



**Judicial Review and Courts Bill**

**Online Procedure**

**House of Commons Committee Stage**

**Briefing**

**November 2021**

**For further information contact**

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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 separate briefings on different elements of the Judicial Review and Courts Bill (the "Bill") for the Committee Stage of the Bill, starting on 2 November 2021. This briefing addresses Part 2, Chapter 2, Online Procedure. It builds on JUSTICE's briefing ahead of the Bill's Second Reading in the House of Commons on 18 October 2021.<sup>1</sup>
3. JUSTICE is broadly supportive of the online procedure provisions. This briefing proposes a number of changes that would: (i) ensure access to justice for those who are digitally excluded; (ii) increase the expertise and diversity of the Online Procedure Rule Committee ("OPRC"); and (iii) ensure that the decision to make many of the Lord Chancellor's powers in respect of the online procedure rules subject to the concurrence of the Lord Chief Justice is not undermined.

## Online hearings– clause 18

4. Clause 18 provides for the creation of OPRs. The OPRs must require that proceedings of a specified kind<sup>2</sup> 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, progressed and disposed of by electronic means and for parties to the proceedings to participate by electronic means.
5. We note that the Online Procedure Rules Bill provided participants with a choice to initiate, conduct, progress or participate in proceedings by non-electronic means. That choice is retained for those without legal representation in relation to the initiation, conduct, progression or participation other than by a hearing. However, in respect of hearings a person is currently unable to choose to participate by electronic means and may only do so at the direction of the court or tribunal. A myriad of issues, including health conditions

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<sup>1</sup> JUSTICE, '[Judicial Review and Courts Bill \(Part 2 – Courts, Tribunals and Coroners\), House of Commons Second Reading Briefing](#)' (September 2021).

<sup>2</sup> Specified in regulations made by the Lord Chancellor (clause 19(1)).

and disabilities, may make it difficult for individuals to follow or engage with a virtual hearing and those same issues may make it difficult for them to explain to the court or tribunal why they would prefer to attend in person. We therefore support the following amendment to clause 18(7):

Amendment 59

**Clause 18, page 35 line 9 after “that” insert —**

*“(a) a person may choose to participate in a hearing by non-electronic means, and*

*(b)”*

***Member’s Explanatory Statement***

*This amendment would allow a person to choose to participate in a hearing by non-electronic means*

## **Online Procedure Rule Committee – clause 21**

### Composition and size of the committee

6. 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”.<sup>3</sup> By contrast the Civil Procedure Rule Committee currently has 17 members.<sup>4</sup>
7. 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 person. We also welcome the inclusion of someone with experience of “information technology relating to end users’ experience of internet portals.”<sup>5</sup>
8. 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.<sup>6</sup> The effect of that legislation is to allow individual rule committees to

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<sup>3</sup> JUSTICE, ‘[Prisons and Courts Bill: House of Commons Second Reading Briefing](#)’ (2017), para 23.

<sup>4</sup> <https://www.gov.uk/government/organisations/civil-procedure-rules-committee/about#membership>

<sup>5</sup> Clause 21(4)(c)

<sup>6</sup> 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.

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.

9. We propose the following amendments be made to **Clause 21**:

Amendment 60

**Clause 21, page 37, line 38, at end insert —**

**“(c) 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.”**

***Member’s Explanatory Statement***

*This amendment would require the Lord Chief Justice to appoint an authorised court and tribunal staff member to the Online Procedure Rules Committee*

Amendment 63

**Clause 21, page 38, line 14, at end insert —**

**“(6A) Before appointing a person under subsection 3(c) the Lord Chief Justice must -**

**(a) consult the Lord Chancellor, and**

**(b) obtain the agreement of the Senior President of Tribunals.”**

***Member’s Explanatory Statement***

*This amendment makes the appointment of the authorised court and tribunal staff member to the Online Procedure Rules Committee subject to consultation with the Lord Chancellor and agreement of the Senior President of Tribunals, mirroring the current requirements in relation to judicial appointments to the Committee.*

Committee diversity

10. At Committee and Report stage of the Online Procedure Rules, 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”.<sup>7</sup>

11. 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.<sup>8</sup> Ensuring gender balance in the creation of the new OPRC 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. We therefore support the following amendment:

Amendment 64

**Clause 21, page 38, line 25, at end insert —**

**“(9A) In making appoints under subsections (3) and (4) above, the Lord Chancellor and the Lord Chief Justice must have due regard to the ethnic and gender balance of the Online Procedure Rules Committee.”**

***Member’s Explanatory Statement***

*This amendment would require the Lord Chancellor and the Lord Chief Justice to have due regard to the ethnic and gender balance of the Online Procedure Rules Committee when making their appointments.*

## **Role of the Lord Chancellor**

12. 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

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<sup>7</sup> Courts and Tribunals (Online Procedure) Bill [HL] Amendments to be moved on report, [HL Bill 183\(c\)](#).

<sup>8</sup> JUSTICE, [Increasing Judicial Diversity](#) (2017).

making of, Online Procedure Rules” (clause 26(1)).

13. 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 nor the concurrence requirement.
14. 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 Lord Chief Justice and Senior President of Tribunals. 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.
15. 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 VIII 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.”<sup>9</sup>
16. We therefore support the following amendments to make the Lord Chancellor’s powers therein also subject to the concurrence requirement:

Amendment 65

**Clause 25, page 42, line 5, at end insert —**

**“(1A) The written notice under subsection (1) is subject to the concurrence requirement (see section 30(1))”**

***Member’s Explanatory Statement***

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<sup>9</sup> HL Deb 24 June 2019 Vol 798 c974

*This amendment would make the Lord Chancellor's power to require the Online Procedure Rules Committee to make rules to achieve a specified purpose subject to the concurrence requirement.*

Amendment 66

**Clause 30, page 43, line 17, leave out “regulations” and insert “regulations or notices”.**

***Member's Explanatory Statement***

*This is a consequential amendment to include a notice given to the Online Procedure Rules Committee to make rules to achieve a specified purpose within the concurrence requirement.*

Amendment 67

**Clause 30, page 43, line 21, leave out “regulations” and insert “regulations or notices”**

***Member's explanatory statement***

*See Explanatory Statement for Amendment 66.*

Amendment 68

**Clause 26, page 42, line 20, leave out subclause (3) and insert -**

**“(3) Regulations under this section are subject to the concurrence requirement (see section 30(1)).”**

***Member's Explanatory Statement***

*This amendment would make the Lord Chancellor's power to make amendments in relation to the Online Procedure Rules subject to the concurrence requirement.*

We also propose the following additional consequential amendment:

Amendment

**Clause 30, page 43, line 14, leave out “regulations” and insert “regulations or notices”**

***Member's explanatory statement***

*See Explanatory Statement for Amendment 66.*

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

17. The Bill refers to “persons who require online procedural assistance” in a number of places:

- 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 made by the OPRC, 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.

18. '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*".

19. JUSTICE is concerned that this definition is unduly narrow and unclear. People may be able to access or use electronic equipment but may still be unable to effectively engage with or participate in online proceedings for other reasons. For example, people who speak English as a second language, people with learning difficulties or 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.<sup>10</sup> It is also unclear whether the definition as currently drafted would include those who are able to use electronic equipment but 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).

20. 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.<sup>11</sup> In that report we 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. Whilst JUSTICE is therefore fully supportive of the inclusion of the duty to

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<sup>10</sup> JUSTICE, [Preventing Digital Exclusion](#) (2018), para 1.19.

<sup>11</sup> JUSTICE, [Preventing Digital Exclusion](#) (2018).



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.

21. We also note that the Administrative Justice Council,<sup>12</sup> PLP<sup>13</sup> and the Good Things Foundation itself,<sup>14</sup> 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.<sup>15</sup> These issues must be addressed to ensure the support envisaged by the Bill.

22. JUSTICE supports the following amendments:

Amendment 86

**Clause 18, page 34, line 38, leave out “require online procedural assistance” and insert “are digitally excluded”.**

***Member’s Explanatory Statement***

*This amendment would require regard to be had to the needs of persons who are digitally excluded when making Online Procedure Rules.*

Amendment 87

**Clause 24, page 41, line 30, leave out “require online procedural assistance” and insert “are digitally excluded”.**

***Member’s Explanatory Statement***

*This amendment would require the Lord Chancellor to have regard to the needs of persons who are digitally excluded when allowing or disallowing Online Procedure Rules to be made.*

Amendment 88

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<sup>12</sup> D. Sechi, [Digitisation and accessing justice in the community](#) (Administrative Justice Council, April 2020).

<sup>13</sup> Jo Hynes, [Digital Support for HMCTS Reformed Services: what we know and what we need to know](#), May 2021.

<sup>14</sup> Good Things Foundation, [HMCTS Digital Support Service: Implementation Review Executive Summary](#) September 2020, p.16.

<sup>15</sup> JUSTICE, [Preventing Digital Exclusion from Online Justice](#) (2018)

**Clause 27, page 42, line 31, leave out “require online procedural assistance” and insert “are digitally excluded”.**

***Member’s Explanatory Statement***

*This amendment would require the Lord Chancellor to arrange for the provisions of appropriate and proportionate for persons who are digitally excluded*

Amendment 89

**Clause 31, page 44, leave out lines 11 to 15 and insert —**

**““persons who are digitally excluded”, means persons who, for reasons including their inability to access the internet or digital devices, lack of basic digital skills, or problems with confidence and motivation, experience difficulty in engaging with computers or online processes.”**

***Member’s Explanatory Statement***

*This amendment inserts a new definition of “persons who are digitally excluded”.*