



Judicial Review and Courts Bill

Online Procedure

House of Commons Report Stage

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 separate briefings on different elements of the Judicial Review and Courts Bill (the "Bill") for Report Stage on 25 January 2022. This briefing addresses Part 2, Chapter 2, Online Procedure. Further detail can be found in JUSTICE's previous briefings for the Bill's Second Reading in the House of Commons¹ and the Committee stage of the Bill.²
3. JUSTICE welcomes the increased use of technology as part of the solution to dealing with a number of issues which currently plague the system. In our report, '*What is a Court?*', we emphasised the importance of technology and its potential to meet user needs and to maximise access to justice.³ In many instances, the needs of court users can be met, and their participation in 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 it creates.
4. Digitisation can offer improvements in access to justice. For many people, the court system can be distant, daunting, and costly.⁴ Properly designed, a digital system can be more 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 an online programme. Online facilities can enable individuals who would find

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

² JUSTICE, '[Judicial Review and Courts Bill, Online Procedure, House of Commons Committee Stage Briefing](#)' (November 2021).

³ JUSTICE, '[What is a Court?](#)', (May 2016).

⁴ 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 research from J. Jacobson, G. Hunter and A. Kirby, *Inside Crown Court: Personal experiences and questions of legitimacy* (Policy Press, 2015)

it difficult to travel to a physical courtroom, and engage with a traditional adversarial process, to access justice.

5. However, despite 96 per cent of households estimated to have internet access, there are still significant parts of the population who do not have internet access.⁵ Only 80 per cent of households with an adult aged 65 or older have internet access⁶ and those who are homeless, in asylum accommodation or detention or in prison have severely limited access. Furthermore, internet access alone is not a sufficient indication of the proportion of the population able or willing to engage with online justice services. 15 per cent of people in the UK do not use the internet and a further 14% in the UK are 'limited users' of the internet, according to a 2017 study.⁷ It is therefore crucial that individuals have access to proper support and assistance in order to enable them to utilise online justice services and ensure that these do not further digital exclusion. Even with support, some people may still not be able to engage with online justice procedures and it is crucial to ensure that those individuals are not disadvantaged and denied access to justice.
6. JUSTICE is broadly supportive of the online procedure provisions which largely mirror those contained in the Courts and Tribunals (Online Procedure) Bill 2017- 19 (the "Online Procedure Bill"). However, we have a number of concerns relating to: (i) ensuring access to justice for those who are digitally excluded; (ii) the expertise and diversity of the; and (iii) the power afforded to the Lord Chancellor by the Bill.

Online Procedure Rule Committee – clause 21

Composition and size of the committee

7. 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".⁸ By contrast the Civil Procedure Rule Committee currently has 17 members.⁹

⁵ Office for National Statistics, '[Internet access - households and individuals, Great Britain: 2020](#)' (2020)

⁶ Ibid.

⁷ Good Things Foundation and Professor Simeon Yates [The Real Digital Divide? Understanding the Demographics Of Non-Users And Limited Users of the Internet: An Analysis of Ofcom Data](#) (2017).

⁸ JUSTICE, '[Prisons and Courts Bill: House of Commons Second Reading Briefing](#)' (2017), para 23.

⁹ <https://www.gov.uk/government/organisations/civil-procedure-rules-committee/about#membership>

8. 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.”¹⁰
9. That said, **in JUSTICE’s view 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.**¹¹ 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.

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”.¹²
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.¹³ 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. **In our view it is therefore important to ensure the racial and gender diversity of the OPRC.**

¹⁰ Clause 21(4)(c)

¹¹ 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.

¹² Courts and Tribunals (Online Procedure) Bill [HL] Amendments to be moved on report, [HL Bill 183\(c\)](#).

¹³ JUSTICE, [Increasing Judicial Diversity](#) (2017).

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 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.”¹⁴ **JUSTICE is of the opinion that the Lord Chancellor’s powers to require OPRs to be made (Clause 25) and to 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)) should also be subject to the concurrence requirement.**

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

16. 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.

17. ‘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*”.

18. 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

¹⁴ HL Deb 24 June 2019 Vol 798 c974

such as divorce or debt which reduce their confidence and capability.¹⁵ 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).

19. 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.¹⁶ 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 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.

20. We also note that the Administrative Justice Council,¹⁷ PLP¹⁸ and the Good Things Foundation itself,¹⁹ 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.²⁰ These issues must be addressed to ensure the support envisaged by the Bill.

21. JUSTICE therefore urges Parliamentarians to vote for New Clause 2 which would clarify the nature of online procedural assistance and ensure that the above issues are addressed:

New Clause 2

¹⁵ JUSTICE, [Preventing Digital Exclusion](#) (2018), para 1.19.

¹⁶ JUSTICE, [Preventing Digital Exclusion](#) (2018).

¹⁷ D. Sechi, [Digitisation and accessing justice in the community](#) (Administrative Justice Council, April 2020).

¹⁸ Jo Hynes, [Digital Support for HMCTS Reformed Services: what we know and what we need to know](#), May 2021.

¹⁹ Good Things Foundation, [HMCTS Digital Support Service: Implementation Review Executive Summary](#) September 2020, p.16.

²⁰ JUSTICE, [Preventing Digital Exclusion from Online Justice](#) (2018)

To move the following Clause -

“Online Procedural Assistance

- (1) Online Procedural Assistance, must be made available and accessible to any party or potential party to proceedings governed by Online Procedure Rules that requires it. In delivering this duty, the Lord Chancellor must have due regard to the intersection of digital exclusion with other factors, such as age, poverty, disability and geography and deliver support services accordingly.
- (2) It must include assistance to enable such a party or potential party to have a reasonable understanding of the nature of the proceedings, the procedure applicable under Online Procedure Rules and of how to access and navigate such procedure. To this effect, it will provide both advice and technical hardware, as appropriate, and will provide assistance to such individuals throughout the course of their proceedings.
- (3) Anyone who requires Online Procedural Assistance must have the option of receiving it either via remote appointments or in-person appointments at a site local to them.
- (4) Online Procedural Assistance must include, for a party or potential party whose first language is not English, assistance, by interpretation or translation as appropriate, in a language that is familiar to the party or potential party.
- (5) The delivery of Online Procedural Assistance must be evaluated at yearly intervals by an independent evaluation team. To assist in these evaluations, data must be routinely collected relating to the protected characteristics of those using the service, outcomes of cases that used Online Procedural Assistance and the frequency and location of the appointments provided. This must also be made publicly available.”

Member’s explanatory statement

This new clause clarifies the nature of online procedural assistance.

JUSTICE
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