



Courts and Tribunals (Online Procedure) Bill Briefing [Lords Committee Stage]

Introduction

LawWorks is pleased to provide a briefing for the Parliamentary stages of this Bill. This legislation provides for online procedures in civil and family courts, in the First-tier Tribunal and Upper Tribunal, and in employment tribunals and the Employment Appeal Tribunal. The “online court” is a core component of the government’s courts reform strategy, and this Bill creates an Online Procedure Rule Committee (OPRC) to determine procedural rules in online court and tribunal proceedings.

With the recent legal aid (LASPO) review now complete and progress made with digital application forms such as <https://www.gov.uk/make-money-claim>, this legislation is timely in order to take forwards HMCTS reforms to the next level. However, the benchmark for success is whether the move to online works for the justice system’s users, and whether the system is fit for purpose with the resources, capabilities and equality of arms to deliver fair outcomes with appropriate information and support throughout the process. How courts and tribunals operate not only impacts on access to justice, but also expresses the rule of law in a tangible form. As the Lord Chancellor says in the foreword to the Government’s recently published ‘Legal support action plan’, “The ability of individuals to resolve their legal problems is vital to a just society and is a fundamental principle underpinning the rule of law.”ⁱ

About LawWorks

LawWorks (the Solicitors Pro Bono Group) promotes, supports and facilitates pro bono legal services that extend access to the law for individuals and communities in need and the organisations that support them. We champion pro bono because of the positive contribution and difference it makes for individuals, communities and society. We work (in England and Wales) with the solicitors’ profession and our members, the Law Society, law schools and law students, law centres, advice agencies and others to develop and support pro bono legal services, and to promote access to justice for all. LawWorks also works closely with the Litigants in Person Support (LIPS) Strategy, a national partnership (funded by the Ministry of Justice) to improve the experience of people facing the legal process alone. The partner organisations are the Personal Support Unit (PSU), RCJ Advice, Law for Life (incorporating Advicenow), Advocate, LawWorks and the Access to Justice Foundation.

LawWork’s overall view of the online court

We support online courts as one channel, amongst many, for improving access to justice and extending the facility for citizens to enforce their rights. With our LIPS partners, we have also been broadly supportive of the objectives of the Ministry of Justice’s Courts and Tribunal reform programme, as summarised in *‘Transforming our Justice System’*, (a joint statement from the Government and Judiciary). The programme includes an ambitious £1.2 billion plan to modernise the system through IT and design a justice system that is “just”, “proportionate”, and “accessible to all”.ⁱⁱ The joint statement sets the right vision and direction, but to genuinely enhance access to justice this approach needs practical resources, regular engagement with stakeholders, third sector and court user organisations, and investment in ‘assisted digital’ and legal support.

The Briggs review of civil courts, which proposed the online court, highlighted the importance of Public Legal Education (PLE) to delivering a system in which processes are understood, expectations managed, with outcomes perceived as fair.ⁱⁱⁱ (See page 3 of this Briefing on the Briggs agenda).



Online and digitised procedures cannot wholly compensate for long-term underinvestment in our courts and tribunal facilities and operations; this has led to IT failures, a crumbling courts estate, and delays to cases being heard. Whilst the £1.2 billion additional investment dedicated to the reform programme is very welcome, this has been predicated on divesting assets (i.e., court closures and property sales) with lesser than expected returns, and negative impacts for the physical infrastructure and local presence of the justice system. The funding challenges should be viewed within the wider context of dwindling resources for the justice system over the past decade. The recent Bar Council report by Professor Martin Chalkley '*Funding for Justice 2008 to 2018: Justice in the age of austerity*' has analysed the stark extent of this including spending reductions of 34 per cent for the Crown Prosecution Service, 32 per cent in legal aid (including a 70 per cent cut in social welfare law legal help) and a 17 per cent reduction in funding for the provision of court services and staff.^{iv}

As yet it is unclear whether the reforms will achieve their objectives. Last year, the Public Accounts Committee (PAC) questioned the ability of HMCTS to manage its court reform programme, noting that the pressure to deliver quickly risked driving changes before fully understanding the impact on users and the wider justice system.^v The clearest assessment of the challenges to date has come from the National Audit Office's (NAO) report on 'Early progress in transforming courts and tribunals' which questioned whether the benefits are being delivered."^{vi} Further issues are also raised in our recent submission to the Justice Select Committee Inquiry on Courts Modernisation.^{vii}

Issues with this legislation

Whilst we welcome the introduction of this long-promised legislation which will enable online procedures in some of our courts and tribunals, the Bill as drafted is skeletal and there are some key issues that need to be debated during its Lords and Commons stages:

- It is unclear whether litigants will have the right to choose whether they wish to proceed with an online procedure or with a physical oral hearings court procedure;
- Much of the detail and implementation, including the scope of the rules, the Rule Committee's work and application of online procedures in specific court and tribunal jurisdictions, is left to Ministerial order-making powers;
- The composition of the Rules Committee could reflect a wider range of expertise and interests;
- There is insufficient reflection of wider recommendations and issues raised by the Briggs report, for example the need for assisted digital support and PLE to be built in to the online procedure.

Implementation issues

The right to a fair hearing is a key obligation under the European Convention on Human Rights, so it is essential that decisions around the use of online procedures comply with this right and genuinely

enhance access to justice. The legislation should protect as a default right the choice to have an oral hearing; even with the best available assisted digital support there is still the potential for the most vulnerable and least literate to be excluded from the process. HMCTS itself appears to acknowledge this, stating in a blog last year that they “will continue to make provision for litigants to continue using paper documents”.^{viii} As currently drafted, Ministers would have powers to compel the use of online proceedings for a range of civil, family and proceedings from low to high-value claims. We agree with the House of Lords’ Select Committee on the Constitution’s report on the Bill that there need to be safeguards.^{ix}

As the new online process will involve a significant transformation in the way in which justice is delivered in our courts, it needs to be robustly scrutinised, including subsequent regulations that will give effect to new procedures. The Online Procedure Rules should therefore be subject to the affirmative resolution procedure in Parliament when introduced through regulations. The Bill does include a requirement to consult with the Lord Chief Justice, or the Senior President of Tribunals where appropriate both in relation to regulations and appointments to the Rules Committee. We also see a potential role for the Civil Justice Council (CJC) as a statutory consultee, and suggest that the CJC be specifically referenced.

The Rules Committee

Under clause 4 the Committee will comprise two judges (appointed by the Lord Chief Justice), a legal practitioner and two other persons appointed by the Lord Chancellor, one with experience/knowledge of the lay advice sector, and one with experience/knowledge in IT and users’ experience of internet portals. This is a small group compared to other Rules Committees (such as the Civil Procedure Rules Committee). We believe that appointments should be made in consultation with the Civil Justice Council.

The Briggs agenda and access to legal support

The Ministry of Justice has recently published a “Legal Support Action Plan” which clearly sets out a welcome commitment to enhance the support offered to litigants in person, and improve access to early legal advice and support.^x We cannot overstate the importance of the Government delivering on this, alongside the wider recommendations of the Briggs review. Our research (based on a representative sample of clients) on the outcomes of advice from visiting legal advice clinics found there was a significant impact on whether those with legal problems decided to progress their issues to court or tribunal. Before getting support from the clinic, nearly half of clients interviewed were thinking of going to court or tribunal. However, of those who said they were thinking of going to court or tribunal, a quarter changed their plans following advice, showing that early advice can play a role in diverting people from court or tribunal.^{xi}

Given the levels of digital exclusion in the population, it is also vitally important for HMCTS to deliver or enable “assisted digital” support for the online process. The problem of digital exclusion is very real and can be an aspect of vulnerability. Almost five million people in the UK have never used the internet and over 11 million adults lack basic digital skills, such as being able to complete online forms or locate relevant websites.^{xii} Last year HMCTS spoke of delivering a “network of support centres across

the country” for face to face help,^{xiii} but there is still little information on these, beyond what can be found on the online centres network website run by the Good Things Foundation’s website^{xiv}. Some anecdotal evidence suggests that so far the offer from online support centres is negligible. The importance of those who are digitally excluded being able to access meaningful face-to-face support cannot be overstated, as the following case study illustrates:

Thomas, an elderly man who is not computer literate, received court papers alleging he owed his property management company in excess of £8000. He did not understand how to respond to the court papers and wrote to the court enclosing his bank statements to show he was up to date with payments. To his surprise judgement in default was entered against him in the sum of £8116.43. Worried that a bailiff may try and enforce the judgement, Thomas was able to obtain help from RCJ Advice, who successfully applied to set aside the judgement.

We would therefore support any amendments to strengthen information, advice/support and assisted digital provision as part of this legislation.

Tribunals

We believe that care needs to be taken in moving social security appeals online - a particularly troubled area of tribunal adjudication, as the tribunal is having redress systemic policy failures. The latest official figures available for the last quarter of 2018, show that “80% of disposals were cleared at hearing with 70% of DEP decisions overturned. Of the 51,300 disposals in October to December 2018, 80% were cleared at a hearing and of these, 70% had the initial decision revised in favour of the claimant (up from 65% in the same period in 2017). This overturn rate varied by benefit type, with Education and Support Allowance (ESA) at 74%, Personal Independence Payment (PIP) 73%, Disability Living Allowance 66% and Universal Credit 58%. ESA and PIP cases have driven the overall increase in the overturn rate, rising five and four percentage points respectively compared to October to December 2017.”^{xv} The appeal success rates suggests ongoing problems of poor decision making by the DWP, and it is notable that all these cases were first taken through a process of ‘mandatory reconsideration’ by the Department but the overturn rates remain high. LawWorks own social security project has a success rate of over 90 per cent.

The sensitivity of the Tribunal to the likelihood of underlying administrative failures is therefore crucial. One of the key ideas being piloted as part of Tribunals reform is a ‘preliminary view’ and ‘early neutral evaluation’ process. There is a risk that the online procedure could lead to confusion for appellants mistaking the preliminary view for full adjudication. We would therefore like to any proposal in relation to an online procedure for social security appeals to be subject to further consultation, and addressing some of the key policy issues around poor DWP decision-making.

June 2019

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- ⁱ *Legal Support: The Way Ahead An action plan to deliver better support to people experiencing legal problems*
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777036/legal-support-the-way-ahead.pdf
- ⁱⁱ *Transforming our Justice System*
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf
- ⁱⁱⁱ *Briggs Review of Civil Court Structures* <https://www.judiciary.gov.uk/civil-courts-structure-review/civil-courts-structure-review-ccsr-final-report-published/>
- ^{iv} [https://www.barcouncil.org.uk/media/688940/funding_for_justice- the last 10 years version - professor martin chalkley.pdf](https://www.barcouncil.org.uk/media/688940/funding_for_justice-_the_last_10_years_version_-_professor_martin_chalkley.pdf)
- ^v <https://publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/976/976.pdf>
- ^{vi} *Early progress in transforming courts and tribunals*
<https://www.nao.org.uk/wp-content/uploads/2018/05/Early-progess-in-transforming-courts-and-tribunals.pdf>
- ^{vii} <https://www.lawworks.org.uk/solicitors-and-volunteers/resources/courts-modernisation-justice-select-committee-inquiry>
- ^{viii} <https://insidehmcts.blog.gov.uk/2018/06/28/helping-people-to-use-online-services/> .
- ^{ix} House of Lords Select Committee on the Constitution 21st Report of Session 2017–19, HL Paper 373 Courts and Tribunals (Online Procedure) Bill <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/373/373.pdf>
- ^x *Legal Support: The Way Ahead An action plan to deliver better support to people experiencing legal problems*
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777036/legal-support-the-way-ahead.pdf
- ^{xi} LawWorks Clinics Network report 2018 <https://www.lawworks.org.uk/sites/default/files/files/LW-Clinics-Report-2017-18-web.pdf>
- ^{xii} Science and Technology Committee (Commons) Report, Digital Skills Crisis
https://publications.parliament.uk/pa/cm201617/cmselect/cmsctech/270/27004.htm#_idTextAnchor005
- ^{xiii} <https://insidehmcts.blog.gov.uk/2018/06/28/helping-people-to-use-online-services/>
- ^{xiv} <https://www.onlinecentresnetwork.org/projects/hmcts-face-face-assisted-digital-support>
- ^{xv} Tribunals Quarterly Statistics, October to December 2018 (Provisional)
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785695/Tribunal and GRC statistics Q3 201819.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785695/Tribunal_and_GRC_statistics_Q3_201819.pdf)