

JUDICIAL REVIEW AND COURTS BILL

EXPLANATORY NOTES ON LORDS AMENDMENTS

What these notes do

- 1 These Explanatory Notes relate to the Lords Amendments to the Judicial Review and Courts Bill as brought from the House of Lords on 7th April 2022.
- 2 These Explanatory Notes have been prepared by the Ministry of Justice in order to assist the reader of the Bill and the Lords amendments, and to help inform debate on the Lords amendments. They do not form part of the Bill and have not been endorsed by Parliament.
- 3 These Explanatory Notes, like the Lords amendments themselves, refer to [Bill Number], the Bill as first printed for the Lords.
- 4 These Explanatory Notes need to be read in conjunction with the Lords amendments and the text of the Bill. They are not, and are not meant to be, a comprehensive description of the Lords amendments.
- 5 Lords Amendments 6 to 10 and 12 to 22 were tabled in the name of the Minister.
- 6 Lords Amendments 1, 2 and 3 were tabled by Lord Marks of Henley-on-Thames and were opposed by the Government.
- 7 Lords Amendments 4 was tabled by Lord Anderson of Ipswich and was opposed by the Government.
- 8 Lords Amendment 5 was tabled by Lord Etherton and was opposed by the Government.
- 9 Lords Amendment 11 was tabled by Baroness Chapman of Darlington and was opposed by the Government.
- 10 In the following Commentary, an asterisk(*) appears in the heading of any paragraph that deals with a non-Government amendment.

Commentary on Lords amendments

Lords Amendments to Clause 1: Quashing orders

Lords Amendment 1*, 2* and 3*

- 11 These amendments remove the power in clause 1 which would have allowed courts to impose quashing orders with either no retrospective effect or limited retrospective effect (also referred to as prospective quashing order).
- 12 Amendment 1 removes new section 29A(1)(b), which was the subsection conferring the new power on the court to limit or remove the retrospective effect of quashing orders.
- 13 New section 29A(4) of the Senior Courts Act as inserted by the Bill goes hand in hand with new section 29A(1)(b). The latter makes it possible for courts to impose quashing orders with no retrospective effect or limited retrospective effect. The former provides that any action or decision is deemed as lawful, and is therefore upheld, to the extent that the order under

section 29A(1)(b) prevents it being quashed retrospectively. The effect of Amendment 2 would be to remove new section 29A(4), in consequence of Amendment 1, meaning that a quashed action or decision cannot be upheld, to any extent at all unless and to the extent that the quashing does not come into effect until a future date under the power in new section 29A(1)(a) and new section 29A(3).

- 14 New section 29A(5) of the Senior Courts Act as inserted by the Bill goes hand in hand with new sections 29A(1)(b) and 29A(4). New section 29A(5) provides that any such action or decision, subject to the powers in section 29A(1) is treated as if valid and unimpaired by any defect, for the period of time specified by the court. The effect of Amendment 3 would be to remove the reference to new section 29A(4) from new section 29A(5), in consequence of Amendment 1, meaning that a quashed action or decision cannot be treated as valid and unimpaired, save as to the extent covered by the powers in new section 29A(1)(a) and provision in new section 29A(3).

Lords Amendment 4 *

- 15 This amendment removes, from the Bill as passed by the Commons, the presumption in favour of the courts using the prospective or suspended quashing order provided for in Clause 1(1) of the Bill.
- 16 The court would be able to use the new powers, after having considered the factors in new clause 29A(8) of the Senior Courts Act 1981 as inserted by the Bill.

Lords Amendment to Clause 2: Limitation of review of Upper Tribunal's permission-to-appeal decisions

Lords Amendment 5*

- 17 This amendment removes the proposed ouster clause in Clause 2 of the Bill which applies to certain decisions of the Upper Tribunal, known as *Cart* Judicial Reviews (see paragraphs 23 to 26 of the Bill's original explanatory notes). Instead, the amendment replaces the current clause 2 with a new clause which would remove entirely the jurisdiction of the Court of Appeal over decisions of the supervisory High Court in England and Wales and Northern Ireland and the Court of Session (in Scotland) where those decisions relates to the review of decisions of the Upper Tribunal on permissions to appeal. There would be no exemptions and thus decisions of the High Court would be totally protected from further appeal to the Court of Appeal.
- 18 The amendment would allow an appeal from the supervisory court directly to the Supreme Court (with the leave of the supervisory court or the Supreme Court) where the supervisory court has certified that a point of law of general public importance is involved and it appears either to the supervisory court or to the Supreme Court that the point is one that ought to be considered by the Supreme Court.

Lords Amendment to Clause 13: Maximum term of imprisonment on summary conviction for either-way offence

Lords Amendment 6

- 19 This amendment allows subsection (3) of Clause 13 to operate before and after the other provisions of that Clause come into force. This amendment, alongside amendments 16, 18 and 21 allows for a change of approach to the commencement of Clause 13 so that most of the provisions will only commence after the separate provisions which will increase magistrates' court sentencing powers are commenced.

Lords Amendment to insert a new clause after Clause 23: Power to make certain provision about dispute-resolution services

Lords Amendment 7

- 20 Amendment 7 will enable the Online Procedure Rule Committee (OPRC) to have greater flexibility in relation to pre-action behaviour by prospective litigants, by allowing Online Procedure Rules to refer to things done by third parties rather than having to spell out the details in the Rules themselves.
- 21 Subsection (1) sets out which Online Procedure Rules the new clause will apply to - those which provide for electronic transfer of information from a pre-action dispute resolution service to the court or tribunal (enabling "plugging in" to court or tribunal proceedings), or for a court or tribunal to take into account the engagement (or otherwise) of parties with such a pre-action dispute resolution service (similarly to pre-action protocols under existing rules).
- 22 Subsection (2) allows for the Rules to be expressed so that the way in which they apply in relation to any pre-action dispute resolution service depends on things done from time to time by a particular person; and subsection (3) sets out two specific examples - that the Rules might refer to online dispute resolution services which appear on an externally provided list as meeting the standards, or are certified by a specified person as meeting the standards, without the Committee having to accredit the services itself, or having to maintain a list in the Rules of accredited providers. Subsection (4) defines terms used in the clause.

Lords Amendments to Clause 38: Discontinuance of investigation where cause of death becomes clear

Lords Amendments 8 and 9

- 23 These amendments make consequential amendments to the Births and Deaths Registration Act 1953, the Merchant Shipping Act 1995 and the Coroners and Justice Act 2009. Provisions in those Acts refer to Section 4 of the Coroners and Justice Act 2009 which, prior to its amendment, allowed a coroner to discontinue an investigation if the cause of death is revealed by post-mortem examination. The consequential amendments reflect the new wording of Section 4 as set out in Clause 39 of the Bill which allows a coroner to discontinue an investigation where the cause of death becomes clear. Amendments 8 and 9 therefore replace the wording "revealed by post-mortem examination" with "becoming clear before inquest".

Lords Amendment to insert a new clause after Clause 42: Provision of information to registrar when investigation discontinued

Lords Amendment 10

- 24 New section 23(4) of the Births and Deaths Registration Act 1953 enables a registrar to register a death on the basis of information provided by the coroner, on request by the registrar, when the coroner's investigation has been discontinued and the coroner has authorised the disposal of the body.
- 25 New section 23(4) does not remove the duty imposed by the Births and Deaths Registration Act 1953 on a qualified informant (normally a family member) to provide the registrar with information required for a death to be registered. However, where a qualified informant is unable or unwilling to provide such information, this new section enables the registrar to

request that the coroner supplies the relevant information for registration, in those cases where the coroner has established the information as part of their initial investigation.

- 26 These cases are the exception rather than the norm and new section 23(4) is only intended to apply to those deaths where no qualified informant is available or willing to provide information. In order for the new section to apply the coroner must have conducted some initial investigation but then discontinued the investigation as the cause of death becomes clear before an inquest is formally opened (for instance where it has been established by a post-mortem examination that the death is one of natural causes). The coroner must have also authorised the disposal of the body.
- 27 New section 23(4) does not impose a duty on the coroner to provide information to the registrar.

Lords Amendment to insert a new clause after Clause 42: Publicly funded legal representation for bereaved people at inquests

Lords Amendment 11*

- 28 This amendment would seek to amend the Exceptional Case Funding Scheme, as defined in section 10 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 to provide legal aid for representation for bereaved people at inquests where public bodies (for example the police or an NHS trust) are legally represented.

Lords Amendment to insert a new clause after Clause 45: Payments in respect of pro bono representation

Lords Amendment 12

- 29 In the current section 194 of the Legal Services Act 2007, pro bono costs orders can be made in the civil courts. A pro bono costs order is an order to make a payment to a prescribed charity (currently the Access to Justice Foundation) in respect of the representation of a party to proceedings, where that party's representation was provided free of charge.
- 30 This amendment would extend the effect of section 194 by allowing the same sort of pro bono costs order to be made in the First-Tier Tribunal, the Upper Tribunal, an employment tribunal, the Employment Appeal Tribunal and the Competition Appeal Tribunal, by adding further sections to the 2007 Act.
- 31 This amendment would add new sections 194A, 194B and 194C to the 2007 Act. New section 194A makes pro bono costs orders available in the First-Tier Tribunal, the Upper Tribunal, an employment tribunal, the Employment Appeal Tribunal and the Competition Appeal Tribunal. Since these are reserved tribunals that operate across the UK, new section 194A extends to the whole of the UK. However, in recognition of the fact that there are circumstances where a reserved tribunal could adjudicate on devolved law, and in order to avoid trespassing upon devolved competence, the power does not include proceedings within devolved competence.
- 32 New section 194B makes pro bono costs orders available in leap-frog appeals directly from the Upper Tribunal to the Supreme Court and also in appeals to the Supreme Court from appeal courts in Northern Ireland. It does not make such orders available in appeals from the Court of Session in Scotland to the Supreme Court because the Scottish Parliament would have competence to do so. In contrast, the Northern Ireland Assembly would not have competence to provide so in appeals from the Northern Ireland appeal courts. Given that existing section 194 concerning civil appeals to the Supreme Court extends to England and Wales only but new section 194B, concerning the additional civil appeals described above, extends more widely (i.e. also to Northern Ireland), section 194B re-makes the previous

section 194 provision to the extent that it relates to all civil appeals to the Supreme Court. This accounts for the additional civil appeals to the Supreme Court and ensures that all civil appeals to the Supreme Court are contained in a single provision with the appropriate overall territorial extent.

- 33 New section 194C concerns the charity prescribed for the purposes of current section 194. Since the Access to Justice Foundation is currently authorised to act across the UK, new section 194C allows that same charity to continue acting as the “prescribed charity” in relation to current section 194, as well as to be the “prescribed charity” for the purposes of new sections 194A and 194B. However, it also allows for the possibility of prescribing a different UK-wide charity in the future, to cover for any eventuality in which that could conceivably become necessary.

Lords Amendments to Clause 47: Extent

Lords Amendments 13 and 14

- 34 Amendment 14 would clarify the territorial extent of the new clause after Clause 45 (Payments in respect of pro bono representation). Specifically, amendment 13 allows new section 194B of the Legal Services Act 2007 (as inserted by the new clause New Clause 48) to extend to England, Wales and Northern Ireland and new sections 194A and 194C of that Act (also as inserted by New Clause 48) to extend to England, Wales, Scotland and Northern Ireland; and amendment 13 provides for a technical drafting point consequential upon amendment 14.

Lords Amendments to Clause 48: Commencement and transitional provision

Lords Amendments 15 and 17

- 35 These amendments provide that Clause 11 (Powers of Crown Court to remit cases to the magistrates' court) comes into force on Royal Assent, rather than by regulations.

Lords Amendment 16, 18, 21

- 36 Together with Lords Amendment 6, these amendments ensure that most of the provisions in Clause 13, which allow magistrates' court sentencing powers to be varied, will commence after separate provisions to extend those sentencing powers have been commenced. The amendments provide for two scenarios. If the increase in magistrates' court sentencing powers has come into force before the date of Royal Assent, then the rest of the clause will come into force automatically the day after Royal Assent. Alternatively, if the increase comes into force later, then the remainder of the Clause can be brought into force after that date by regulations.

Lords Amendment 19

- 37 This amendment provides for New Clause 43 inserted by Lords Amendment 10 (Provision of information to registrar when investigation discontinued) to come into force by regulations.

Lords Amendment 20

- 38 This amendment would allow New Clause 48 inserted by Lords Amendment 12 (Payments in respect of pro bono representation) to come into force two months after Royal Assent.

Lords Amendment to Schedule 2:

Lords Amendment 22

- 39 This amendment addresses an anomaly in Section 42 of the Gambling Act 2005. It will change the maximum penalty upon summary conviction for the triable either-way offence of Cheating, from 51 weeks, to “the general limit in a magistrates’ court”. This will ensure that the offence carries the same penalty on summary conviction as all other triable either-way offences, and will ensure that the penalty for this offence will be caught by any use of the new power being introduced by Clause 13.

Financial Effects of Lords Amendments

- 40 Lords Amendment 11 would expand access at legal aid for inquests. Additionally, that access would not be means tested. While the Ministry of Justice is unable to calculate how many inquests the new measure would apply to, there would be significant and open-ended costs, which would not be met by the current budget for legal aid.

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