

Delegated Powers Memorandum

Judicial Review and Courts Bill

Prepared by the Ministry of Justice

Introduction

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Judicial Review and Courts Bill (“the Bill”).
2. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

Purpose and effect of the Bill

3. The Bill includes measures relating to criminal courts procedure, non-criminal courts and tribunal procedure, Coroners, and judicial review:
 - Criminal procedure measures intended to improve efficiency in the courts by:
 - i. expediting the pre-trial processes in the magistrates' court;
 - ii. eliminating the need for some pre-trial procedures to enable preliminary proceedings to be conducted in writing if the defendant so wishes;
 - iii. enabling efficient transfer of cases between courts where appropriate;
 - iv. introducing a procedure to enable defendants to plead guilty to minor offences and accept a financial penalty online;
 - v. abolishing local justice areas.
 - Make provision for an Online Procedure Rule Committee that will be able to make Online Procedure Rules in relation to civil, tribunal (including employment tribunals and the Employment Appeal Tribunal) and family proceedings.
 - Amendments to the Coroners and Justice Act 2009 to:

- i. allow virtual hearings in coroners' courts;
 - ii. allow a coroner to discontinue an investigation where the cause of death is natural causes, without a post-mortem examination;
 - iii. allow inquests to proceed without a hearing in non-contentious cases.
 - iv. retain (on a temporary basis) the provision currently in the Coronavirus Act 2020 at section 30 which suspends the requirement to hold an inquest with a jury in respect of a death which is suspected to be caused by Covid-19.
 - v. allow the merger of coroner areas within a local authority area where the new coroner area would not be the entire local authority area.
- Amendments to judicial review practice and procedure to:
 - i. Remove the ability to apply for judicial review of a decision of the Upper Tribunal to refuse permission to appeal from the First-tier Tribunal. This will operate subject to certain exceptions.
 - ii. Create two new powers available to the court in Judicial Review proceedings in respect of quashing orders.

Delegated Powers

4. The Bill concerns both courts and tribunals and contains a range of delegated powers. There is a well-established legal framework in relation to delegated powers concerning practice and procedure in courts and tribunals which is relevant for powers taken in this Bill.

Rules of court

5. In relation to courts and tribunals, the power to prescribe practice and procedure is commonly delegated by statute to a rule-maker – usually a judicially-chaired rule committee, such committees being independent of the Government¹, or in some cases of

¹ The essential scope of the power, in relation to “practice and procedure” is cast in identical terms to the corresponding power to make Civil Procedure Rules (in section 1 of the Civil Procedure Act 1997) (and also, for example, Family Procedure Rules (section 75 of the Courts Act 2003), Tribunal Procedure Rules (section 22 of the Tribunals, Courts and Enforcement Act 2007) and Employment Tribunals

less frequently amended rules, a senior judicial office holder (usually the Lord Chief Justice). Exceptionally, the powers to make procedure regulations or rules prescribing the practice and procedure in employment tribunals and the Employment Appeal Tribunal are respectively conferred on the Secretary of State for Business, Energy and Industrial Strategy² ('BEIS') and the Lord Chancellor (but would be transferred to the Tribunal Procedure Committee under provision contained in clauses 32 to 36 of and Schedule 5 to the Bill). Such rules are made by statutory instrument, subject to the negative resolution procedure (other than in some exceptional cases described below).

6. Rules of court are often extensive (the Civil Procedure Rules, for example, currently comprise 89 Parts) and ill-suited to being contained in primary legislation. Rules of court have not been contained in primary legislation since the first Rules of the Supreme Court which formed a Schedule to the Supreme Court of Judicature Act 1873 (and which were themselves amendable by subsequent rules of court made under delegated powers). Rules of court are also made, subject only to very limited exceptions (essentially the first exercise of powers to make rules for closed material procedures) by dedicated rule committees or (as with probate or rules concerning non-criminal matters in the magistrates' court³) the Lord Chief Justice or a judicial officer holder nominated by the Lord Chief Justice, subject to approval by the Lord Chancellor. While provision is on occasion made in statute for specific matters which would be regarded as procedural, this is rare and limited to specific provisions, and it would be a novel departure, raising issues in relation to the division of responsibilities between the judiciary and executive arising out of the reform of the office of Lord Chancellor, for rules of court generally to be contained in primary legislation.
7. As mentioned, the majority of existing powers to make rules of court are subject to the negative resolution procedure. This is widely accepted as appropriate for what are generally regularly made instruments which fine-tune an existing extensive body of rules, and are made by an independent expert committee or senior judicial office holder.

Procedure Regulations and Employment Appeal Tribunal Rules (sections 7 and 30, respectively, of the Employment Tribunals Act 1996) .

² References to the "Secretary of State" means the Secretary of State for BEIS unless otherwise stated.

³ Section 127 Senior Courts Act 1981 (probate rules) and section 144 Magistrates' Courts Act 1980 respectively.

Civil Procedure Rules

8. The Civil Procedure Rules are made under powers in the Civil Procedure Act 1997 (CPA 1997), which are the first modern powers regarding rules of court. Later powers concerning rules of court such as the powers to make Criminal Procedure Rules, and Family Procedure Rules (and even Tribunal Procedure Rules) followed this model. The Civil Procedure Rules govern the practice and procedure in the civil division of the Court of Appeal, the High Court, and the county court. Such rules are to be made with a view to securing that the system of civil justice is accessible, fair and efficient, and that the rules are both simple and simply expressed (section 1 CPA 1997).
9. The rules are made by the Civil Procedure Rule Committee. The Committee's membership is made up of persons specified in section 2 CPA 1997 and appointed by either the Lord Chief Justice or Lord Chancellor. Before making rules, the Committee must consult such persons as they consider appropriate to do so and meet, unless inexpedient to do so. The Rules must be signed by a majority of the Committee and then submitted to the Lord Chancellor who may allow or disallow them.
10. The Lord Chancellor has the following additional powers under the CPA 1997:
 - to make consequential amendments to enactments by statutory instrument (under section 4 of the CPA 1997) in two ways:
 - i. as a result of the Civil Procedure Rules (subject to the negative procedure); and
 - ii. to facilitate the making of those rules (restricted to enactments made before the CPA 1997 and subject to affirmative procedure);
 - to give written notice that rules are to be made by the Committee for a specified purpose (section 3A CPA 1997); and
 - by statutory instrument, to amend the constitution of the Committee (subject to the negative procedure, but requiring the concurrence of the Lord Chief Justice and consultation with the Head and Deputy Head of Civil Justice – section 2A CPA 1997).
11. The Civil Procedure Rules are supplemented by Practice Directions made by the Lord Chief Justice (or a judicial office holder nominated by the Lord Chief Justice) (section 5

CPA 1997); and the Rules may, instead of providing for a matter themselves, refer to provision made or to be made in Practice Directions about that matter (paragraph 6 of Schedule 1 CPA 1997). This is an important power which is widely exercised to give efficacy to the rules: Practice Directions themselves are not subject to Parliamentary procedure; but rules providing for a matter to be dealt with in a Practice Direction are subject to negative resolution procedure like any other rules.

Family Procedure Rules

12. The power to make Family Procedure Rules is governed by the Courts Act 2003, sections 75-81. The legislative provisions are similar to those in the Civil Procedure Act 1997 in respect of the Civil Procedure Rules. The Family Procedure Rules govern practice and procedure in the Family Division of the High Court and the family court (section 75 CA 2003). The rules are made by the Family Procedure Rule Committee and are subject to similar requirements to those that apply to the Civil Procedure Rules (section 79 CA 2003). Membership of the Committee is constituted along similar lines to the Civil Procedure Rule Committee (section 77 CA 2003) and requirements concerning the constitution of the Committee may be amended by the Lord Chancellor (section 78 CA 2003). Family Procedure Rules are made by statutory instrument subject to the negative resolution procedure. Again, the Lord Chancellor may give written notice to the Family Procedure Rule Committee to make rules to achieve a specified purpose (section 79A CA 2003) and may make consequential amendments as a result of the Family Procedure Rules (section 80 CA 2003). The Family Procedure Rules are supplemented by Practice Directions made by the Lord Chief Justice or a judicial office holder nominated by the Lord Chief Justice (in this case the President of the Family Division) (section 81 CA 2003).

Tribunal Procedure Rules

13. Tribunal Procedure Rules are governed by the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007), section 22. Tribunal Procedure Rules are made by the Tribunal Procedure Committee in relation to the practice and procedure to be followed in the First-tier Tribunal and Upper Tribunal. The power to make Tribunal Procedure Rules is to be exercised so that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done; the tribunal system is accessible and fair; and that proceedings before the First-

tier Tribunal or Upper Tribunal are handled quickly and efficiently⁴. Tribunal Procedure Rules are made by statutory instrument subject to the negative resolution procedure.

14. Tribunal Procedure Rules are again subject to similar legislative requirements that apply to civil and family procedure rules (section 22 TCEA 2007). The relevant provisions may be found in parts 1 to 4 of Schedule 5 TCEA 2007. The TCEA 2007 established a unified structure for most tribunals, establishing two new tribunals to which the functions of a number of pre-existing jurisdictions were transferred, in the form of a First-tier Tribunal and an Upper Tribunal, divided into seven chambers (General Regulatory; Social Entitlement; Health, Education and Social Care; Tax; War Pensions and Armed Forces Compensation; Immigration and Asylum; and Property). While most chambers have their own bespoke rules made by the Tribunal Procedure Committee, the Committee favours the use of generic rules, keeping the core rules for each chamber as similar as possible.
15. Membership of the Tribunal Procedure Committee is again constituted along similar lines to the Civil Procedure Rule Committee, with broadly similar provisions with regard to appointments to the Committee (paragraphs 20 to 24 of Schedule 5 TCEA 2007). Requirements concerning the constitution of the Tribunal Procedure Committee may be amended by the Lord Chancellor with the concurrence of the Lord Chief Justice, and if necessary the Lord President of the Court of Session and/or the Lord Chief Justice of Northern Ireland (paragraph 25 of Schedule 5 TCEA 2007). Tribunal Procedure Rules are made by statutory instrument subject to the negative resolution procedure (see paragraph 28 of Schedule 5 TCEA 2007). Again, the Lord Chancellor may give written notice to the Tribunal Procedure Committee to make rules to achieve a specified purpose (paragraph 29 of Schedule 5) and may make consequential amendments as a result of the tribunal procedure rules (paragraph 30 of Schedule 5). The Tribunal Procedure Rules are supplemented by practice directions made by the Senior President of Tribunals (section 23 TCEA 2007).

Employment Tribunal Procedure Regulations

16. Currently, the Employment Tribunals Act 1996 (ETA 1996) confers powers on the Secretary of State to make regulations (“employment tribunal procedure regulations”) that make provision for the establishment of tribunals to be known as employment tribunals

⁴ Schedule 5 TCEA 2007 sets out the provisions regarding how rules are made and the constitution of the committee.

and appear to him to be necessary or expedient with respect to proceedings before the employment tribunals (see section 1 and section 7).

17. There are other references in the ETA 1996 to the Secretary of State's power to make regulations: pre-hearing reviews and preliminary matters (section 9); national security (section 10); confidential information (section 10A); restriction of publicity in cases involving sexual misconduct and disability (s.11 and section 12) and early conciliation provisions (section 18A). The current Employment Tribunal rules are the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
18. Currently, Section 30 of the ETA 1996 confers a power on the Lord Chancellor to make Employment Appeal Tribunal procedure rules, following consultation with the Lord President of the Court of Session. The current Employment Appeal Tribunal procedure rules are the Employment Appeal Tribunal Rules 1993.
19. Clauses 32 to 36 of and Schedule 5 to this Bill would transfer the powers of the Lord Chancellor and Secretary of State described above to the Tribunal Procedure Committee, as a power to make Tribunal Procedure Rules. The provisions in relation to the Online Procedure Rule Committee (OPRC) would ensure that the OPRC would have the same rule making powers with regard to procedure in employment tribunals and the Employment Appeal Tribunal as would thereby lie with the Tribunal Procedure Committee.

Automatic online conviction and standard statutory penalty

20. The Government's response in February 2017 to its consultation on Transforming Justice (<https://www.gov.uk/government/consultations/transforming-our-courts-and-tribunals>) set out its intention to introduce the automatic online conviction and standard statutory penalty procedure.
21. Section 29 of the Criminal Justice Act 2003 sets out a method for instituting criminal proceedings against a person by issuing a written charge and requisition or a Single Justice Procedure Notice. Paragraph 2 of Schedule 2 contains amendments to that provision which will allow relevant prosecutors to conduct proceedings for certain specified minor offences by issuing a new type of notice ("written notification by electronic means") which will be referred to in the Single Justice Procedure Notice and will, if the defendant wishes, enable the prosecution to be dealt with under the new automatic online conviction and standard statutory penalty scheme. The substantive procedure for this is inserted into the MCA 1980 by Clause 3.

Range of powers

22. The Bill contains the following range of delegated powers:

- Power to make regulations subject to the affirmative procedure
- Power to make regulations subject to the negative procedure
- Power to make procedural rules (rules of court and equivalent to Tribunal Procedure Rules) made by the OPRC subject to the negative procedure
- Power to make Practice Directions

Clause by Clause analysis:

Clause 3: Automatic online conviction and standard statutory penalty procedure - specification of criminal offences, penalties and other liabilities

Power conferred on: Lord Chancellor

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative resolution procedure

Context and Purpose

23. New section 16H(3)(a) MCA 1980 (clause 3 of the Bill inserts new sections 16G to 16M MCA 1980) provides that a person may only be convicted of an offence by way of accepting the automatic online conviction option if the offence is of a kind specified for this purpose in regulations made by the Lord Chancellor. The limit on this power at section 16H(4) is that the Lord Chancellor may not specify a particular offence unless it is a summary-only offence that is not punishable with imprisonment.

Justification for taking the power

24. The intention is that the following types of offences will be appropriate for prosecution by this procedure:

- (a) Offences where there is no identifiable individual victim
- (b) Offences which are simple to prove

- (c) Offences in relation to which there is a high degree of consistency in sentencing
- (d) Offences in relation to which there is little likelihood of the court utilising a problem-solving approach and/or making complex ancillary orders
- (e) Offences in relation to which there is enough sentencing data available to enable an appropriate standard penalty to be set.

25. The alternative approach would be for the Bill itself to specify the offences to which the procedure might apply. The Government has decided not to adopt this approach because at this stage it is not possible to set out all the current offences to which the procedure may ultimately apply. It is intended that initially the procedure will be tested by applying it to a limited range of offences and that the procedure may thereafter be extended to other offences as appropriate. New section 16J(2) MCA 1980 makes provision for the endorsement of the person's driving record with penalty points, but the Government does not envisage driving offences being specified in the first Regulations. This incremental approach will be made possible by way of the flexibility of a delegated power to specify offences, which can then be added to after the operation of the new procedure is reviewed. The offences initially intended for inclusion in the Regulations are failure to produce a ticket for travel on a train, failure to produce a ticket for travel on a tram, and fishing with an unlicensed rod and line.

26. New section 16I ("Penalties and other liabilities") and 16J ("Regulations about penalties etc.") MCA 1980 states that the regulations will specify the amount of the fine, the number of penalty points on the driver's record, the amount of compensation payable (in relation to offences where compensation is available and not exceeding the amount specified for the offence), prosecution costs (to be determined by the prosecutor) and the surcharge payable, which may be a proportion of the amount of the specified fine. The regulations may also specify different amounts for fines, amounts of compensation, and surcharges for different offences and different circumstances in which any particular offence is committed.

27. The way in which the specified fine is determined using the power will be based on current fining practice. Relevant factors in setting the fine level for each offence may be the overall average of fines imposed for the offence in Sentencing Guidelines published by the Sentencing Council (an independent, non-departmental public body), current sentencing practice and income data. It is necessary for the power to provide for the ability to set different fines for different offences, or different fines for an offence committed in different

circumstances; for example, if a speeding offence is specified as suitable for this procedure, it may be appropriate to set a fine of a certain amount for offenders convicted of driving at up to 20mph over the speed limit and a higher amount for offenders convicted of driving more than 20mph over the speed limit.

Justification for the procedure

28. The Government recognises that the automatic online conviction is a novel procedure and one that carries consequences for those that decide to opt into it. In deciding which offences the new procedure will apply to and the level of penalty and other liability the Government believes that the higher level of scrutiny afforded by the affirmative procedure is appropriate. This will enable Parliament to debate the offences selected by the Lord Chancellor and the level of penalties etc., thereby ensuring that the principles set out above are maintained when the scheme is first set up and extended to other offences or varied.

Clause 15 and Schedule 1 Documents to be served in accordance with Criminal Procedure Rules

Context and Purpose

29. Schedule 1 amends various provisions to do with the service or delivery of documents, which currently refer to service by post, so as to allow the same methods to be adopted as for service under Criminal Procedure Rules. For the most part the provisions concern criminal proceedings; the delegation is therefore in line with the current powers of the Criminal Procedure Rules Committee. In seven instances Criminal Procedure Rules will be deemed to cover the service of documents other than in cases to which those Rules are expressed to apply. The effect is to extend the existing power of the Criminal Procedure Rule Committee to include laying down methods of service in investigative or regulatory contexts preliminary to criminal proceedings or otherwise related to suspected crime: see paragraphs 3 (notices before prosecution under the Prices Act 1974), 9 (notices before prosecution under the Weights and Measures Act 1985), 10 (powers to ascertain identity of driver under the Road Traffic Act 1988), 11(2) and (6) (notices before prosecution, and other documents relating to alleged offences, under the Road Traffic Offenders Act 1988), and 14 (notices to do with the closure of unlicensed premises under the Criminal Justice and Police Act 2001) of the Schedule.

Justification for the provisions

30. The updating and extension of the provisions relating to service of documents in investigative or regulatory contexts preliminary to criminal proceedings or otherwise related to suspected crime is intended to match the arrangements for service and proof of service etc. during criminal proceedings set out in Part 4 of the current Criminal Procedure Rules. This is part of the modernisation of the criminal justice system and applies the procedures and rules which are already in operation to these new contexts. Section 12 of the Road Traffic Offenders Act 1988 already provides for Criminal Procedure Rules to govern proof of service of a requirement preliminary to criminal proceedings and hence in circumstances in which the Criminal Procedure Rules would not otherwise apply, an extended competence acknowledged in rule 4.1 of the Criminal Procedure Rules. These further amendments adopt comparable principles. The Criminal Procedure Rules committee will take this deeming provision into consideration if they make any changes to the current rules.

Clause 16 Power to make consequential or supplementary provisions in relation to criminal procedure

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Affirmative resolution if it amends primary legislation, otherwise negative*

Context and Purpose

31. Clause 16 enables the Lord Chancellor by regulations to make consequential or supplementary provision in relation to any of the criminal procedure provisions in Chapter 1 of Part 2 of the Bill. This includes the power to amend, repeal or revoke primary legislation passed prior to this Bill receiving Royal Assent or made in the same session, and to subordinate legislation whenever made. By virtue of Clause 45 (“Regulations”) of the Bill this includes the power to make incidental, transitional or saving provision and also to make different provision for different purposes and different areas.

Justification for the power

32. The Government believes it is necessary to take such a power to avoid any implementation difficulties or legislative inconsistencies, which may otherwise arise. The Bill already contains amendments to existing legislation, many of which are consequential, supplementary or incidental. The Bill, where it concerns criminal procedure is complex and the need for the further changes may not emerge until the reforms begin to be implemented.
33. The Government therefore considers it appropriate to include this power so that full effect can be given to the provisions of the future Act if needed. Use of this power will be limited to that which is strictly necessary to implement the provisions of the Act. Where it is used to amend primary legislation, such powers, although seemingly wide, are limited by virtue of such amendments being necessarily consequential, supplementary or incidental on the provisions in the Bill, or required to ensure there is no gap in provision between existing and new legislative provisions. The power does not extend to amending provisions of this Bill, or future legislation.
34. Whilst the Government acknowledges that precedents cannot be relied upon for justification, it notes there are various precedents for similar such consequential and supplementary provisions e.g. in section 93 of the Criminal Justice and Courts Act 2015 (“Power to make consequential and supplementary provisions etc.”) and section 149 of the Legal Aid, Sentencing and Punishment Act 2012 (“Power to make consequential and supplementary provisions etc.”).

Justification for the procedure

35. The Government recognises that it is generally appropriate that such amendments to primary legislation by secondary legislation requires the affirmative resolution procedure. Where only secondary legislation is to be amended the negative resolution will apply.

Clause 42 Abolition of local justice areas

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Affirmative resolution procedure where primary legislation is amended, otherwise negative.*

Context and Purpose

36. Clause 42 is titled “Abolition of local justice areas”. Section 8 of the Courts Act 2003 requires that England and Wales be divided into local justice areas and provides the Lord Chancellor can alter the boundaries of areas by secondary legislation. There are currently 75 local justice areas in England and Wales. These create geographical boundaries that relate to three main areas of magistrates’ court business: initiating and listing cases (sequencing for a court’s daily business); the payment and enforcement of fines and community orders; and the leadership and management arrangements for the magistracy.
37. HMCTS (established in the Courts Act 2003) has made certain procedural changes that provide for greater flexibility regarding the allocation of cases and magistrates between local justice areas. This provision will abolish local justice areas; magistrates will no longer be appointed to a specific local justice area, instead their appointment will be on a national basis across England and Wales. Restrictions on allocating and transferring cases between magistrates’ courts and relating to the payment and enforcement of fines and community orders will also be removed and provisions concerning the organisation and leadership of the magistracy will be amended.

Justification for taking the power

38. The consequential arrangements will require a substantial number of amendments to be made. These are mainly of a technical nature e.g. removing references to “local justice area” and will be made by an affirmative resolution statutory instrument where any primary legislation is to be amended. Whilst the Government acknowledges that precedents cannot be relied upon for justification, it notes there are various precedents for similar provisions providing for abolition of bodies or organisation and the making of consequential regulations to deal with putting in place other arrangements and or simply making technical amendments to legislation notably section 30 of the Public Bodies Act 2011 which abolishes regional development agencies and which at section 30(7) provides for a dedicated power to make consequential and supplementary amendments.

Justification for the procedure

39. The Government recognises that it is generally appropriate that such amendments to primary legislation by secondary legislation require the affirmative resolution procedure. Where only secondary legislation is to be amended the negative resolution procedure will apply.

The Online procedure

Clause 18: Rules for an online procedure in courts and tribunals; and

Clause 22: Powers of the Online Procedure Rule Committee.

Power conferred on: *The Online Procedure Rule Committee*

Power exercisable by: *Rules of court made by statutory instrument*

Parliamentary Procedure: *Negative resolution procedure*

Context and Purpose

40. These provisions are intended to enable a new online procedure capable of applying in relation to civil, family and tribunal proceedings (which includes employment tribunals and the Employment Appeal Tribunal) and to this end establish an Online Procedure Rule Committee, similar in concept to the Civil and Family Rule Committees and the Tribunal Procedure Committee, to provide new, simplified rules to support this procedure.

41. Clause 18 requires Online Procedure Rules to be made in relation to civil, family and tribunal proceedings of a kind specified in regulations by the Lord Chancellor under clause 19. The power to make such rules is to be exercised (clause 18(3) with a view to securing that—

(a) practice and procedure under the rules are accessible and fair (for which purpose (clause 18(4)), regard must be had to the needs of those who require support to engage with electronic means),

(b) that the rules are both simple and simply expressed,

(c) that disputes may be resolved quickly and efficiently under the rules, and

(d) that the rules support the use of innovative methods of resolving disputes.

42. The power to make Online Procedure Rules is (as are the powers to make Civil Procedure Rules, etc.), a broad and flexible one, and there are certain additional aspects to the power covering the relationship between Online Procedure Rules and the “standard” procedure Rules, and between participation by electronic means and instances where participation by non-electronic means is to be possible.

43. Clause 22(1) provides that the OPRC has the same rule-making powers as the Civil and Family Procedure Rule Committees and the Tribunal Procedure Committee (including in respect of employment tribunals and the Employment Appeal Tribunal. Clause 18(6) and (7) require the Committee to make rules to provide for alternative, non-electronic procedures to accommodate cases where a party is not legally represented, and for the court or tribunal more generally to be able to direct the use of non-electronic procedures to enable a party to participate in a hearing even though the rules require participation in the hearing to be by electronic means. The Online Committee may also (as existing rule committees may) apply existing procedural rules, with or without modifications, made by the other rule committees (clause 22(2) to (5)) and may (again as is the case with other rule committees), instead of making provision about a matter, provide for that provision to be made by Practice Directions (clause 22(6)).
44. Clause 18(9) and (10) enable Online Procedure Rules to provide for instances in which proceedings are not to be governed by Online Procedure Rules, or may move into or out of the online procedure, which is to say for the “standard” procedural rules (Civil Procedure Rules, Family Procedure Rules or Tribunal Procedure Rules) not to apply or to cease to apply and the standard procedural rules to apply instead, or for Online Procedure Rules to apply, or apply again, and the standard procedural rules to cease to apply.
45. Clause 24(1)(a) imposes a duty on the Online Committee to consult such persons as they consider appropriate, before making rules. That clause further provides that the Lord Chancellor may allow or disallow rules made by the Committee (having regard to the needs of those who need support in engaging with online procedure – clause 24(4)), but must give the Committee written reasons for disallowing any rules (clause 24(3) and (5)).

Justification for taking the power

46. These powers are comparable to those provided in respect of Civil, Family and Tribunal Procedure Rules described above. As the Online Procedure develops and its scope increases, it is necessary to ensure that rules can be made and amended to take account of these changes. The experience of other rule committees, and those making rules of court since the first Rules of the Supreme Court of Judicature, is that rule development is an ongoing process. Rules are subject to regular amendment (amending instruments in respect of the Civil Procedure Rules are made at least twice a year and, in recent years, more often than that), often taking account of developments in case law and requiring changes to be made at short notice. In other cases, amendments may be administrative,

ensuring the courts continue to operate efficiently. In either case the expertise of the Online Procedure Rule Committee members will be invaluable to ensure the utility of the rules.

Justification for the procedure

47. The Online Procedure Rules are to be subject to the negative procedure (clause 24(7)). Again, this mirrors the position in relation to Civil Procedure Rules, Criminal Procedure Rules and Family Procedure Rules (see section 3 of the Civil Procedure Act 1997 and sections 72(6) and 79(6) of the Courts Act 2003 respectively) and Employment Tribunal Procedure Regulations and Employment Appeal Tribunal Rules (see section 41(3) of the Employment Tribunals Act 1996). Online Procedure Rules will be subject to development and scrutiny by the Online Procedure Rule Committee. In the early stages of development of the online procedure, regular amendments to the online rules may be necessary. Moreover, as with other rules of court, small but important amendments might be required at short notice, and may be more frequent given the potential scope of the online procedure. The flexibility required to ensure that the rules remain effective and the procedures they prescribe operate properly, is best served by the negative procedure. As explained above, except in one very specific and sensitive circumstance (closed material procedures) court rules have not been subject to an affirmative procedure since 1873, and the Government sees no justification to provide for a different level of scrutiny to that which generally applies to the other rules of court: as stated above, the rules will be subject to scrutiny by the Online Procedure Rule Committee in any event, and that Committee will be under a duty to consult on the rules where appropriate.

Clause 19: “Specified kinds” of proceedings

Clause 20: Provision supplementing section 18

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Affirmative resolution procedure*

Context and Purpose

48. As noted above, clause 18 requires procedural rules to be made in relation to civil, family and tribunal proceedings of a kind specified in regulations by the Lord Chancellor under clause 19(1) of the Bill.

49. Clause 19(2) enables the Lord Chancellor to specify such proceedings by reference to, amongst other factors, the legal or factual basis of the proceedings, the value of the matter in issue and, in civil and family proceedings, the court in which the proceedings would be brought.
50. Clause 20(1) enables the Lord Chancellor to specify the circumstances in which a party might choose to commence proceedings under the current civil, family, and tribunal rules, which would otherwise be subject to the online procedure. Subsection (2) enables the Lord Chancellor to specify the circumstances in which the online procedure rules are not to apply to proceedings or would cease to apply to proceedings and to be subject to the current rules instead (so enabling the Online Procedure Rule Committee to make rules under clause 18(9)). Subsection (3) enables the Lord Chancellor to provide that certain proceedings, which would otherwise be excluded from the online procedure by regulations, may still be subject to the online procedure rules (so enabling the Online Procedure Rule Committee to provide parallel rules for a paper based procedures under clause 18(10)).
51. In respect of regulations made under clauses 19 and 20, clauses 19(3) and 20(6) provide that the exercise of the power is subject to the “consultation requirement” (which is defined in clause 30(2)), meaning that the Lord Chancellor must consult the Lord Chief Justice in respect of civil and family proceedings or the Senior President of Tribunals in respect of tribunals and the Employment Appeal Tribunal, as appropriate.

Justification for taking the power

52. These provisions will ensure that the Government will retain control over the proceedings to which the online procedure will apply or may no longer apply. The initial intention is that it will apply to money claims up to the value of £25,000. However, over time the Government wishes to be able to widen its scope, not least in respect of family and tribunal proceedings, and may also wish to stagger implementation to cover different stages of specified proceedings. The ability to break down proceedings in this way, and to monitor the impact of the reforms as well as the IT and make necessary changes, is a key element of the development of the online system and can only be achieved if the regulations under which the online procedure is implemented enable this.

Justification for the procedure

53. As noted above, these provisions will ensure that the Government will retain control over the proceedings to which the online procedure will apply. However, the potential impact

on court users as the scope of the online procedure is widened, makes regulations made under this power suitable for fuller consideration by Parliament and, as such, for the affirmative procedure.

Clause 23: Power to change certain requirements relating to the Committee

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Negative resolution procedure*

Context and Purpose

54. This provision enables the Lord Chancellor to amend clause 21(2) to (7), which concern the membership of the Online Procedure Rule Committee. As such, it is a Henry VIII power. Any amendment requires the concurrence of the the Lord Chief Justice and the Senior President of Tribunals, and consultation with the Head and Deputy Heads of Civil Justice, and the President of the Family Division.

Justification for taking the power

55. The power for the Lord Chancellor to amend the provisions regarding the membership of the Online Procedure Rule Committee essentially replicates the existing powers that the Lord Chancellor has to amend the comparable provisions on membership of the Civil Procedure Rule Committee, the Criminal Procedure Rule Committee and the Family Procedure Rule Committee (see section 2A of the Civil Procedure Act 1997 and sections 71 and 78 of the Courts Act 2003 respectively). To ensure that suitably qualified persons may continue to be appointed to the committee as the scope of the online procedure increases, the Lord Chancellor may need to amend both requirements as to the number and expertise of committee members. The comparable powers in relation to the existing three rule committees have been used only very rarely. Nevertheless, as with the existing three committees, the powers in relation to the Online Procedure Rule Committee are necessary to ensure that changes may be made as and when required so that new members may be appointed as the need arises.

Justification for the procedure

56. Although the power to make amendments in relation to membership of the Online Procedure Rule Committee is a Henry VIII power, it is subject to the negative procedure. Again, this mirrors the approach in relation to the Civil Procedure Rule Committee, the Criminal Procedure Rule Committee and the Family Procedure Rule Committee (see section 2A(4) of the Civil Procedure Act 1997 and section 108(5) of the Courts Act 2003). Requiring the amendments to membership of the Online Procedure Rule Committee to be made by way of negative procedure will ensure consistency across the rules committees, and as noted, above, the exercise of the power will require the concurrence of the Lord Chief Justice and Senior President of Tribunals and is subject to consultation with the senior judiciary. For these reasons, the Government believes that the negative resolution procedure is appropriate.

Clause 25: Power requiring rules to be made

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Written notice under this provision*

Parliamentary Procedure: *None*

Context and Purpose

57. This power enables the Lord Chancellor, if considered expedient to do so, to give notice to the Online Procedure Rule Committee to make such rules as the Lord Chancellor considers necessary to achieve a specified purpose (i.e. one specified in the notice).

Justification for taking the power

58. The power reflects similar provision in section 3A of the Civil Procedure Act 1997 (Civil Procedure Rule Committee), section 79A of the Courts Act 2003 (Family Procedure Rule Committee) and Part 3 of Schedule 5 to the Tribunals Courts and Enforcement Act 2007 (Tribunal Procedure Rule Committee) (see paragraphs 6-17 above). It enables the Lord Chancellor to ensure that rules giving effect to otherwise lawful Government policy can be made if the Online Procedure Rule Committee, for whatever reason, declines to make the rules themselves. Although such occurrences are rare (the Civil Procedure Rule

Committee, for example, has only twice received such notice in 24 years), without this power, Government policy may be stymied for want of rules, with the prospect of having to introduce further primary legislation in order to address the issue.

Justification for the procedure

59. In accordance with similar provisions in other legislation, the power to give written notice is not subject to Parliamentary procedure. It is a matter of expediency that the relevant Minister should be able to direct the Committee to make rules, which might be required as a matter of urgency, without additional procedure. Further the Committee can only make rules within the scope of its powers in clause 22. However, once made by the Committee, the rules will be subject to the provisions of clause 24, in that they will be made by statutory instrument and subject to the negative procedure, with similar justification as applies to that clause.

Clause 26: Power to make amendments in relation to Online Procedure Rules

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Affirmative resolution procedure*

Context and Purpose

60. This provision enables the Lord Chancellor, by regulations and having consulted both the Lord Chief Justice and the Senior President of Tribunals, to make consequential amendments to any enactment, in consequence of online procedure rules (subsection (1), and to facilitate the making of online procedure rules (subsection (2)). Although on its face this is a 'Henry VIII' power in that secondary legislation can amend primary legislation, this is not a novel power in the context of rules of court, and is common to procedure rules in civil, family and tribunal jurisdictions (see above).

Justification for taking the power

61. Initially it is envisaged that the online procedure will apply to money claims up to the value of £25,000. However, given the anticipated development, overtime, of the online procedure

and the widening of its scope it is particularly important that consequential amendments may be made to other enactments as work continues on rolling out the new procedure in order to ensure that procedure operates without hindrance. It is initially intended that the new Committee will deliver the rules required to support a new *civil* 'online procedure', it might be some time, therefore (and by way of example), before the Lord Chancellor makes regulations enabling the Committee to make family Online Procedure Rules

Justification for the procedure

62. As is the case with comparable powers, for example those under the Courts Act 2003 to make Family Procedure Rules and Criminal Procedure Rules, the current proposal is that these should be subject to the affirmative procedure where they amend primary legislation.

Schedule 3 (as referred to in clause 18): Practice directions

Power conferred on: *The Lord Chief Justice/the Senior President of Tribunals/Senior Judiciary/the President of the Employment Appeals Tribunal/Chamber Presidents/Territorial Presidents*

Power exercisable by: *Practice direction*

Parliamentary Procedure: *None*

Context and Purpose

63. This provision mirrors existing provision for other Procedure Rules. The Constitutional Reform Act 2005, the Civil Procedure Act 1997 and the Courts Act 2003, respectively make provision for giving practice directions in relation to civil and family proceedings. As explained above, Civil and Family Procedure Rules and Tribunal Procedure Rules may, instead of providing for a matter themselves, instead refer to provision made or to be made in Practice Directions about that matter. The majority of the 89 parts of the Civil Procedure Rules, for example, are supported by at least one practice direction apiece, which provide the details necessary to put into practice the general principles of the Rules. The Employment Tribunals Act 1996 makes provision for practice directions in respect of employment tribunals and the Employment Appeal Tribunal.

64. Practice directions are made by the Lord Chief Justice (or a judicial office holder nominated by the Lord Chief Justice) and approved by the Lord Chancellor. In some cases, for example where the directions concern the interpretation or application of the law, the Lord

Chancellor is not required to approve the direction, but must be consulted. Directions not made by the Lord Chief Justice (or the Lord Chief Justice's nominee), are subject to the approval of both the Lord Chief Justice and the Lord Chancellor. In tribunal proceedings, similar provision is made by the Tribunals, Courts and Enforcement Act 2007, with practice directions being made by the Senior President of Tribunals and approved by the Lord Chancellor. Again, in some cases, the Lord Chancellor is only required to be consulted. Directions given by a Chamber President are subject to the approval of the Senior President of Tribunals and Lord Chancellor. In employment tribunals, the Senior President of Tribunals may make practice directions which are subject to approval by the Lord Chancellor. Regulations made under the 1996 Act may enable territorial Presidents to make directions subject to approval by the Senior President and the Lord Chancellor. In both cases, in some circumstances the Lord Chancellor need only be consulted. Regulations under the 1996 Act may also make provision for practice directions enabling panel members and tribunal staff to act as mediators. In this instance ACAS is required to be consulted. In respect of the Employment Appeal Tribunal, practice directions are given by the Senior President of Tribunals or the President of the Appeal Tribunal and are approved by the Lord Chancellor or the Lord Chancellor and Senior President respectively. Again, in some cases, the Lord Chancellor is only required to be consulted.

65. Part 1 of this Schedule makes provision for practice directions in civil and family proceedings to which the online procedure will apply. The provisions are similar to those which are currently provided in respect of these proceedings by the Civil Procedure Act 1997 and the Courts Act 2003 and the Constitutional Reform Act 2005. Part 2 of the Schedule makes similar provision in respect of tribunal proceedings, again reflecting the provisions in the 2007 Act. Part 3 of the Schedule makes provision in respect of employment tribunals and the Employment Appeal Tribunal. Practice directions in Parts 2 and 3 which requires only consultation with (rather than approval of) the Lord Chancellor or, where applicable, the appropriate Minister, will require the approval of the Senior President of Tribunals, rather than the Lord Chief Justice.

Justification for taking the power

66. It is anticipated that the need for practice directions in respect of the online procedure will be limited, since much of the detail often included in practice directions will be subsumed into the online procedure itself, so removing the need for further direction or explanation to give effect to, or assist understanding of, the rules. Nonetheless their use cannot be completely discounted and, in order to ensure that matters that can be provided for, and

the means by which they are provided, under the current powers that apply to the Civil, Family and tribunal rules, can be provided in respect of the online procedure, it is considered appropriate to provide for making practice directions in this instance.

Justification for the procedure

67. As is the case with the comparable powers, these directions are not subject to Parliamentary procedure. They are made by the judiciary to ensure that relevant rules may be better understood and to secure the efficiency of court proceedings. Given that these are effectively judicial instruments, it would seem both inappropriate and impractical to require Parliamentary scrutiny.

Clause 28: Consequential and transitional provision etc

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Negative resolution (if it does not amend primary legislation),
otherwise affirmative resolution*

Context and Purpose

68. This clause enables the Lord Chancellor by regulations to amend, repeal or revoke primary legislation, which has passed into force prior to the Bill receiving Royal Assent or in the same session, where consequential, supplementary or incidental amendments in consequence of any provision of the Bill are required and to make transitional, transitory or saving position. Clause OP28(2)(b) makes similar provision in respect of secondary legislation, save that it applies to any provision made before the regulations come into force.

69. The Government believes it is necessary to take such a power to avoid any implementation difficulties, or legislative inconsistencies that may otherwise arise, beyond those addressed in Clause 26 which are limited to the operation of the Online Procedure Rules themselves. Schedule 4 of the Bill already contains amendments to existing legislation, many of which are consequential, supplementary or incidental, but implementation of the Bill, especially since it concerns civil and family proceedings and tribunal proceedings

which currently fall to more than one Department, is likely to be complex. The need for the further changes may not emerge until the reforms begin to be implemented. Further similar amendments to secondary legislation may be needed, and if so, the wider power will be necessary to achieve the purposes of the Bill. The proposed abolition of local justice areas is another example of the need for the power. Effecting the abolition will involve amending current legislation to provide for the alternative arrangements and also to amend references to “local justice area” throughout the statute book; there are over 100 references in the Sentencing Act 2020.

70. The Government therefore considers it appropriate to include this power so that full effect can be given to the provisions of the Bill. Use of this power will nonetheless be limited to that which is strictly necessary to implement the provisions of the Bill. Where it is used to amend primary legislation, such ‘Henry VIII’ powers, although seemingly wide, are limited by virtue of being necessarily consequential, supplementary or incidental on the provisions in the Bill, or required to ensure there is no gap in provision between existing and new legislative cover. Additionally, the power does not extend to amending provisions of this Bill, or future legislation.

71. Whilst the Government acknowledges that precedents cannot be relied upon alone for justification, it notes there are various precedents for similar provisions including section 93 of the Criminal Justice and Courts Act 2015, section 53 of the Pensions Act 2014, section 20 of the Offender Rehabilitation Act 2014, and section 149 of the Legal Aid, Sentencing and Punishment Act 2012.

Justification for the procedure

72. The Government recognises that it is generally appropriate that such amendments to primary legislation by secondary legislation requires the affirmative resolution procedure. Where only secondary legislation is in issue, however, the negative resolution procedure will apply.

Employment Tribunal Procedure Rules

73. Currently, the Employment Tribunals Act 1996 (ETA 1996) confers powers on the Secretary of State to make regulations (“employment tribunal procedure regulations”) that make provision for the establishment of tribunals to be known as employment tribunals

and appear to him or her to be necessary or expedient with respect to proceedings before the employment tribunals (see section 1 and section 7).

74. There are other references in the ETA 1996 to the Secretary of State's power to make regulations: pre hearing reviews and preliminary matters (section 9); national security (section 10); confidential information (section 10A); restriction of publicity in cases involving sexual misconduct and disability (s.11 and section 12) and early conciliation provisions (section 18A). The current ET rules are the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

75. Currently, Section 30 of the ETA 1996 confers a power on the Lord Chancellor to make EAT procedure rules, following consultation with the Lord President. The current EAT procedure rules are the Employment Appeal Tribunal Rules 1993.

76. This Bill would ensure that the power to make employment tribunal procedure regulations and Employment Appeal Tribunal procedure regulations would instead lie with the TPC, very similar to the arrangements for the First-tier and Upper Tier Tribunal.

Tribunal rules

Clause 32, Schedule 5: Power to make procedural rules for employment tribunal and Employment Appeal Tribunal proceedings

Power conferred on: *The Tribunal Procedure Committee*

Power exercisable by: *Tribunal rules given effect by statutory instrument*

Parliamentary Procedure: *Negative resolution procedure*

Context and purpose

77. Clause 32(2) and (3) substitutes for sections 7 and 30 of the Employment Tribunals Act 1996 (ETA 1996) new sections which provide for practice and procedure in employment tribunals and the Employment Appeal Tribunal respectively to be governed by Employment Tribunal Procedure Rules; and clause 32(4) inserts into the ETA 1996 a new section 37QA which confers the power to make Employment Tribunal Procedure Rules on the Tribunal Procedure Committee, and introduces a new Schedule A1 which makes

provision about that power. Further amendments are made by Part 2 of Schedule 5 to enable provision which can presently be made by employment tribunal procedure regulations or Employment Appeal Tribunal rules to be made by Employment Tribunal Procedure Rules instead. At present, the Secretary of State has the power to make employment tribunal procedure regulations under section 7 of the ETA 1996, and the Lord Chancellor has the power under ETA 1996 section 30 to make rules dealing with procedure in proceedings in the Employment Appeal Tribunal. At present, it is considered that the current legislative framework would be incompatible with the incremental, agile approach necessary to implement the planned reforms in the employment tribunals (as outlined in the Government's *Reforming the Employment Tribunals System* consultation) and will not be sufficiently responsive to ensure that procedures continue to remain effective in future, hence the transfer of those powers to the Tribunal Procedure Committee to have effect as a consolidated power to make Employment Tribunal Procedure Rules.

Justification for taking the power

78. The Tribunal Procedure Committee currently has power to make procedural rules for proceedings in the First-tier Tribunal and Upper Tribunal under section 22 of and Part 1 of Schedule 5 to the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007). The intention is to align ETA 1996 new sections 7 and 30 and new Schedule A1 with the TCEA 2007 so that (1) the Tribunal Procedure Committee is responsible for making rules governing practice and procedure for employment tribunal proceedings and Employment Appeal Tribunal proceedings instead of the Secretary of State or the Lord Chancellor respectively and (2) the Committee has power to make procedural rules for employment tribunal proceedings and Employment Appeal Tribunal proceedings which corresponds to its power to make procedural rules for proceedings in the First-tier Tribunal and Upper Tribunal under TCEA 2007 section 22 and Schedule 5, Part 1. This will enable the effective implementation of the Government's planned reforms in the employment tribunals and the Employment Appeal Tribunal. Employment tribunals and the Employment Appeal Tribunal are not being brought within the scope of the Tribunal Procedure Committee's existing rule-making powers under the TCEA 2007 because the Government wishes to retain the distinct nature of employment tribunals and the Employment Appeal Tribunal.

Justification for the procedure

79. Paragraph 21 of new Schedule A1 to the ETA 1996 (introduced by paragraph 1 of Schedule 5) provides that rules for employment tribunal proceedings under ETA 1996

section 7 and Employment Appeal Tribunal proceedings under ETA 1996 section 30 are subject to the same procedure as applies to procedure rules made by the Tribunal Procedure Committee for proceedings in the First-tier Tribunal and Upper Tribunal under TCEA 2007 Schedule 5, Part 3, save that the reference in the TCEA 2007 to Chamber Presidents is read as a reference to the President of the Employment Tribunals (England and Wales) and the President of the Employment Tribunals (Scotland), or the President of the Employment Appeal Tribunal.

80. Under TCEA 2007 Schedule 5, Part 3 the Committee must consult such persons as they consider appropriate (and the Lord President of the Court of Session if rules concern Scotland) and meet before making rules unless inexpedient to do so. The Rules must be signed by a majority of the Committee and then submitted to the Lord Chancellor who may allow or disallow them. If allowed by the Lord Chancellor, the rules come into force in a statutory instrument subject to annulment by resolution of either House of Parliament. The Government considers that the proposed level of scrutiny is appropriate given that these are procedural rules and there is nothing to justify departure from the procedure in the TCEA 2007 Schedule 5, Part 3.

Schedule 5, paragraph 18: power to make regulations about composition of the Employment Appeal Tribunal in cases involving national security

Power conferred on: Lord Chancellor

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Negative resolution procedure

Context and purpose

81. Section 10 of the ETA 1996 provides that regulations made by the Secretary of State may make provision about the composition of an employment tribunal in a case where a Minister of the Crown makes a direction or a President or Regional Employment judge makes an order in cases where it is expedient in the interests of national security or at issue is Crown employment proceedings. This can ensure, for example, the tribunal sits in private; will exclude the applicant or their representatives from all or part of Crown employment proceedings; or will keep secret all or part of the reasons for their decision in

particular Crown employment proceedings. Section 10B sets out offences relating to breaches of those requirements.

82. The amendment at Schedule 12, paragraph 3, inserting the new section 30B, ensures that the same arrangements can apply in the Employment Appeal Tribunal, aligning it with the employment tribunals.

Justification for taking the power

83. This amendment brings the Employment Appeal Tribunal into line with the employment tribunals, and ensures that when responsibility for making procedure rules is transferred to the Tribunal Procedure Committee, provision regarding national security cases can continue to be made. It transfers the existing power under section 10 so that it is exercisable by the Lord Chancellor rather than the Secretary of State and the new power under section 30B is exercisable by the Lord Chancellor. It is usual for the Lord Chancellor rather than the Secretary of State to be responsible for tribunal procedure, given his duty under section 39 of the Tribunals, Courts and Enforcement Act 2007 to ensure that there is an efficient and effective system to support the carrying on of the business of the tribunals.

Justification for the procedure

84. The regulation making power in section 10 ETA 1996 is subject to the negative resolution procedure due to section 41(3) of the ETA 1996. The Government considers that this is also therefore the appropriate level of scrutiny for the exercise of the same power in the Employment Appeal Tribunal context.

Schedule 5, paragraph 23: power to amend legislation in connection with Procedure Rules

Power conferred on: Lord Chancellor

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative resolution procedure for any amendments or repeals of an enactment comprised in an Act, otherwise negative resolution procedure

85. Paragraph 23 of Schedule 5 inserts new section 37QB in ETA 1996 which enables the Lord Chancellor to make an order amending, repealing or revoking any enactment to the extent the Lord Chancellor considers necessary or desirable to facilitate Employment Tribunal Procedure Rules made by the Tribunal Procedure Committee or in consequence of ETA 1996 section 7, Schedule A1 or Employment Tribunal Procedure Rules. These are, to the extent that primary legislation may be so amended, Henry VIII powers.

Justification for the power

86. The Lord Chancellor currently has an equivalent power to amend enactments in relation to Tribunal Procedure Rules for proceedings in the First-tier Tribunal and Upper Tribunal under TCEA 2007 Schedule 5, Part 4, paragraph 30. The intention is to align the provision made in the ETA 1996 with the TCEA 2007. The aim of this provision is to ensure that the employment tribunal system operates smoothly and without conflicting with legislation on the statute book.

Justification for the procedure

87. TCEA 2007 section 49 provides that the Lord Chancellor's power under TCEA 2007 Schedule 5, Part 4, paragraph 30 is subject to negative procedure unless it is exercised to amend or repeal enactments comprised in an Act in which case affirmative resolution procedure applies (see TCEA 2007 section 49(6)(d)). The Government considers that the proposed level of scrutiny is appropriate and there is nothing to justify departure from the procedure set down in TCEA 2007 section 49.

Coroners Measures

Clause 40: No requirement for jury at inquest where coronavirus suspected

Power conferred on: Lord Chancellor

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative

Context and Purpose

88. The proposed amendment will continue (on a temporary basis) the provision which is currently in section 30 of the Coronavirus Act 2020. Section 30 disapplies the obligation for a coroner to hold an inquest with a jury in relation to a death where COVID-19 (which is a notifiable disease) is suspected to be the cause.

89. Section 7(2)(c) of the Coroners and Justice Act 2009 (the 2009 Act) requires a coroner to hold an inquest with a jury where the coroner has reason to suspect that the death was caused by a notifiable disease. Regulation 2 of the Health Protection (Notification) (Amendment) Regulations 2020 (SI 2020/237) added COVID-19 to Schedule 1 to the Health Protection (Notification) Regulations 2010 which lists notifiable diseases.
90. Without the measure in section 30 of the Coronavirus Act 2020, the status of COVID-19 as a notifiable disease in England would have meant that any inquest into a death where the coroner had reason to suspect that the death was caused by COVID-19 would have had to have taken place with a jury.
91. The reason for the provision being included in the Coronavirus Act 2020 was that there was a concern that this requirement could have had a very serious resource implication for coroner workloads and Local Authority run coroner services. Whilst inquests could be adjourned until the pandemic passed, this would have deprived bereaved families of swift closure. Section 30 of the Coronavirus Act 2020 therefore modified section 7(2)(c) of the 2009 Act to disapply the requirement that coroners must conduct any inquest with a jury where they have reason to suspect that the death was caused by Covid 19.
92. The Coronavirus Act 2020 has a sunset clause of 2 years in length, so its provisions will come to an end in March 2022.
93. There is a concern that when section 30 of the Coronavirus Act 2020 is sunsetted, coroners will be required to hold inquests with a jury where they have reason to suspect a death has been caused by COVID-19 (in accordance with section 7(2)(c) of the Coroners and Justice Act 2009).
94. The same policy considerations arise that were the basis for enacting section 30 of the Coronavirus Act 2020 in the first place – namely that if there are future outbreaks of COVID-19 after March 2022, coroners would be obliged to hold an inquest with a jury which could put significant resource implications on coroner workloads and on Local Authorities. This would add to the existing backlog of jury inquests which has accumulated in large part because of the difficulties in scheduling such inquests due to social distancing requirements.
95. Rather than make this amendment permanent, the Government considers it appropriate that this provision be retained on a temporary basis for 2 years with the ability for the Lord Chancellor to extend the period by regulation if the Lord Chancellor considers it would be expedient for the provision to continue in force beyond that period, taking into account the

likely effect of the expiry of this provision on the coronial system, and consulting with the DHSC.

96. Consequently, the proposal is to have a measure which expires after 2 years and which contains a power to delay the sunset provision by regulations.

Justification for taking the power

97. The justification for taking this power is that until deaths from COVID-19 become very few in number, the requirement for inquests where COVID-19 is suspected to be the cause of death to be held with a jury will place the same significant resource implications on coroner workloads and on Local Authorities. It is considered that having a measure that lasts for 2 years and which could be reviewed and delayed (or extended) during that period for a further period would enable the Government to avoid this by having a power to extend the provision which disapplies the obligation to hold inquests with a jury in cases where COVID-19 is suspected.

98. The Bill will provide that once the provision has lapsed, it will remain permanently switched off.

Justification for the procedure

99. Replicating a provision from the Coronavirus Act 2020 that is likely to have been repealed by the time this Bill is enacted is justifiable for the reasons set out above. It may be considered unusual to treat one notifiable disease differently from other notifiable diseases. This can be justified here on the basis that contagious nature of COVID-19 makes it an exceptional disease and so it is appropriate to retain this measure until the country has recovered from the pandemic. The Government believes that the higher level of scrutiny afforded by the affirmative procedure is appropriate. This will enable Parliament to debate whether the rationale put forward by the Lord Chancellor for seeking any further extension is justified by the current and anticipated future cases of COVID-19.

PART 3: FINAL PROVISIONS

Clause 45: Regulations

100. Clause 45 does not confer a power to make regulations. It supplements all the other regulation-making powers in the Bill so that any regulations may include incidental, transitional or saving provision and include different provision for different purposes or

areas. These additional provisions are required to ensure that the Government is able to implement the provisions that Parliament has approved by providing flexibility as to how they are implemented. The provisions do not in any substantive way change the scope of the substantive regulation-making power but could be used to enable measures to be introduced in different courts or different areas to allow phased implementation.

Clause 47: Commencement and transitional

Power conferred on: Lord Chancellor

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: None

Context and Purpose

101. It is standard procedure to make provision for commencement by way of regulations unless commencement is to be automatic or separate provision for commencement of a clause is made in the Bill. It is also standard that no Parliamentary procedure attaches to the commencement regulation. Parliament has approved the provisions and the power enables the Lord Chancellor to bring them into force at a convenient time, and by area if required. The power in clause 47(5) to include transitional, transitory or saving provision in relation to commencement is also standard to ensure effective and orderly implementation.

Ministry of Justice

20 July 2021