4, line 8, at end insert –

(b) one person who is an “authorised court and tribunal staff member” as defined by the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018;

Page 4, line 25, after “2 (a)”, insert “or 2 (b)”

Clause 4 – Amendment on gender and ethnic balance

21. JUSTICE supports Lord Beecham’s proposed amendment, introducing a requirement that “the Lord Chancellor must ensure that gender balance is reflected on the Online Procedure Rule Committee”.
22. JUSTICE’s Working Party Report *Increasing Judicial Diversity* found that reducing homogeneity in the legal system is important for both legitimacy and quality of decision-making.¹⁵ Ensuring gender balance in the creation of new Rules Committees would serve as a positive step towards this aspiration.

¹⁵ JUSTICE, *Increasing Judicial Diversity* (2017) available at <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2017/04/JUSTICE-Increasing-judicial-diversity-report-2017-web.pdf>. See paras 2.3, 2.6.

23. However, as currently drafted, Lord Beecham’s amendment does not address ethnic representation. JUSTICE sees no reason why this should be prioritised any less than gender balance, and so would suggest Lord Beecham’s amendment is introduced with the added words below:

Page 4, line 24, at end insert—

“() The Lord Chancellor must ensure that gender and ethnic balance is reflected on the Online Procedure Rule Committee.

Clauses 7(3) and 13 – Appropriate Minister

24. Clause 7(3) provides that an “appropriate Minister may allow or disallow Online Procedure rules made by the Committee”. While the clause conveys a notably wide discretion, JUSTICE recognises that this clause follows convention and that there is an equivalent provision governing the Civil Procedure Rules Committee.¹⁶
25. However, JUSTICE has outstanding concerns relating to the phrase “appropriate Minister”. Clause 13(4) provides that for “relevant functions”, including the disallowing of Online Procedure Rules, the “appropriate Minister” will generally be the Lord Chancellor. Clause 13(5) and (6) set out the exceptional circumstances in which the relevant function will instead be “exercisable by the Secretary of State”. The circumstances are where the Online Procedural Rules or practice directions relate to a kind of proceedings in or relating to the employment tribunals.
26. It is not clear on the face of the Bill who exactly the “Secretary of State” would be in these circumstances, if not the Lord Chancellor. JUSTICE would appreciate clarification on this point.
27. Further, in order to interpret “appropriate Minister” for the purposes of Clause 7(3), a reader of the Bill must find and then trace through each of the subsections of Clause 13(1)-(6). This is not necessarily intuitive for a non-lawyer. JUSTICE is heartened by the principle enshrined in the Bill that Online Procedure Rules should be “simple and simply expressed,” and – subject to the clarification requested at paragraph 23, above – would suggest that Clause 13 might be re-structured to realise this aspiration at the level of primary legislation.

¹⁶ Civil Procedure Act 1997 s 2(8).