



Public Law Project

Judicial Review and Courts Bill

PLP Briefing for House of Commons Committee Stage

1. In light of the concerns expressed in our second reading briefing regarding Online Procedure, we recommend amendments be made to the composition of the Online Procedure Rule Committee and the provision for digitally excluded individuals.
2. **RECOMMENDATION: Clarify the nature of ‘online procedural assistance’.**¹ First, based on our recent research,² we are concerned about the provisions for digitally excluded individuals in the Bill. There needs to be clear assurances that the 16% of the UK population who lack basic digital skills and are unable to ‘participate in a digital society’ will not be left behind by this Bill.³ The Online Procedure is just one of an ever increasing number of ways that individuals interact with the state using electronic means and it is important that the justice system leads the way in providing an effective safety net for digitally excluded persons. The duty contained in section 27 for the Lord Chancellor to ‘make support available for those who require it’ calls for greater detail to ensure that its implementation is effective, and it is recognised as an important undertaking which requires significant resourcing.
3. Amendment 27 is a probing amendment designed to clarify the nature of online procedural assistance.

After clause 27, insert the following new clause-

“Online Procedural Assistance

(1) Online Procedural Assistance, must be made available and accessible to any party or potential party to proceedings governed by Online Procedure Rules that requires it. In delivering this duty, the Lord Chancellor must have due regard to the intersection of digital exclusion with other factors, such as age, poverty, disability and geography and deliver support services accordingly.

(2) It must include assistance to enable such a party or potential party to have a reasonable understanding of the nature of the proceedings, the procedure applicable under Online Procedure Rules and of how to access and navigate

¹ An amendment relating to digital exclusion was tabled by Lord Marks of Henley-On-Thames, Lord Beith, Lord Pannick & Lord Judge in relation to the Courts and Tribunals (Online Procedure) Bill 2017-19 and detailed [here](#). This suggested amendment draws on elements of this amendment.

² See: https://publiclawproject.org.uk/content/uploads/2021/05/210513_Digital-Support-Research-Briefing_v6_Final-draft-for-publicationpdf.pdf & https://publiclawproject.org.uk/content/uploads/2021/07/210728_Rapporteur-Briefing-v3.pdf.

³ Lloyds Bank (2020) UK Consumer Digital Index 2020. p.38, available at: https://www.lloydsbank.com/assets/media/pdfs/banking_with_us/whats-happening/lbconsumer-digital-index-2020-report.pdf

such procedure. To this effect, it will provide both advice and technical hardware, as appropriate, and will provide assistance to such individuals throughout the course of their proceedings.

(3) Anyone who requires Online Procedural Assistance must have the option of receiving it either via remote appointments or in-person appointments at a site local to them.

(4) Online Procedural Assistance must include, for a party or potential party whose first language is not English, assistance, by interpretation or translation as appropriate, in a language that is familiar to the party or potential party.

(5) The delivery of Online Procedural Assistance must be evaluated at yearly intervals by an independent evaluation team. To assist in these evaluations, data must be routinely collected relating to the protected characteristics of those using the service, outcomes of cases that used Online Procedural Assistance and the frequency and location of the appointments provided. This must also be made publicly available”.

4. **RECOMMENDATION: Include someone with experience representing the views of people who are digitally excluded in the OPRC.**⁴ Second, at present the Online Procedure Rule Committee does not include any members who would be able to represent the views of digitally excluded people or have expertise in the specific challenges digitally excluded people might encounter if they needed to be a party to proceedings under the Online Procedure. We consider this to be an important voice that if overlooked at the point of making Online Procedure Rules could have serious ramifications for access to justice in the future.

Clause 21(4), page 38, line 6, at end insert:

“and; (d) one of whom must have experience representing the views of people who are digitally excluded”

5. **RECOMMENDATION: Include a second information technology expert in the OPRC.** Third, the Bill places significant responsibility on a single information technology expert. To imply that there is one information technology expert who can be the source of truth for digital procedure is incorrect as there are lively debates in that sphere.⁵ As Lord Beecham argued in the House of Lords Second Reading of the Courts and Tribunals (Online Procedure) Bill 2017-19, the size of the Online Procedure Rule Committee is significantly smaller than other procedure rule committees.⁶ Limiting the Committee to only having one information technology expert presents a risk of a particular view of the capability and role of information technology in the justice system to take precedence. Expanding the Committee to include a wider range of expertise in information technology and internet portals

⁴ This amendment was tabled by Yasmin Qureshi, Richard Burgon, Gloria De Piero and Imran Hussain in relation to the Courts and Tribunals (Online Procedure) Bill 2017-19 and detailed [here](#).

⁵ Joe Tomlinson, “Three Fixable Flaws in The Courts and Tribunals (Online Procedure) Bill”, June 17, available at: SSRN: <https://ssrn.com/abstract=3405332> or <http://dx.doi.org/10.2139/ssrn.3405332>

⁶ HL Deb 14 May 2019 [Courts and Tribunals (Online Procedure) Bill [HL]] c1522, available at: [https://hansard.parliament.uk/lords/2019-05-14/debates/3B63BD53-5E8D-4C89-A7AB-DAD9D74F844F/CourtsAndTribunals\(OnlineProcedure\)Bill\(HL\)#contribution-A79F7127-00A3-4E1A-B52E-946C7F17C44E](https://hansard.parliament.uk/lords/2019-05-14/debates/3B63BD53-5E8D-4C89-A7AB-DAD9D74F844F/CourtsAndTribunals(OnlineProcedure)Bill(HL)#contribution-A79F7127-00A3-4E1A-B52E-946C7F17C44E)

would be a valuable contribution to ensuring the Online Procedure Rules are suitably 'future-proofed'.

Clause 21(4)(c), page 38, line 5 leave out “one” and insert “two”

Clause 21(4)(c), page 38, line 5 leave out “person” and insert “persons”

6. For further details on the concerns outlined here, please see appendix one, which details PLP's Second Reading Briefing.

Appendix One:

Judicial Review and Courts Bill

PLP Briefing for House of Commons Second Reading

1. Public Law Project ('PLP') is an independent national legal charity. We work through a combination of research, policy work, training and legal casework to promote the rule of law, improve public decision-making and facilitate access to justice.

Executive Summary

2. This briefing identifies a series of issues in Chapter 2 of Part 2 of the Bill, concerning Online Procedure. We analyse the measures proposed in **clauses 18-31** which have the potential to preclude practical access to justice. Introducing electronic means for parties to initiate, conduct, progress or participate in proceedings needs to be matched with sufficient safeguards to address digital exclusion. We are concerned that in its current iteration the Bill not only does not provide these safeguards but grants significant rule-making powers to the Lord Chancellor, including a Henry VIII power in relation to clause 26.

Part 2, Chapter 2: Concerns with Online Procedure

3. The clauses contained in Chapter 2 reintroduce proposals that were initially in the Courts and Tribunals (Online Procedure) Bill 2017-19 ('the 2019 Bill'), which in turn reintroduced proposals that were in Part 2 of the [Prison and Courts Bill](#) in the 2016-17 Parliamentary session. When we refer to the 2019 Bill, it is to the last version, [Bill 430 2017-19 \(as amended in Public Bill Committee\)](#). The last version includes amendments made at earlier stages in addition to amendments relating to digital exclusion made by Lord Keen and Lord Marks at the Lords Report Stage, which have been carried across to the new Bill. The '[Three Fixable Flaws in The Courts and Tribunals \(Online Procedure Bill\) 2017-19](#)' identified in a research paper written by PLP's Research Director Dr Joe Tomlinson in 2019 remain the primary basis of our concerns with Chapter 2.

4. Like its predecessor, the Bill seeks to create an Online Procedure Rule Committee, (OPRC) whose core function will be to create the Online Procedure Rules (OPR). The

Rule Committee make up is the same as in the 2019 Bill, including only one IT expert⁷ to sit on the OPRC. This is concerning given the focus of Chapter 2 and the Government's broader commitment to reforming HM Courts and Tribunals Service (HMCTS) so it is 'fit for the future'.⁸ The draft Bill places significant responsibility on a single IT expert and to imply that there is one IT expert who can be the source of truth for digital procedure is incorrect as there are lively debates in that sphere.⁹ Furthermore, technical 'IT experience' and 'knowledge relating to end-users' experience of internet portals' are two distinct skills and knowledge sets and while it is accepted that one individual can possess both, it seems to limit the pool of potential membership unnecessarily.

For these reasons, there ought to be, at very least, two experts where the Bill presently requires one.

5. As with the Bill's earlier iteration, the power distribution within the OPRC is also a cause for serious concern. The crux of the issue is that the Lord Chancellor has a Henry VIII power, in their ability to 'amend, repeal or revoke any enactment to the extent that the Lord Chancellor considers necessary or desirable in consequence of, or in order to facilitate the making of, Online Procedure Rules' (clause 26(1)). Under clause 26(3), there is only a duty for the Lord Chancellor to 'consult the Lord Chief Justice and the Senior President of Tribunals' before making such amendments in relation to the Online Procedure Rules. During the passage of the 2019 Bill, the House of Lords Constitution Committee observed that the powers bestowed on ministers to limit oral hearings was 'broad'. To ensure appropriate control over this power, the Committee suggested that ministers should not just consult with the Lord Chief Justice, or the Senior President of Tribunals where appropriate, they should also seek their concurrence.¹⁰

6. Under clause 25, the Lord Chancellor has powers to require rules to be made, with no duty to consult. Taken with the Henry VIII powers contained in clause 26, PLP is concerned that the rulemaking process gives too much power to the Lord Chancellor.

Additional concerns with clauses 18-31:

7. The 2019 Bill allowed anyone to choose to 'initiate, conduct, progress or participate in proceedings' by non-electronic means (clause 1(6)). The new Bill limits this in such a way that the effect of clause 18(6) will be that a person can only 'initiate, conduct, progress or participate in proceedings, other than a hearing' by non-electronic means *if they are not legally represented*. For the hearing itself, a person, whether represented or not, cannot *choose* to participate by non-electronic means, although the court or Tribunal does have the power to direct or order a person to participate by non-electronic means:

⁷ *Judicial Review and Courts Bill*, Clause 21(4)(c). Available to download from:
<https://publications.parliament.uk/pa/bills/cbill/58-02/0152/210152.pdf>

⁸ HMRC Courts and Tribunal Service Response, "*Fit for the future: transforming the Court and Tribunal Estate*" consultation, available at:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/800874/hmcts-fit-for-the-future-consultation-response.pdf

⁹ Joe Tomlinson, "*Three Fixable Flaws in The Courts and Tribunals (Online Procedure) Bill*", June 17, available at:

SSRN: <https://ssrn.com/abstract=3405332> or <http://dx.doi.org/10.2139/ssrn.3405332>

¹⁰ House of Lords Constitution Select Committee, "*Courts and Tribunals (Online Procedure) Bill*", May 2019, available at:
<https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/373/37303.htm>

Clause 18 consequently limits hearing participants' ability to choose to participate in a hearing by non-electronic means, compared to the 2019 Bill.

8. The digitalisation of justice systems means it is important to consider their impact on the digitally excluded. However, in its current form, PLP is concerned that the Bill gives insufficient attention to this important group. Unlike the 2019 Bill, here the duty to provide support to digitally excluded persons is vaguer and does not explicitly mention this group, nor the aim of expanding Digital Support,¹¹ the assisted digital service set up in recognition that digitally excluded individuals require support to navigate reformed services in courts and tribunals in England and Wales. The programme has been in a 'test and learn' pilot since September 2017, with a full national service due in autumn 2021.

9. In 2020, 80% of households in Great Britain with one adult aged 65 or over, had internet access.¹² Beyond simple access, although it is difficult to make an accurate assessment of the proportion of court users who are digitally excluded, the Civil Justice Council calculates that 6% of those with civil justice problems lack 'Basic Online Skills' and 14% lack 'Basic Digital Skills'.¹³ Regardless of how digital exclusion is measured, it is a challenge that needs to be overcome before the digitalisation of justice systems can be said to provide access to justice for all court users. The Digital Support service aims to identify and support those who need digital assistance through their partner, Good Things Foundation, a digital exclusion charity. Participating centres across England and Wales – primarily public libraries, Citizens Advice offices, community centres and Law Centres – then deliver the service. Sites can offer support for the following specific reformed services: civil money claims, divorce, probate, social security and child support, single justice system (e.g. TfL fines), and help with fees.

10. PLP has recently published a research briefing, [Digital Support for HMCTS reformed services: what we know and what we need to know](#),¹⁴ where we appraise the initial roll-out of Digital Support, identifying ways the service has been adapted as lessons are learned. Our research identified that the programme's ability to offer a meaningful intervention is impeded by how centre funding is allocated.¹⁵ Centres are not separately funded to advertise the service to generate referrals, making it difficult for them to provide Digital Support to anyone other than their current client base. Additionally, despite many online processes requiring multiple engagements over time, centres cannot be paid for any additional support unless it is a new service. This in turn raises concerns around how centres can provide support beyond initial online form completion.

¹¹ HMCTS, "HMCTS services: Digital Support Guidance", May 2021, available at: <https://www.gov.uk/guidance/hmcts-services-digital-support>

¹² Office for National Statistics, "Internet access - households and individuals", 2020, available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/bulletins/internetaccesshouseholdsandindividuals/2020>

¹³ 'Basic Online Skills' involve being able to complete simple tasks, such as retrieving information, emailing and filling out forms online. 'Basic Digital Skills' involve all of these online skills, plus the ability to 'verify sources of information found online'. Civil Justice Council, "Assisted Digital Support for Civil Justice System Users: Final Research Report", April 2018, available at: <https://www.judiciary.uk/wp-content/uploads/2018/06/cjc-report-on-assisted-digital-support.pdf>

¹⁴ Jo Hynes, "Digital Support for HMCTS Reformed Services: what we know and what we need to know", May 2021, available at: https://publiclawproject.org.uk/content/uploads/2021/05/210513_Digital-Support-Research-Briefing_v6_Final-draft-for-publicationpdf.pdf

¹⁵ Ibid, page 16.

11.. Similarly, concerns regarding boundaries between legal and digital advice were raised by PLP to the House of Commons Justice Committee in January 2019¹⁶ and were also raised in the Good Things Foundation’s implementation review, which found that emotional, procedural, and sometimes legal support were ‘often crucial to the success of a face-to-face [Digital Support] appointment, and in some instances not having this support would be a barrier to accessing HMCTS services online.’¹⁷ The pilot will soon make way for a national service. As it stands, the ability of Digital Support to serve as the primary safety net against digital exclusion is unproven.

12. Promisingly, clause 27 places a duty on the Lord Chancellor to make support available ‘for those who require it’. However, at present this duty is vague and, unlike the 2019 Bill, does not in fact make clear that this is a commitment to assist *digitally excluded* individuals. Furthermore, the OPRC does not include anyone with specific expertise in the challenges of digital exclusion.

The ‘support’ this clause refers to should be a more concrete commitment to supporting the digitally excluded, and the OPRC should include at least one member with experience in representing the views of people who are digitally excluded.

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¹⁶ Public Law Project, “*Submission to the Justice Committee Inquiry on the access to justice impacts of court and tribunal reforms*”, available at: <https://publiclawproject.org.uk/resources/plp-submission-to-the-justice-committee-inquiry-on-the-access-to-justice-impacts-of-court-and-tribunal-reforms/>

¹⁷ Good Things Foundation, “*HMCTS Digital Support Service: Implementation Review Executive Summary*”, September 2020, available at: <https://www.goodthingsfoundation.org/insights/hmcts-digital-support-service-review/>