

Delegated Powers Memorandum

Courts and Tribunals (Online Procedure) 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 Courts and Tribunals (Online Procedure) Bill (“the Bill”). The provisions in the Bill were announced in the Queen’s speech in June 2017 as part of wider reforms to modernise the courts system, and was introduced in the House of Lords on Wednesday 1st May 2019. An earlier Bill (the Prison and Courts Bill), which included similar provisions, was introduced into the House of Commons on 23 February 2017, but did not complete Committee stage before the dissolution of Parliament prior to the general election.
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. Clauses 1 to 9 of the Bill make provision for an Online Procedure Rule Committee that will be able to make Online Procedure Rules in relation to the civil, tribunal (including employment tribunals and the Employment Appeal Tribunal) and family proceedings.
4. Clauses 10 to 14 make the necessary legal provision for the short-title of the bill, the extent, orders, regulations and parliamentary procedures, and powers to make consequential, and transitional, etc. provision.

Delegated Powers

5. 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 courts and tribunals which is relevant for powers taken in this Bill.

Rules of court

6. In relation to courts and tribunals, the power to prescribe the practice and procedure is commonly delegated by statute to procedural rules made by the relevant procedure rules committee which are independent of the Government¹. The rules that prescribe the practice and procedure in employment tribunals and the Employment Appeal Tribunal are respectively made by the Secretary of State for Business, Energy and Industrial Strategy² ('BEIS') and the Lord Chancellor. Such rules are made by statutory instrument, subject to the negative resolution procedure. However, there are matters that remain with the Lord Chancellor, and the Secretary of State, which will be set out in appropriate detail.
7. 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. 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 to be contained in primary legislation.
8. 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.

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 the Employment Tribunals Rules and Employment Appeal Tribunals 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); section 144 Magistrates' Courts Act 1980 respectively.

Civil Procedure Rules

9. 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).
10. 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.
11. 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).
12. 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

13. Family Procedure Rules are also 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 the 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). 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 (section 81 CA 2003).

Tribunal Procedure Rules

14. 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 and Upper tribunals. The rules are 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.

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

15. 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.
16. 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 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). 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 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 Rules

17. 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 to be necessary or expedient with respect to proceedings before the employment tribunals (see section 1 and section 7).
18. 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.

19. 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. The current Employment Appeal Tribunal procedure rules are the Employment Appeal Tribunal Rules 1993.

20. This Bill 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 currently lies with the Secretary of State and the Lord Chancellor, respectively.

Range of powers

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

- Regulations subject to the affirmative procedure
- Regulations subject to the negative procedure
- Rules of court made by the OPRC subject to the negative procedure
- Directions

Clause by Clause analysis:

The Online procedure

Clause 1: Rules for an online procedure in courts and tribunals; and

Clause 5: 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

22. The Bill creates a new online procedure capable of applying to civil, family and tribunal proceedings (which includes employment tribunals and the Employment Appeal Tribunal) and, establishes 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.
23. Clause 1 requires “procedural rules” (i.e. rules of court or tribunal procedure rules) to be made in relation to civil, family and tribunal proceedings of a kind specified in regulations by the Lord Chancellor, or the Secretary of State⁵ in respect of employment tribunal proceedings, under clause 2 of the Bill.
24. Clause 5(1) provides that the OPRC has the same rule-making powers as the Civil and Family Rule Committees, the Tribunal Rule Committee and, in respect of employment tribunals and the Employment Appeal Tribunal, the Secretary of State and Lord Chancellor respectively.
25. Clause 1(7) enables the Committee to make rules to provide for alternative, paper based procedures to accommodate cases to which the online procedure rules might otherwise cease to apply, where regulations made under clause 3(3) so provide. The Online Committee may also apply existing procedural rules, with or without modifications, made by the other rule committees (clause 5(2) and (4)).
26. Clause 7(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 appropriate Minister may allow or disallow rules made by the Committee, but must inform the Committee if they do so (clause 7(3) and (4)).

Justification for taking the power

27. These powers are comparable with those provided in respect of the Civil, Family and Tribunal Procedure Rules described at paragraphs 6 to 19 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 rules committees suggests that rule development is an ongoing process. Rules are subject to

⁵ The Lord Chancellor and the Secretary of State are jointly referred to as “the appropriate Minister”, as defined in clause 13(1)).

regular amendment (amending orders in respect of the Civil Procedure Rules are issued 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

28. The Online Procedure Rules are to be subject to the negative procedure (clause 7(6)). Again, this mirrors the position in relation to the Civil Procedure Rules, the Criminal Procedure Rules and the 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 the Employment Tribunal Rules 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 stated in paragraph 7, 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 2: “Specified kinds” of proceedings

Clause 3: Provision supplementing of section 1

Power conferred on: *The Lord Chancellor and the Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Context and Purpose

29. As noted above, clause 1 requires procedural rules to be made in relation to civil, family and tribunal proceedings of a kind specified in regulations by the appropriate Minister, under clause 2(1) of the Bill.
30. Clause 2(2) enables the appropriate Minister 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.
31. Clause 3(1) enables the appropriate Minister, 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 appropriate Minister 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 1(6)). Subsection (3) enables the appropriate Minister, 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 1(7)).
32. In respect of regulations made under clauses 2 and 3, clauses 2(3) and 3(5) provide that the appropriate Minister is subject to the “consultation requirement” (which is defined in clause 12(3)), 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. When making regulations under the same provisions, the Secretary of State must consult the Senior President of Tribunals.

Justification for taking the power

33. 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

34. 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, are suited to the affirmative procedure.

Clause 6: 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

35. This provision enables the Lord Chancellor to amend clause 4(2) to (6), 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 Secretary of State, 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

36. 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

37. 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 Secretary of State, 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 8: Power requiring rules to be made

Power conferred on: *The Lord Chancellor and the Secretary of State*

Power exercisable by: *Written notice under this provision*

Parliamentary Procedure: *None*

Context and Purpose

38. This power enables the “appropriate Minister”, if considered expedient to do so, to give notice to the Online Procedure Rule Committee to make such rules as it considers necessary to achieve a specified purpose.

Justification for taking the power

39. 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 once received such notice in 19 years), without this power, Government policy may be stymied for want of rules, with the prospect of introducing further primary legislation in order to address the issue.

Justification for the procedure

40. 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 5. However, once made by the Committee, the rules will be subject to the provisions of clause 7, in that they will be made by statutory instrument and subject to the negative procedure, with similar justification as applies to that clause.

Clause 9: 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

41. 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 to rules of court, and is common to procedure rules in civil, family and tribunal jurisdictions (see paragraphs 6-19 above).

Justification for taking the power

42. 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 for this reason that the power to amend secondary legislation in clause 9(2)(b), provides for amendment to any such legislation made before the regulations are made, rather than before clause 9 comes into force. 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

43. As is the case with comparable powers, for example those under the Civil Procedure Act 1997 to make the Civil Procedure Rules, the current proposal is that these should be subject to the affirmative procedure given the breadth of the power to amend both primary and secondary legislation.

Schedule 1: 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

44. The Constitutional Reform Act 2005, the Civil Procedure Act 1997 and the Courts Act 2003, respectively make provision for giving practice directions in civil and family proceedings. As set out above in paragraph 12, Civil 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.
45. 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 the Lord Chief Justice and the Lord Chancellor. In tribunal proceedings, similar provision is made by the Tribunals, Courts and Enforcement Act 2007. Practice directions are given 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 and 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 Employment Appeal Tribunals, 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.
46. Part 1 of this Schedule, makes provision for giving 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. Of note is the fact that, unlike other practice direction making powers, there is no express provision for Employment Appeal Tribunal rules to refer to provision made in practice directions⁶. However, to ensure that online procedure rules can make similar provision for all proceedings to which the rules can relate (i.e. that the rules can make the same provision in relation to Employment Appeal Tribunal proceedings as they can in relation to other kinds of proceedings), in this regard, the online procedure rules can do more than “conventional” rules under section 30 of the Employment Tribunals Act 1996. 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

47. 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

48. 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 the efficiency of court proceedings. Given that these are effectively judicial instruments, it would seem both inappropriate and impractical to require Parliamentary scrutiny.

⁶ This may be contrasted with the power in paragraph 6 of Schedule 1 to the Civil Procedure Act 1997, as explained in paragraph 12 of the memorandum.

Clause 10: Consequential and transitional provision etc

Power conferred on: *The Lord Chancellor or Secretary of State*

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

49. This clause enables the Secretary of State or 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 10(2)(b) makes similar provision in respect of secondary legislation, save that it applies to any provision made before the regulations come into force.

50. 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 9 which, are limited to the operation of the Online Procedure Rules. Schedule 2 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 two separate Departments 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 Act.

51. The Government therefore considers it appropriate to include this power so that full effect can be given to the provisions of the Act. Use of this power will nonetheless be limited to that which is strictly necessary to implement the provisions of the Act. 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.

52. Whilst the Government acknowledges that precedents cannot be relied upon 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

53. 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 the negative resolution will apply.

Clause 12: Regulations

54. This clause does not confer a power to make regulations, nor affect the procedure which would apply, but does supplement the other regulation making powers in the Bill so that they may include different provision for different purposes or areas; include supplementary, incidental and consequential provision; and make transitional provision and savings. These supplemental powers are required to ensure that the Government is able to fully implement the provisions that Parliament has approved, but provides flexibility as to how they are implemented. They do not in any substantive way change the scope of the power in question.

Clause 14: Commencement

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: None

Context and Purpose

55. It is standard procedure to make provision for commencement by way of regulations unless commencement provision is made for a clause on the face of the Bill. It is also standard that no parliamentary procedure attaches to the regulation. Parliament has

approved the provisions and the power enables the Secretary of State to bring them into force at convenient time, and by area if required. The power in clause 14(4)(c) to include transitory and saving provision is also standard to ensure effective and orderly implementation.

Ministry of Justice

30 April 2019