Judicial Review and Courts Bill

(Part 2 – Courts, Tribunals, and Coroners)

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. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. JUSTICE has put together two separate briefings on different elements of the Judicial Review and Courts Bill (the "Bill") ahead of its Second Reading in the House of Commons on 18 October 2021. This briefing addresses Part 2 of the Bill, which relates to the provisions concerning criminal procedure, online procedure rules ("OPRs"), and reforms to the Coroner Service.

3. **Criminal Procedure**: in 2017, the Government proposed the Prison and Courts Bill (which did not progress due to the general election that year) to make significant changes to the way the criminal courts operate through greater use of technology. At the time, JUSTICE briefed on its measures,[1] many of which have been revived in the current Bill, which paves the way for radical change to the criminal justice system. JUSTICE refers to two in particular:

    a. The introduction of an automatic online conviction and standard statutory penalty ("AOCSSP") procedure, whereby an individual could plead guilty without the need for a hearing in the magistrates' court; and

    b. The creation of new pre-trial allocation procedure (the "New Allocation Procedure") whereby an individual can indicate a plea in writing or online for all summary-only, indictable only, and triable either-way cases without the need for a physical hearing. The courts are also empowered to proceed with the allocation process in a defendant's absence where they have not appeared for a good reason, as well as allow the magistrates' court to direct indictable only and triable either way cases to the Crown Court without the need for a first hearing.

4. While JUSTICE would welcome the spirit of some of these measures, they must be introduced with sufficient safeguards and financial resource, accompanied by an

[1]JUSTICE, 'Prisons and Courts Bill, House of Commons, Second Reading Briefing', (March 2017).

independent pilot before their wider application. This briefing reiterates a number of our concerns with the proposals.

5. **Online Procedure Rules**: these provisions, of which JUSTICE is broadly supportive, largely mirror those contained in the Courts and Tribunals (Online Procedure) Bill 2017-19 (the "2019 Bill"). However, we have the following concerns:

    a. The implementation of online procedure rules must be done in a way that ensures access to justice for all, including those who may find it difficult to access and engage with online justice. This includes:
        i. allowing parties to choose to participate in hearings in person, even if they are legally represented;
        ii. ensuring that sufficient regard is had to the needs of those who are digitally excluded; and
        iii. ensuring that sufficient support is provided to those who are digitally excluded.
    b. The Bill as currently drafted gives too much power to the Lord Chancellor.
    c. The Online Procedure Rules Committee ("OPRC") is too small and should at a minimum also include an "authorised court and tribunal staff" member.[2] Further it should reflect the gender and ethnic make-up of British society.

6. **Coroner Service**: the Bill, at Part 2, Chapter 4, proposes reforms to the Coroner Service. In 2019, JUSTICE established a working party, chaired by Sir Robert Owen with a diverse and highly experienced membership, to consider the weaknesses in the current arrangements for inquests and public inquiries. The working party gave particular attention to the experiences of bereaved people, who, instead of finding answers through the inquest process, are often left feeling confused, betrayed, and re-traumatised. This briefing is informed by the working party's report *When Things Go Wrong: The response of the justice system* (the "JUSTICE WTGW Report").[3]

7. For these measures, JUSTICE has the following concerns:

    a. Clauses 37 to 39 risk key evidence not being tested at inquests, introduce greater discretion for coroners when inconsistency has been repeatedly highlighted, and do not address the needs of bereaved families.

[2] As defined in the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018.

[3] JUSTICE, '*When Things Go Wrong: The response of the justice system'* (August 2020).

b. The Bill fails to make any meaningful improvements to the Coroner Service and misses the opportunity to introduce automatic, non-means tested publicly funded legal representation for bereaved families at inquests where the State is represented.

Criminal Procedure – Part 2, Chapter 1

Automatic Online Conviction and Standard Statutory Penalty Procedure

8. The Bill, at clause 3, would establish the principle for all summary and non-imprisonable offences[4] to be automated through an online plea, conviction, and penalty website. This means that a defendant could opt to plead guilty online which would result in an automatic conviction without the need for a hearing. Upon introduction, the Government claims that the provision will only apply to offences involving "*travelling on a train or tram without a ticket and fishing with an unlicensed rod*".[5] The offences will be set out in secondary legislation (approved by the affirmative procedure). As such, further eligible offences could be set out at a later date.

9. The Bill provides that such a process remains optional for defendants, who could request a physical hearing instead.[6] Moreover, defendants must be over the age of 18, and must be provided with the "*required documents*".[7]

10. These measures represent an expansion of the approach taken through the Single Justice Procedure ("SJP"), which was created pursuant to the Criminal Justice and Courts Act 2015. This allows adult defendants to choose to enter a plea in writing or online for the same type of offences mentioned above (i.e., summary and non-imprisonable). The SJP is regularly used to prosecute so-called 'minor' offences, such as those involving the non-payment of TV licences, motoring offences, not having a valid ticket on public transport, and recently any breaches of the 'lockdown' restrictions imposed through the Coronavirus

[4] Examples include, *inter alia*, offences involving motor vehicles, minor criminal damage, and being drunk and disorderly in a public place.

[5] Judicial Review and Courts Bill, 'Explanatory Notes', 21 July 2021, p.13.

[6] Clause 3, *see* for example new section 16G(2).

[7] Pursuant to clause 3, new section 16H(6), these include (a) a written charge, (b) a single justice procedure notice, and (c) other documents as prescribed by the Criminal Procedure Rules. The Explanatory Notes further expand that "*Defendants (which throughout these Explanatory Notes with regards to criminal procedure, includes all 'accused persons') will be given full details of the prospective fixed fine, surcharge and other costs (for example, compensation and/or penalty points if relevant) before agreeing to accept the automatic conviction and penalty.*" - Judicial Review and Courts Bill, 'Explanatory Notes', 21 July 2021, p.26.

Act 2020.[8] Those who plead guilty or fail to respond to the letter setting out the charge, are sentenced by a single magistrate (aided by a legal advisor) 'on the papers', without any input from the defendant or prosecutor. An important difference is that under the new AOCSSP procedure, cases could take place *"entirely online and without the involvement of a magistrate*".[9]

New Allocation Procedure

11. A criminal case's journey begins in a magistrates' court. However, the type of offence will determine which court ultimately hears it. These are:[10]

    a. **Summary-only**: the case should normally be heard in the magistrates.

    b. **Indictable-only**: the case should be heard in the Crown Court.

    c. **Triable either-way**: the case can be heard in either a magistrates' court or the Crown Court, depending on factors such as complexity, severity, the right for a defendant to opt for a jury trial, and the sentencing powers available to the magistrates' court.

12. The procedures which govern such proceedings are set out in the Criminal Procedure Rules, which are issued pursuant to secondary legislation and the Criminal Procedure Rule Committee. At present, defendants must attend a hearing in the magistrates' court both to enter a plea as well as for the allocation decision, where, according to the type of offence, the appropriate venue (magistrates' or Crown Court) is determined.[11]

13. The Bill, at clause 6 (for adults) and clause 8 (for children), would introduce a New Allocation Procedure whereby defendants are given the option to enter a plea online through the Common Platform[12] with respect to triable either way proceedings. This would remove the need for a defendant to attend an allocation hearing in person as is currently

[8] The use of the SJP for coronavirus-related offences has not been without controversy, with hundreds wrongly charged and prosecuted. See, for example, Fair Trials, 'Single Justice Procedure: unlawful Coronavirus prosecutions and convictions behind closed doors', 1 June 2021.

[9] Judicial Review and Courts Bill, 'Explanatory Notes', 21 July 2021, p.13

[10] Pursuant to the Magistrates' Courts Act 1980 and the Crime and Disorder Act 1998.

[11] There are few exceptions to this rule, for example where proceedings cannot continue as a result of a defendant's disorderly conduct.

[12] The Common Platform is HM Courts and Tribunal Service's digital case management system. It allows those involved in criminal proceedings (judges, barristers, prosecutors, and court staff) to access case information. It is currently in the process of being rolled out across England and Wales. For more information, see – UK Government, 'HMCTS services: Common Platform', 14 May 2021.

the case. However, the provisions are not mandatory, and a defendant could attend a physical hearing if they wished. Clause 9 provides that where a defendant does not appear at their hearing without a good reason, a magistrates' court would now be able to proceed and allocate the case without their input.

14. In cases concerning both adults[13] and children,[14] the Bill requires that the magistrates' court provide, in writing, information including, *inter alia*, a statement of the charge, an explanation of the procedural options (i.e., in person or through this online option) and the consequences of their choice when giving or failing submit a plea.

Concerns

15. JUSTICE welcomes the increased use of technology as part of the solution to dealing with a number of issues which currently plague the system, including the court backlog, ageing court estate, and slow processes that result in hearing dates taking place sometimes years after a defendant is charged.[15] The status quo is unsustainable, and requires urgent redress. In our report, '*What is a Court?*', we emphasised the importance of technology and its potential to meet user needs and maximise access to justice.[16] In many instances, the needs of court users can be met – and their participation in the proceedings facilitated – by technical solutions which do not require their physical presence. Nor is it always in the best interests of the parties to be brought together for a physical hearing and the extended timescale for resolution that creates.

16. Digitisation can offer improvements in access to justice. For many people, the court system can be distant, daunting, and costly.[17] Properly designed, a digital system can be more

[13] Clause 6(2), new section 17ZA(3) – (4).

[14] Clause 8, new section 24ZA(3) – (4).

[15] See, for example, a number of JUSTICE working parties in which our members recommended greater recourse to greater use of technology across the justice system. For example, for civil procedures in 'Delivering Justice in Times of Austerity' (2015) and criminal procedures in 'Complex and Lengthy Criminal Trials' (2016), and across justice spaces in 'What is a Court?' (2016). 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.

[16] JUSTICE, 'What is a Court?', (May 2016).

[17] Ipsos MORI, conducting interviews with 508 legal professionals, found that "88% of legal professionals agreed that 'The court process is intimidating to the general public'", see Hodge Jones & Allen, 'Innovation in Law Report 2014', p.16. This tallies with the findings of a recent report, based on interviews with professional and lay court users, that the Crown Court experience has "many distressing, stressful and perplexing aspects" for court users, which "extend far beyond…readily definable vulnerabilities", see J Jacobson, G Hunter & A Kirby on behalf of the Criminal Justice Alliance, 'Structured Mayhem: Personal Experiences of the Crown Court' (2015), pp.3 and 5, which draws upon

intuitive and provide access for emerging generations of court and tribunal users – for example, by allowing them to engage with the justice system through a mobile phone application or online programme. Online facilities can enable individuals who would find it difficult to travel to a physical courtroom, and engage with a traditional adversarial process, to access justice.

17. That said, JUSTICE considers that the Bill must enshrine a number of safeguards to ensure that the system operates in a way that is fair and compliant with defendants' right to a fair trial, both at common law and pursuant to Article 6 of the European Convention on Human Rights. We note the following concerns which are relevant to both of the abovementioned provisions.

18. First, the measures must not lead to greater digital exclusion on the part of court users. The Government rightly recognises the fact that digital exclusion continues to permeate society, and especially for those who enter the criminal justice system. There is, for example, a continued lack of broadband provision in some parts of the country. Only 84% of rural households in the UK have standard broadband availability, compared to 98% of urban households.[18] Studies have also shown significant levels of digital illiteracy that pervade society,[19] especially those from lower socio-economic backgrounds. Indeed, one report noted that in 2019, a striking 22% of the UK's population lack even basic digital skills.[20] This would, therefore, present a significant challenge to access to justice where such processes are increasingly facilitated online.

19. The Government claims that this issue will be mitigated through providing "*an assisted digital support service for those defendants who may struggle or would otherwise not be able to use the new online procedures*".[21] A Digital Support service has been piloted by HMCTS in conjunction with Good Things Foundation since 2017. The service includes access to digital assistance in relation to the SJP. Organisations are funded to provide

research from J. Jacboson, G. Hunter and A. Kirby, Inside Crown Court: Personal experiences and questions of legitimacy (Policy Press, 2015)

[18] Ofcom, 'Connected Nations 2020 England Report', 17 December 2020, p.4.

[19] H Holmes and G Burgess, University of Cambridge, '"Pay the wi-fi or feed the children": Coronavirus has intensified the UK's digital divide'.

[20] Lloyds Bank, 'UK Consumer Digital Index 2019', p.10.

[21] Judicial Review and Courts Bill, 'Fact Sheet (Courts)', 21 July 2021, p.3

digital assistance only, however, the Administrative Justice Council,[22] PLP[23] and the Good Things Foundation itself,[24] have all highlighted the issue with attempting to separate digital assistance from a broader range of support, in particular legal advice, often required in order to facilitate access to justice services online. In addition, JUSTICE has previously highlighted the need to ensure that Digital Support is available to those most in need of it, and has sufficient geographic coverage, including in areas where internet access is still difficult.[25] These issues must be addressed to ensure that the digital assistance is effective and the measures in the Bill do not result in further digital exclusion.

20. Second, defendants must have the opportunity to receive legal advice and assistance. At present, these allocation decisions can currently be taken at court with the assistance of the duty solicitor. As we explained in our 2016 response to the consultation '*Transforming Our Justice System*',[26] 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. With respect to the New Allocation Procedure, JUSTICE therefore welcomes the Government's statement that defendants will "*not be able to access the online procedure for indication of plea or trial venue allocation decision directly".* This is because submissions would be made through the Common Platform, for which defendants *"will need to instruct a legal representative to act on their behalf who will of course ensure they fully understand the process and will be able to identify any vulnerabilities*".[27] This is 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. JUSTICE calls on the Government to provide further details and assurances as to the provision of legal advice in practice.

21. There must also be explicit measures that ensure individuals are screened for vulnerabilities, as happens when an individual appears in person. If not, a defendant who

[22] D. Sechi, *Digitisation and accessing justice in the community* (Administrative Justice Council, April 2020).

[23] Jo Hynes, *Digital Support for HMCTS Reformed Services: what we know and what we need to know*, May 2021.

[24] Good Things Foundation, *HMCTS Digital Support Service: Implementation Review Executive Summary* September 2020, p.16.

[25] JUSTICE, *Preventing Digital Exclusion from Online Justice* (2018)

[26] JUSTICE, 'Response to Consultation on Transforming our Justice System', (November 2016), pp.16-17.

[27] Judicial Review and Courts Bill, 'Fact Sheet (Courts)', 21 July 2021, p.3.

has opted for the New Allocation Procedure could reach the sentencing stage of their case without ever seeing a judge or magistrate.

22. With respect to the AOCSSP procedure, we are not convinced that sufficient safeguards exist to mitigate against the risk of convictions that should never have been entered. As a result, the Bill may inadvertently place an even greater burden on the courts to ensure there are no miscarriages of justice. This risk is not hypothetical, as is clear from the numerous issues with the SJP. Levels of engagement with the SJP is poor, with approximately 71% of people in 2020 not responding to the charge letter notifying them that they are being prosecuted (i.e., entering no plea).[28] The Government has failed to explain how this issue will not simply translate over to the new AOCSSP procedure. JUSTICE therefore seeks assurances that defendants will be signposted to high quality legal advice and information in clear and accessible language. Moreover, we understand that the requirements of the electronic notification process for the AOCSSP procedure will be set out in regulations.[29] We seek further clarification as to what these requirements will be, with guarantees that nobody will face automatic online convictions as a result of failing to respond to communications in the absence of positive consent to the AOCSSP procedure in the first place. Equally, there are palpable concerns with the potential for IT problems, as seen most recently this summer where the Information Commissioners' Office is investigating a glitch in HMCTS' systems which resulted in over 5000 defendants incorrectly entering a 'guilty' plea.[30]

23. For both new procedures, we consider that the Bill must enshrine the following to remedy these issues:

    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;

[28] House of Commons, Question for Ministry of Justice, UIN 143756, tabled on 26 January 2021. It is important to note that no regular statistics are published with respect to the SJP. Any data that does exist is principally through parliamentary questions. JUSTICE is equally concerned that the AOCSSP procedure would suffer from a similar lack of transparency.

[29] Clause 3, new section 16G(4).

[30] T Kirk, Evening Standard, 'More than 5,000 handed criminal convictions in error after IT flaw goes unnoticed', 26 July 2021.

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; and

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 the New Allocation Procedure or AOCSSP procedure is suitable for the person, not just whether the offence or the case is.[31]

24. Third, the Government must ensure that these measures do not impede the effective participation of, and consequently negatively impact, already-disadvantaged groups, such as:

a. **Women**: the existing SJP regime disproportionately targets women. As APPEAL and the Women's Justice Initiative note, "*the vast majority of those being prosecuted and convicted of TV licence evasion are women*."[32] Their research and case studies exemplify what happens in the absence of sufficient safeguards, with women facing criminal records despite not having received a letter, or where the letter was sent to the wrong address. While these concerns apply to the SJP in general, the fact that women are more likely to commit certain so-called 'low-level' offences means they are impacted to a greater extent. The Government must ensure such disparities are not replicated for the AOCSSP procedure.

b. **Children**: the Bill would allow children to use the New Allocation Procedure despite their inherently vulnerable nature and well-evidenced propensity to plead guilty notwithstanding the evidence or potential defences.[33] While the Bill provides that a parent or guardian should be aware of proceedings where they take place online, we are not convinced that this is sufficient to mitigate against the risk and consider that children should be removed from its scope.

[31] *See*, for example, CrimPR 24.9, which provides that the SJP may be used with respect to offences which are (i) tried only in the magistrates and (ii) not punishable with imprisonment. The only requirement for defendants is that they be at least 18 years old.

[32] T Casey and N Sakande, APPEAL and the Women's Justice Initiative, 'Decriminalising TV Licence Non Payment Consultation Response', (March 2020), p.5.

[33] See R Helm, 'Guilty pleas in children: legitimacy, vulnerability, and the need for increased protection', Journal of Law and Society, Volume 48, Issue 2, pp. 179-201.

c. **Ethnic minorities**: racial disparities permeate the criminal justice system. The Equalities Statement to the 2017 Prisons and Courts Bill (within which many of the current measures were first mooted) notes that "*such changes have the potential to have adverse effects on the basis of age, disability, and ethnicity (linked to socio-economic disadvantage) to the extent that some groups are less internet or digitally enabled than others*".[34] The Government at the time appeared to accept, rather than seek to mitigate, these adverse outcomes. This is unacceptable. The new measures must not be introduced without addressing how thew new procedures would avoid further entrenching discrimination into the criminal justice system. Moreover, we are concerned that there does not seem to be a fresh assessment of the potential equalities impact of the current Bill's measures. It is clear that further research must be done so as to ensure disproportionate numbers of ethnic minority individuals are not unduly criminalised through procedures that contain potentially weaker safeguards than are presently provisioned under the SJP.

d. **Neurodivergent individuals and/or those with mental health or other conditions**: in our report '*Mental Health and Fair Trial*',[35] we note that criminal justice processes too often do not account for an individual's particular needs which may hamper their ability to understand what is happening. The Bill's new measures are likely to exacerbate this problem,[36] especially where such individuals would lack the opportunity for any type of assessment as to their suitability.

25. Many people in the criminal justice system lead chaotic lives, due to a multitude of difficult reasons. Some are battling alcohol and drug addiction. Others are partially or wholly illiterate. We are therefore concerned that people could chose the AOCSSP procedure, or plea through the New Allocation Procedure, out of convenience rather than what might be in their best interests, such as waiting for an in-person hearing or receiving legal advice. The Government must be clear as to how it would eliminate the risk of these measures' evident potential for further compounding disparities across these vulnerable groups.

[34] Prisons and Courts Bill, 'Equalities Statement: Automatic online convictions and standard statutory penalty' (2017), p.2.

[35] JUSTICE, 'Mental Health and Fair Trial', (November 2017).

[36] See also, for example, Criminal Justice Joint Inspection, 'Neurodiversity in the criminal justice system: A review of evidence', 15 July 2021.

26. Finally, JUSTICE considers that such changes, while important in modernising the system, must be piloted and robustly, and independently evaluated. JUSTICE considers that this should be provisioned on the face of the Bill. This would help to mitigate against the potential for unintended detrimental consequences for those who opt to use these new processes, especially marginalised or vulnerable individuals.

    a. With respect to the New Allocation Procedure, deciding how to plea, and where a case should be heard, can have important consequences for a defendant. For example, choosing to proceed to the Crown Court in a triable either-way offence could result in a harsher penalty than might be received in the magistrates' court due to their greater sentencing powers. A pilot would be important to understand whether online processes have a detrimental impact on defendants' decision making as opposed to the current in person procedures.

    b. Equally, there would be great value in piloting the AOCSSP procedure notwithstanding the fact that it is initially restricted range of so-called 'minor' offences. Punishments that do not result in a custodial sentence are still serious and can have significant consequences for an individual – not least a criminal record, increased motor insurance costs, potential social stigma, and loss of employment or educational opportunities. It is vital that the Government proceed with caution before expanding the measures to other offences. Indeed, the inclusion of additional offences warrants careful scrutiny and assessment to ensure that such processes are appropriate and not conducive to unforeseen detrimental consequences. Where there are clear issues with the SJP, it is important that these are not simply translated across without important lessons being learned. The Bill should be explicit about which offences are to be initially covered. Any future expansions should subject to a positive assessment from an initial pilot.

Online hearings– clause 18

27. Clause 18 provides for the creation of OPRs. The OPRs must require that proceedings of a specified kind[37] are to be initiated by electronic means. Clauses 18(1)(b) and (c) allow for the OPRs to either authorise or require that specified proceedings are conducted,

[37] Specified in regulations made by the Lord Chancellor (clause 19(1)).

progressed and disposed of by electronic means and for parties to the proceedings to participate by electronic means.

28. Clause 18(6) states that where the OPRs require a person to 'initiate', 'conduct', 'progress', or 'participate' in proceedings electronically, they must also allow a person who is not legally represented to choose to do so by non-electronic means. We are pleased that the Government recognises the need to maintain the option for non-electronic channels for those who are not legally represented.

29. It is reasonable to require parties with legal representation to initiate proceedings online, as representatives will be able to engage with the online processes. However, we are concerned that individuals with legal representation will not be able to choose to participate to participate in-person in proceedings. A myriad of issues may make it difficult for individuals to follow or engage with a virtual hearing, even if they have legal representation. For example, some may not be able to access or use digital technology and may not be able to collocate with their legal representative to facilitate access. Even if they can get online, people may find it difficult to effectively participate in online proceedings, for example due to a health condition or disability. We appreciate that the court would have the power by virtue of clause 18(7) to direct parties to participate by non-electronic means (either on application or on its own initiative). However, in our view, in order to ensure effective participation for all, **a party should be able to choose to participate in the hearing by non-electronic means, even if they are legally represented**.

Online Procedure Rule Committee – clause 21

Composition and size of the committee

30. Clause 21 establishes a new OPRC made up of six 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".[38] By contrast the Civil Procedure Rule Committee currently has 17 members.[39]

31. The OPRC must ensure that the rules are not written with only lawyers in mind and we particularly welcome the inclusion of a committee member with experience of the advice sector, given the intention that online justice services will be accessible for litigants in

[38] JUSTICE, 'Prisons and Courts Bill: House of Commons Second Reading Briefing'(2017), para 23.

[39] https://www.gov.uk/government/organisations/civil-procedure-rules-committee/about#membership

person. We also welcome the inclusion of someone with experience of "information technology relating to end users' experience of internet protocols."[40]

32. That said, we think it is essential that the OPRC should feature an "authorised court and tribunal staff" member, as defined in the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018.[41] The effect of that legislation is to allow individual rule committees to delegate functions that were traditionally judicial in nature to nonjudicial court staff. 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. 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**.

Committee diversity

33. At Committee and Report stage of the 2019 Bill Lord Beecham tabled an amendment, introducing a requirement that "the Lord Chancellor must ensure that gender balance is reflected on the Online Procedure Rule Committee".[42]

34. 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.[43] Ensuring gender balance in the creation of new Rules Committees would serve as a positive step towards this aspiration. However, as it was drafted Lord Beecham's amendment did not address racial diversity. JUSTICE sees no reason why this should be prioritised any less than gender balance, and so would suggest that **clause 21 is amended to require that OPRC reflects both gender and racial diversity.**

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[40] Clause 21(4)(c)

[41] 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 *Delivering Justice in an Age of Austerity* (2015), para 2.2.

[42] Courts and Tribunals (Online Procedure) Bill [HL] Amendments to be moved on report, HL Bill 183(c).

[43] JUSTICE, *Increasing Judicial Diversity* (2017).

Role of the Lord Chancellor

35. JUSTICE is concerned at the breadth of powers provided to the Lord Chancellor by OPR provisions of the Bill as currently drafted. The Lord Chancellor has the power to:

    a. Specify which proceedings will be made subject to the OPRs (Clause 19).
    b. Designate exceptions or circumstances where proceedings may be conducted by the standard procedure rules rather than OPRs (Clause 20).
    c. Appoint OPR Committee members (clause 21).
    d. Change the composition requirements of the OPR committee (clause 23).
    e. Allow or disallow OPRs made by the OPR Committee (clause 24(3).
    f. Require OPRs to be made (clause 25).
    g. Amend repeal or revoke any enactment to the extent the Lord Chancellor considers necessary or desirable in consequence of, or in order to facilitate the making of, Online Procedure Rules" (clause 26(1)).

36. The Lord Chancellor's powers under clauses 19, 20 and 23 are subject to the concurrence of the Lord Chief Justice or the Senior President of Tribunals, depending on whether the regulations relate to proceedings in the courts or tribunals. This is the "concurrence requirement". However, the power in Clause 26 is subject only to a requirement to consult the Lord Chief Justice and Senior President of Tribunal, whilst the power to require OPRs to be made in clause 25 is subject to neither a consultation or concurrence requirement.

37. We appreciate that clauses 25 and 26 mirror the approach taken with other procedure rule committees. However, the Government has recognised that the broad powers provided to the Lord Chancellor in this part of the Bill could have a significant impact on access to justice and has therefore decided that some of those powers should be subject to the requirement to obtain the concurrence of the LCJ and SPT. Indeed, the concurrence requirement in clauses 19 and 20 were brought forward by the Government at Report Stage of the Online Procedure Rules Bill to address concerns that the Bill conferred broad powers on ministers, in particular to limit oral hearings in an extensive range of cases.

38. As Lord Judge pointed out at Report Stage of the Online Procedure Rules Bill, it is inconsistent with this aim that the power to require OPRs to be made in clause 25 and the broad Henry VII power to make consequential or facilitative amendments in clause 26(1) are not also subject to the concurrence requirement. Taken together **these clauses give**

too much power to the Lord Chancellor – they enable the Lord Chancellor to "overrule the very rules which were made with the concurrence of the Lord Chief Justice."[44]

Persons who require online procedural assistance – clauses 18(4), 24(4), 27 and 30

39. In a number of places the Bill refers to "persons who require online procedural assistance":

    a. Clause 18(3)(a) requires that the powers to make OPRs must be exercised with a view to securing that practice and procedure under the Rules are accessible and fair. Clause 18(4) states that for the purpose of this subsection regard must be had to the needs of persons who require online procedural assistance.
    b. In deciding whether to allow or disallow rules, the Lord Chancellor must have regard to the needs of persons who require online procedural assistance (clause 24(4)).
    c. Clause 27 places a duty on the Lord Chancellor to arrange for support that is appropriate and proportionate for persons who require online procedural assistance.

40. 'Persons who require online procedural assistance' is defined as "*persons 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".*

41. JUSTICE is concerned that this definition is unduly narrow. People may be able to access or use electronic equipment but may still be unable to effectively participate in online proceedings for other reasons. For example, people who speak English as a second language, who struggle to read English, people with learning difficulties, cognitive or sensory impairments and those who require different modes of communication such as braille or sign language. Furthermore, digital exclusion can be situational – people who might normally be confident using electronic equipment may struggle when faced with crises such as divorce or debt which reduce their confidence and capability.[45] It is also unclear whether the definition as currently drafted would include those who do not have access to the internet itself, for example, because they cannot afford the data, (as opposed to the equipment – a phone, tablet or computer). **The narrow definition of 'persons who**

[44] HL Deb 24 June 2019 Vol 798 c974

[45] JUSTICE, *Preventing Digital Exclusion* (2018), para 1.19.

require online procedural assistance' excludes from consideration the needs of many people who are digitally excluded for reasons other than access or ability to use electronic equipment and should be expanded.

42. In its 2018 report *Preventing Digital Exclusion,* JUSTICE argued for the need to provide effective support to those who are digitally excluded in order to realise the full potential of online justice services and improve access to justice for many people.[46] Whilst JUSTICE is therefore fully supportive of the inclusion of the duty to arrange support for persons who require online procedural assistance, we are concerned that the current definition of persons who require online procedural assistance undermines the effectiveness of this duty. JUSTICE has also previously highlighted the need to ensure that Digital Support is available to those most in need of it, and has sufficient geographic coverage, including in areas where internet access is still difficult.[47]

43. The duty to arrange for provision of support is for the provision of "such support as the Lord Chancellor considers to be appropriate and proportionate". It is not therefore limited only to the provision of digital assistance. In this context, JUSTICE wishes to highlight the fact that, as explained in paragraph 19 above, individuals who struggle to access online justice services are likely to require a broader package of support than pure digital assistance.

Coroner Service, Part 2, Chapter 4 (Clauses 37 to 39)

Clause 37 - discontinuance of investigation where cause of death becomes clear

44. Clause 37 amends s.4 of the Coroners and Justice Act 2009 (the "CJA") so that a coroner may choose to discontinue an investigation prior to an inquest beginning where the cause of death "becomes clear in the course of the investigation". An inquest can currently only be discontinued, once an investigation has commenced, if a post-mortem examination ("PME") reveals the cause of death prior to the inquest commencing.

45. We support the Government's stated aim of reducing distress for bereaved people from unnecessary PMEs and inquests.[48] However, inquests have a crucial role in the justice system in providing a framework to understand what went wrong and to prevent recurrence. We are concerned that Clause 37 reduces, on a discretionary basis and

[46] JUSTICE, *Preventing Digital Exclusion* (2018).

[47] JUSTICE, *Preventing Digital Exclusion* (2018).

[48] Explanatory Notes, para. 61; Fact Sheet (Courts), page 4.

without safeguards, the circumstances in which inquests will be held. There is no clarity as to what evidence a coroner's decision that the cause of death has "become clear" could be based upon. Unlike PME findings, it is very possible that evidence, or its relevance, which forms the basis of a coroner's decision would change once properly tested in an inquest setting, or where further evidence emerges. For instance, individuals may appear to have died from natural causes, but on further investigation evidence may emerge that engages the State and the right to life (Article 2 ECHR).[49] **The potential unintended consequences of Clause 37 and appropriate safeguards need to be fully explored. If the clause is to be included, there must be a mechanism for ensuring that the wishes of interested persons are properly considered.**

Clause 38 - power to conduct non-contentious inquests in writing

46. Clause 38 introduces a new s.9B to the CJA, which would allow coroners to conduct non-contentious inquests without a jury fully in writing, where the "senior coroner decides that a hearing is unnecessary". The new s.9B(2)(a) requires the coroner to have first invited representations from each interested person known to the coroner. However, it gives no guarantee that any weight will be given to bereaved families' wishes.[50] While some may be happy for an inquest to be held by paper, many may much prefer an oral hearing. This could be for a range of reasons, from finding a hearing easier to understand to a hearing providing the recognition that bereaved families require.

47. It is unrealistic to expect that bereaved families at such an early stage will be able to put forward arguments in favour of a hearing, especially if faced by opposing arguments. This is compounded by the lack of automatic publicly funded legal representation for bereaved families in inquests, and those who do qualify for funded representation are highly unlikely to have any representation at the early stages of the inquest process. **Stronger safeguards should be introduced into Clause 38, which at a minimum should specify that bereaved people's wishes must be had regard to by the senior coroner.**

Clause 39 - use of audio or video links at inquests

48. Clause 39 amends s.45 CJA to allow the Chief Coroner to make provisions for inquests to be conducted wholly or partially remotely, with all parties, including the coroner and jury,

[49] INQUEST and INQUEST Lawyers Steering Group Briefing for Second Reading.

[50] The explanatory notes to the Bill explain that "the Chief Coroner will provide further guidance to coroners accompanying any law change, ensuring that 'paper' inquests are conducted fairly and cases which require a full public hearing continue as required" (para. 63). This does not make any mention however of the need to ensure that the wishes and needs of bereaved families are considered.

participating remotely (with the jury present in the same place). Currently the coroner, and the jury if there is one, must be physically present in the court room.[51]

49. In the criminal justice context, JUSTICE has piloted fully virtual jury trials.[52] Independent academic analysis concluded that with careful consideration and adaptation, these can be fair and may have some benefits over short and straightforward, traditional jury trials, such as improved sightlines for jury members. However, whilst we support the principle of increased use of technology in the form of remote proceedings for certain situations in the justice system, this must be implemented with caution and with appropriate safeguards. We are concerned that Clause 39 fails to do this.

50. Inquests cannot be compared to "mainstream courts and tribunals"[53], not least because of the highly sensitive and distressing nature of the issues addressed and their potential complexity, especially for state-related deaths. Whether remote inquests are appropriate is highly dependent on case's circumstances: its facts, complexity, attendees, and vitally the impact of a remote hearing on access to justice for the bereaved family who already face barriers to effective participation. INQUEST point out how most of the families they support "would prefer to attend an inquest in person, and for some the experience of attending remotely from home has added to rather than diminished their distress."[54] **The bereaved family's wishes must be properly addressed, along with appropriate safeguards, greater investment in necessary technology and a comprehensive pilot and evaluation.** At present JUSTICE is concerned these vital steps have not been addressed.

Inconsistency in the coronial system

51. The proposed reforms at Clauses 37 to 39 bring in further individual discretion for coroners. However, inconsistency in service is a significant problem in the coronial jurisdiction, where local authority control with little centralisation means that standards and practices can vary considerably. This lack of coherence not only undermines the inquest process but also results in a lack of transparency and an unnecessary waste of time and resources.[55] This was recently highlighted by the Justice Committee who considered that

[51] Chief Coroner's Guidance No. 38; Chief Coroner's Guidance No. 35.

[52] JUSTICE, 'JUSTICE COVID-19 response', 2020.

[53] Explanatory Notes, para. 66.

[54] 'INQUEST and INQUEST Lawyers Steering Group Briefing for Second Reading, para. 13.

[55] JUSTICE WTGW Report, paras. 2.30 – 2.31.

"*there is unacceptable variation in the standard of service between Coroner areas,*"[56] with the Government accepting that there continues to be an issue.[57]

52. The Justice Committee made several recommendations which would bring about real quality improvement, oversight and coherence to the coronial system, including a national coroner service and a Coroner Service Inspectorate.[58] Rather than bringing these recommendations forward, the Bill increases coronial discretion in areas that have the potential to undermine the value of inquests, without sufficient safeguards for bereaved families, and which will only serve to increase the inconsistency across the system.

Publicly funded legal representation

53. The Bill misses the opportunity to introduce much-needed automatic non-means tested publicly funded legal representation for bereaved families where the State is involved. Public funding for legal representation in inquests is heavily circumscribed and only available in certain circumstances through Exceptional Case Funding (ECF).[59] Many families are forced to pay large sums to legal costs, resort to crowd funding or represent themselves.[60]

54. The JUSTICE WTGW Report called for non-means tested public funding for legal representation for families where the State has agreed to provide separate representation for one or more interested persons.[61] As has been repeatedly called for, including by Rt Hon Dame Elish Angiolini DBE QC, Rt Rev Bishop James Jones, Lord Bach, HHJ Peter Thronton QC as Chief Coroner, the Joint Committee on Human Rights, and, most recently

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[56] Justice Committee, 'The Coroner Service' (May 2021), para. 157.

[57] The Coroner Service: Government Response to the Committee's First Report' (September 2021), p.12: there "*is still a need to address inconsistencies in the delivery of coroner services*".

[58] The JUSTICE WTGW Report also recommended the establishment of a small Coroner Service Inspectorate, which as well as improving oversight and transparency, would help ensure that the Coroner Service was suited for the needs of the public. See JUSTICE WTGW Report, paras. 2.36 – 2.38.

This builds upon several other calls for an inspectorate, including by Tom Luce CB in his 2003 review of the coroner system, '*Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review*' chaired by Tom Luce (Cm 5831, 2003), p. 4.

[59] ECF may be granted only where it is required by Article 2 ECHR or where representation is in the "wider public interest" Legal Aid Agency, 'Inquests – Exceptional Cases Funding – Provider Pack', 15 May 2020, p. 3.

[60] The Government has recently announced that it will be taking forward to remove the means test for applications for ECF in relation to legal representation at inquests and will provide non-means tested legal help for inquests where ECF has been granted for representation. This is a welcome development. However, it does not address the many inquests which do not qualify for ECF and legal representation at inquests will continue to remain out of reach for the vast majority of bereaved people.

[61] JUSTICE WTGW Report, paras. 5.16 – 5.23.

the Justice Committee, for complex inquests specialist legal representation is essential. Inquests into contested deaths involve complex legal issues and the State and corporate interested persons are typically able to deploy ranks of solicitors and counsel, unrestricted in funding. To claim that families' effective participation can be guaranteed by the coroner and the inquisitorial nature of the process is to ignore the reality. Rather, all too often, bereaved families find that their hopes of identifying faults and learnings to prevent future deaths through inquests are frustrated by an inequality of arms and a culture of institutional defensiveness, with no way of effectively participating. The situation is even more deplorable since, as taxpayers, these families are likely to be contributing to funding the public bodies' legal representation, yet they are denied funding themselves.

55. Clauses 37 to 39 risk only worsening the situation for bereaved families. They will be faced with coroners making decisions on discontinuing investigations, going to a paper-only inquest and/or having a remote inquest with no legal advice to explain the decisions or representation to ensure that their views are heard. **Until the lack of publicly funded legal representation is addressed, the inquest process will remain fundamentally unfair. We echo INQUEST's call for the Bill to address this issue.**[62]

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29 September 2021

[62] INQUEST and INQUEST Lawyers Steering Group Briefing for Second Reading, paras. 4 – 7.