

HOUSE OF LORDS

Select Committee on the Constitution

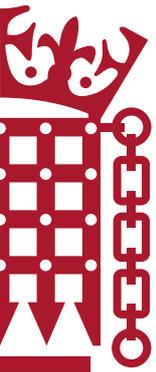
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Courts and Tribunals (Online Procedure) Bill

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Courts and Tribunals (Online Procedure) Bill

Introduction

1. The Courts and Tribunals (Online Procedure) Bill was introduced to the House of Lords on 1 May 2019 and had second reading on 14 May. Committee stage is expected to take place on 10 June.
2. The Bill creates an Online Procedure Rule Committee (OPRC) to sit alongside the existing Rule Committees that determine procedural rules in court and tribunal proceedings. At present, the procedural rules governing non-criminal legal proceedings fall into four main categories:
 - The Civil Procedure Rules 1998 govern practice and procedure in the Civil Division of the Court of Appeal, the High Court and the County Court. They are made by the Civil Procedure Rule Committee.
 - The Family Procedure Rules 2010 concern practice and procedure in the Family Division of the Court of Appeal, the High Court and the Family Court. They are made by the Family Procedure Rule Committee.
 - The Tribunal Procedure Rules govern the practice and procedure in the First-tier Tribunal and the Upper Tribunal. They are made by the Tribunal Procedure Committee.
 - The Employment Tribunal Procedure Regulations and the Employment Appeal Tribunal Rules govern practice and procedure in Employment Tribunals and in the Employment Appeal Tribunal respectively. They are made by the Secretary of State and the Lord Chancellor respectively.
3. The Bill authorises the OPRC to make Online Procedure Rules (OPR) for certain kinds of proceedings that are currently covered by existing sets of procedural rules. Online proceedings will therefore be carved out of the scope of existing, traditional forms of proceedings. The establishment of an ‘online court’ for the purpose of resolving low-value civil claims was recommended by Lord Justice Briggs in his 2016 review of the structure of the civil courts.¹
4. **We welcome the Bill as part of a necessary package of modernisation measures to improve the operation of the courts. Nevertheless, the Bill raises issues of constitutional concern.**

Oral hearings

5. The effect of clauses 1–3 of the Bill is that ministers are invested with broad powers to replace traditional oral hearings with online proceedings.
6. Clause 1 establishes OPR as governing practice and procedure in proceedings of “specified kind[s]” and that such Rules can require relevant kinds of proceedings to be conducted electronically. Clause 3(1) authorises the making

¹ Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (July 2016), chapter 6: <https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> [accessed 5 June 2019]

of regulations that allow the person initiating a given kind of proceedings to choose whether OPR or the standard procedural rules should apply. However, in the absence of regulations made under clause 3(1) permitting the making of a choice, only online proceedings would be available where OPR applies. The Bill thus supplies a legal basis for the displacement of conventional proceedings by online proceedings irrespective of the wishes of the parties to the claim.

7. The pivotal concept of “specified kinds” of proceedings is defined by clause 2. All civil, family and tribunal (including employment tribunal) proceedings are within the potential scope of the specified kinds of proceedings, it being left to “the appropriate minister”² to specify which particular kinds of proceedings should be subject to OPR. Clause 2(2) sets out factors of proceedings which may be specified by a minister to which OPR should apply—such as the type of court the proceedings are brought in, the type of dispute or the amount of money at issue—however nothing in the Bill requires the minister to include such limiting factors in the definition of a specified kind of proceedings. The possibility arises of a minister specifying by regulations that many, or even all, kinds of civil proceedings are to be governed by OPR. The power to make regulations under clause 2 is subject to the affirmative procedure and a requirement to consult the Lord Chief Justice or the Senior President of Tribunals as appropriate; however, there is no requirement to secure their agreement. We return to this issue in paragraphs 12–14.
8. Therefore, while it is open to the appropriate minister to specify that online proceedings should be used only in civil proceedings involving low-value claims (as the Briggs report envisaged), nothing in the Bill limits the use of online procedures to such cases. The powers in the Bill could, for instance, be used to compel the use of online proceedings for civil proceedings involving all but very high-value claims or, even more radically, to compel the use of online proceedings for many, or even all, civil, family, tribunal and employment proceedings. There is therefore the potential under the Bill for significant curtailment of the use of oral hearings.
9. There are two potential answers to the concern that online proceedings may limit or preclude oral hearings. The first is that although powers to make such radical provision are conferred by the Bill, such powers would not in fact be used in such a way. It is, for instance, presumably highly unlikely that any attempt would be made to require the use of online proceedings and preclude oral hearings in all civil, family, tribunal and employment proceedings. It is more likely that the exclusive use of online proceedings will be limited, at least at first, to confined categories of case and/or that the possibility of oral hearings will be preserved either by making online proceedings non-mandatory or by providing for certain cases (e.g. complex cases) to be transferred out of online proceedings.³ Indeed, in its Delegated Powers Memorandum on the Bill, the Government states that the “initial intention” is that the online procedure will apply only to “money claims up to the value of £25,000”. However, it also acknowledges that it wishes to be

2 The “appropriate minister” is usually the Lord Chancellor. If the matter concerns proceedings in the employment tribunals, the “appropriate minister” is instead the Secretary of State. [Courts and Tribunals \(Online Procedure\) Bill](#), clause 13(4)–(6) [HL Bill 176 (2017–19)]

3 This possibility is explicitly provided for by clause 1(6).

“in control over the proceedings to which the online procedure will apply” so that it can “widen [their] scope”.⁴

10. The second potential answer to the concern about oral hearings is that the Bill would not, properly interpreted, confer unlimited powers on ministers to curtail oral hearings. For example, Article 6 of the European Convention on Human Rights (ECHR) confers the right to a “fair and public hearing”—which, in certain circumstances, includes an oral hearing—whenever civil rights and obligations are being determined. The effect of sections 3 and 6 of the Human Rights Act 1998 is that it would be unlawful for ministers to use powers conferred by the Bill incompatibly with individuals’ rights under Article 6. Equally, the right to an oral hearing is recognised in certain circumstances at common law, and the Bill would be interpreted accordingly.⁵ It is thus clear that a court, interpreting the Bill by reference to the common law ‘principle of legality’ and to the ECHR, would conclude that it did not invest ministers with unqualified authority to interfere with the right to an oral hearing.
11. Neither of these points provide sufficient reassurance about the scope of the power to impose online proceedings and thus to curtail oral hearings. **It is unsatisfactory for legislation to be drafted in a way that fails to acknowledge the fundamental right to a fair hearing, both at common law and under the European Convention on Human Rights. While ministers may have no intention of using the powers provided by the Bill to undermine the right to an oral hearing, it is incumbent on Parliament to frame the powers it confers in a way that acknowledges and respects fundamental constitutional principles.**
12. **We are concerned that the Bill confers broad powers on ministers to limit oral hearings in a much wider range of cases than is currently envisaged. One way to secure appropriate control over this power would be to require not just consultation with the Lord Chief Justice, or the Senior President of Tribunals where appropriate, but their concurrence.**
13. **We are not persuaded that to require concurrence with the Lord Chief Justice or Senior President of Tribunals in this context would involve them inappropriately in political decision-making. This is a matter of the fair and efficient administration of the justice system for which they are responsible.**
14. The provisions of the Bill lead to a general concern about the breadth of the powers for the Lord Chancellor. We note that the Lord Chancellor may only make regulations under clause 6 of the Bill with concurrence of the Lord Chief Justice and the Senior President of Tribunals. **A requirement for the Lord Chancellor to secure the concurrence of the Lord Chief Justice, or the Senior President of Tribunals where appropriate, in respect of other powers in the Bill would ameliorate concerns about their breadth.**

4 Ministry of Justice, *Delegated Powers Memorandum: Courts and Tribunals (Online Procedure) Bill* (2019), para 33

5 See, e.g., *R (Smith) v Parole Board* [2005] UKHL 1; *R (Osborn) v Parole Board* [2013] UKSC 61.

Access to justice

15. The Bill enables the making of procedural rules that will compel the use of online proceedings, thus meaning that parties to relevant types of proceedings may have no option of choosing traditional proceedings. This raises questions about the compatibility of the Bill with the constitutional principle of access to justice, given inequalities in access to digital resources. In a report published in March 2019, the Office for National Statistics concluded that in 2018, 5.3 million adults in the UK—that is, 10 per cent of the adult population—could be characterised as “internet non-users”.⁶ Meanwhile, another study found that in 2018, 29 per cent of people aged 65 and over had “zero digital skills”.⁷ Such figures do not take into account those with limited digital skills, for whom basic browsing and messaging may be within their capabilities but the complexity of online legal forms may not. As Lord Justice Briggs noted in his report, “there will be a significant class with specific challenges in using computers ... [including] the still large number of those living mainly in rural areas with no access to broadband, those who cannot afford a laptop or desktop computer, and those who for a variety of understandable reasons regard moving to computer after a life spent communicating on paper a step too far.”⁸ Further, as well as potentially excluding those with limited digital skills, individuals with limited literacy may be disadvantaged by proceedings conducted solely in writing without the potential of oral hearings.
16. Against this background, forcing people to choose between online proceedings or not pursuing legal claims at all risks excluding large numbers of people from the justice system. Lord Keen of Elie QC acknowledged this issue during the second reading debate and said that the Government “understand that some people will find it difficult to engage with such a digital procedure and that is why we intend to take steps to make assistance available to people, whether by telephone, other electronic means or face to face.”⁹ However, the Bill makes no provision to safeguard access to justice in this regard. **We recommend that the Bill places a duty on the Lord Chancellor to ensure that adequate provision is made to enable access to online proceedings for those with limited digital means, digital literacy, or general literacy.**

Composition of the Online Procedure Rules Committee

17. Clause 4 establishes the OPRC and determines its membership, which is to include judicial, professional and lay representation. The OPRC is to consist of two judges (appointed by the Lord Chief Justice), a legal practitioner (appointed by the Lord Chancellor), and two other persons appointed by the Lord Chancellor, one of whom must have experience in and knowledge of the lay advice sector, and one of whom must have “IT experience and knowledge relating to end-users’ experience of internet portals”.

6 Office for National Statistics, *Exploring the UK’s Digital Divide* (4 March 2019): <https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/articles/exploringtheuksdigitaldivide/2019-03-04> [accessed 29 March 2019]

7 Lloyd’s Bank, *UK Consumer Digital Index 2018* (2018): <https://www.lloydsbank.com/banking-with-us/whats-happening/consumer-digital-index.asp> [accessed 29 March 2019]

8 Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (July 2016), para 6.13: <https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> [accessed 5 June 2019]

9 HL Deb 14 May 2019, [col 1525](#)

18. That only three out of five members of the OPRC must be legally qualified is in contrast to the Civil Procedure Rule Committee (CPRC), for which the majority of members must have either a judicial background or be otherwise legally qualified. The CPRC consists of up to 18 members, of whom 10 are judges and of whom only two need not have any form of legal qualification.¹⁰ Rules made by the CPRC must be signed by at least eight members of the Committee. In contrast, rules made by the OPRC will need only three signatures, giving greater influence to members, appointed by a government minister, who do not necessarily possess any legal qualification.
19. **The Online Procedure Rules Committee will have substantial powers that are comparable to other rules committees. Indeed, as the OPRC will have the power to make new sets of procedural rules governing civil, family, tribunal and employment proceedings, its powers will range more widely than any of the existing rule committees. A requirement for concurrence with the Lord Chief Justice, or the Senior President of Tribunals where appropriate, for the making of new procedure rules would ameliorate these concerns.**

¹⁰ [Civil Procedure Act 1997](#), section 2