

THE COURTS AND TRIBUNALS (ONLINE PROCEDURE) BILL [HL]

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Courts and Tribunals (Online Procedure) Bill [HL] as brought from the House of Lords on 3 July 2019.

- These Explanatory Notes have been prepared by the Ministry of Justice in order to assist the reader. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Bill

1. The Courts and Tribunals (Online Procedure) Bill will establish an Online Procedure Rule Committee (OPRC) that will be able to make Online Procedure Rules in relation to civil and family proceedings and tribunals (including employment tribunals and the Employment Appeal Tribunal). The role of the Committee will be to provide new, simple online rules which are intelligible to, and easily navigable by, all people who rely on the courts system.
2. In summary, the Bill:
 - Establishes a new Online Procedure Rules framework which enables parties to civil, family or tribunal proceedings to use the online procedure. The rules are to apply to proceedings specified in regulations made by the Lord Chancellor, or in the case of employment tribunals, the Secretary of State for BEIS. It is expected that the Committee to focus on the civil and family jurisdictions in the first instance.
 - Sets out powers to govern the membership of the OPRC and its scope and remit. It also includes the procedure for appointing members.
 - Enables the Lord Chancellor to alter the composition of the OPRC after seeking concurrence of the Secretary of State, the Lord Chief Justice and the Senior President of Tribunals in order to assist in making of new online rules.
 - Prescribes the process for making Online Procedure Rules.
 - Allows the Lord Chancellor or Secretary of State for BEIS, with the concurrence of the Lord Chief Justice, to require the OPRC to make online rules to achieve a specified purpose within a reasonable period in accordance with the prescribed procedures for making rules.
 - Permits the Lord Chancellor, with the concurrence of the Lord Chief Justice, to amend legislation in consequence of, or in order to facilitate the making of Online Procedure Rules.

Policy background

3. The introduction of an 'online court' to resolve some low value civil money claims was one of the key recommendations of the Review of Civil Court Structures led by Lord

Justice Briggs, which was published in July 2016.¹

4. The Bill will establish a new online procedure which will apply to civil, family and tribunal proceedings. In addition, the provisions will establish the OPRC. The new rule committee will have expertise in the law and the provision of lay advice, IT and other relevant experience which will enable it to produce court rules to support the online procedure. The online procedure will be a new digital procedure governed by a new set of rules separate from current processes. It will use a mix of technology, conciliation and judicial resolution to provide a simple and quick dispute resolution process.

Legal background

5. The legislation relating to courts and tribunals is set out in a number of statutes and secondary legislation. The following paragraphs explain the current legislative background.

Online procedure and online procedure rules

6. There are currently no existing legislative provisions regarding the use of an online procedure. It is intended that the OPRC may make rules in relation to any matter about which the Civil Procedure Rules 1998, Family Procedure Rules 2010 and tribunal procedure rules may be made.
7. The Civil Procedure Rules 1998² are made pursuant to the Civil Procedure Act 1997 (CPA 1997). The Rules govern the practice and procedure in the Civil Division of the Court of Appeal, the High Court, and the County Court. Section 1 of the CPA 1997 provides that such rules are to be made with a view to securing that the system of civil justice is accessible, fair and efficient, and the rules are both simple and simply expressed. The rules are made by the Civil Procedure Rule Committee, whose members are made up of persons specified in section 2 of the CPA 1997 and appointed by either the Lord Chief Justice or the Lord Chancellor. Section 2 further provides that before making rules, the Committee must consult such persons as they consider appropriate and meet, unless inexpedient to do so. Finally, it provides that the Rules must be signed by eight members of the Committee and then submitted to the Lord Chancellor who may allow or disallow them. The Civil Procedure Rules 1998 are supplemented by Practice Directions made by the Lord Chief Justice (section 5 CPA 1997).

¹ <https://www.judiciary.gov.uk/civil-courts-structure-review/civil-courts-structure-review-ccsr-final-report-published>

² Civil Procedure Rules 1998 (SI 1998/3132)

8. The Family Procedure Rules 2010³ are made pursuant to section 75 of the Courts Act 2003. The legislative provisions are similar to those in the CPA 1997 in respect of the Civil Procedure Rules 1998. The Rules govern the practice and procedure in the family division of the Court of Appeal, the High Court and the Family Court (section 75). 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 1998; for example, in respect of membership (section 77) and the process for making the rules (section 79). The Family Procedure Rules are supplemented by Practice Directions made by the Lord Chief Justice (section 81).
9. The Tribunal Procedure Rules⁴ are made pursuant to section 22, parts 1 to 4 and Schedule 5 of the Tribunal, Courts and Enforcement Act 2007 (TCEA 2007). The Tribunal Procedure Rules govern the practice and procedure to be followed in the First-tier and Upper Tribunals, as established by section 2 TCEA 2007. Schedule 5 of the TCEA 2007 sets out the provisions regarding how the rules are made (paragraphs 26-30) and the constitution of the Tribunal Procedure Rule Committee (paragraphs 20-25), which are again along similar lines to the requirements that apply to the Civil Procedure Rules. The Tribunal Procedure Rules are supplemented by practice directions made by the Senior President of Tribunals (section 23 of the TCEA 2007).
10. The Employment Tribunals Act 1996 (ETA 1996) confers powers on the Secretary of State to make regulations ("employment tribunal procedure regulations") that appear to him or her to be necessary or expedient with respect to proceedings before the employment tribunals. The ETA 1996 has been amended on a number of occasions to provide for specific circumstances which the regulations may include a provision for. For example, section 7 of the Employment Tribunals Act 1996 lists various circumstances that regulations may cover including requiring persons to attend to give evidence and produce documents (section 7(3)(d)) and provisions about postponement of hearings (s.7(3ZB)). The current employment tribunals procedure rules are in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.⁵
11. Section 30 of the ETA 1996 confers a power on the Lord Chancellor to make Employment

³ Family Procedure Rules 2010 (SI 2010/2955)

⁴ The Tribunal Procedure Rules consist of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685), the Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008 (SI 2008/2686), the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273), the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976), the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (SI 2010/2600), the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013/1169) and the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604)

⁵ Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 2013/1237)

Appeal Tribunal procedure rules, following consultation with the Lord President. The current Employment Appeal Tribunal procedure rules are the Employment Appeal Tribunal Rules 1993.⁶

Territorial extent and application

12. Clauses 1 to 15 and Part 2 of Schedule 1 extend and apply to England and Wales and in part to Northern Ireland and Scotland; Part 3 of Schedule 1 extends and applies to England, Wales and Scotland. Clause 15(5) provides that clauses 1 to 14 and Schedule 1 extend to England and Wales, and to Scotland and Northern Ireland in so far as they apply to the First-tier Tribunal and the Upper Tribunal; and to Scotland in so far as they apply to the employment tribunals and Employment Appeal Tribunal.
13. Clauses 1 to 10 create a new online procedure in courts and tribunals. Schedule 2 makes consequential amendments to existing legislation as a result of these changes, including to provide that the standard civil, family and tribunal procedure rules do not apply to proceedings which are subject to the Online Procedure Rules, but will do so if the Online Procedure Rules cease to apply. Paragraph 1 of Schedule 2 amends the Employment Tribunals Act 1996 and extends and applies to England, Wales and Scotland; paragraph 4 amends the Tribunals Courts and Enforcement Act 2007 and extends and applies to the United Kingdom; and paragraph 5 amends clause 7(1) and so extends and applies to England and Wales, and to Scotland and Northern Ireland in so far as it applies to the First-tier Tribunal and the Upper Tribunal, and to England, Wales and Scotland in so far as it applies to the employment tribunals and the Employment Appeal Tribunal.

⁶ Employment Appeal Tribunal Rules 1993 (SI 1993/2854)

Commentary on provisions of Bill

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

14. Clause 1 provides that there are to be procedural rules (meaning rules of court or tribunal procedure rules) which require parties to civil, family or tribunal proceedings to use the online procedure. The rules are to apply to proceedings specified in regulations made by the Lord Chancellor or, in respect of employment tribunals, the Secretary of State (jointly referred to as the “appropriate Minister”) under clause 2 (having sought the concurrence of the Lord Chief Justice and/or Senior President of Tribunals: “the concurrence requirement”). Rules may provide for all or any part of the procedure for conducting proceedings online, including starting and defending proceedings and participating in hearings. *Subsection (4)* provides that when exercising the power to make rules with a view to securing that rule are accessible and fair, the OPRC must have regard to the needs of those who require support in order to initiate, conduct, progress or participate in proceedings by electronic means in accordance with the online procedural rules. *Subsection (5)* provides for different rules to be made for different kinds of proceedings. *Subsection (6)* enables a person who uses the online procedure to choose whether to do so using digital services or by “non-electronic means”, so enabling them, for example, to send papers to the appropriate court or tribunal, to be scanned and uploaded to the electronic system.
15. *Subsection (7)* provides that the Online Procedure Rules may provide for circumstances in which the rules are not to apply or are to cease to apply to proceedings where so giving effect to regulations made under clause 3(2). This would enable, for example, particularly complex cases to be transferred out of the online procedure to the appropriate court or tribunal and so become subject to the civil, family, or tribunal procedural rules (‘the applicable standard rules’) as appropriate.
16. *Subsection (8)* permits the Online Procedure Rules to provide for circumstances in which rules may apply to proceedings to which the Online Procedure Rules would otherwise cease to apply (“excluded” proceedings), where permitted by regulations made under clause 3(3). This would enable proceedings which, for any reason, might have been required to exit the online procedure, to re-enter at a later stage of the proceedings. *Subsection (9)* permits rules to provide for separate proceedings to be taken in a different court than the normal one and for separate proceedings to be taken together.

Clause 2: “Specified kinds” of proceedings

17. This clause determines the proceedings which may be specified in regulations as subject to the online procedure and Online Procedure Rules. *Subsection (2)* provides a non-exhaustive list of the factors by reference to which proceedings may be specified as coming within the scope of the online procedure, including the legal basis of the proceedings (for example, a breach of contract) and the factual basis of the proceedings (for example, a money claim), and the value of any claim within the proceedings. Regulations made under this clause are subject to the “concurrence requirement”.

Clause 3: Provision supplementing clause 1

18. *Subsection (1)* enables the appropriate Minister to specify the circumstances in which a

These Explanatory Notes relate to the Courts and Tribunals (Online Procedure) Bill [HL] introduced to the House of Lords on 1 May 2019.

party to proceedings may choose whether to use the online procedure or the appropriate alternative civil or family court or tribunal to which the standard rules apply. *Subsection (2)* enables the appropriate Minister to specify the circumstances in which the online procedure should not apply, or cease to apply, to specified proceedings (“excluded proceedings”), while *subsection (3)* enables regulations to specify the circumstances in which such proceedings may, thereafter, again be subject to the Online Procedure Rules, so enabling the rules to provide for alternative procedures under clause 1(7). Regulations made under this clause are subject to the “concurrency requirement”.

Clause 4: Duty to make support available for digitally excluded people

19. This clause requires the Lord Chancellor to arrange for the provision of such support as the Lord Chancellor considers to be appropriate and proportionate, for the purpose of assisting persons to initiate, conduct, progress or participate in proceedings by electronic means, in accordance with the Online Procedure Rules.

Clauses 5 and 6: The Online Procedure Rule Committee and its powers

20. These clauses set out the membership of the OPRC and its powers. It also includes the procedure for appointing members. The OPRC will be independent and will be made up of members of the judiciary, the legal professions and those with expertise in the lay advice sector and IT. The Committee will consist of six members – 3 judicial members appointed by the Lord Chief Justice, and the remainder by the Lord Chancellor. The Lord Chancellor is authorised to reimburse the committee members for travel expenses and out of pocket expenses incurred whilst on committee business. The Committee has the same rule-making powers that are available to the Civil Procedure Rule Committee, the Family Procedure Rule Committee and the Tribunal Procedure Committee and may apply any other procedural rules.

Clause 7: Power to change certain requirements relating to the Committee

21. This clause enables the Lord Chancellor to alter the composition of the OPRC, by amending clause 5, with the concurrence of the Secretary of State, the Lord Chief Justice and the Senior President of Tribunals and following consultation with senior members of the judiciary. As the scope of the Online Procedure Rules increases, it may be necessary to increase its membership or widen its expertise in order to assist in making rules.

Clause 8: Making Online Procedure Rules

22. This clause prescribes the process for making Online Procedure Rules. Before making or amending rules, the Committee must hold a meeting (unless it is inexpedient to do so) whether in person or otherwise, and consult such persons as they consider appropriate, which allows the committee to call on the expertise of non-Committee members to inform discussion about any proposed rule changes. Any rules made by the Committee must be signed by a majority of members before being submitted to the appropriate Minister who may allow or disallow the rules. The Lord Chief Justice may appoint one of the judicial members as chair, who, when making rules, will effectively have the casting vote should the Committee be tied. In deciding whether to allow or disallow rules, the Minister must have regard to the needs of those who require support in order to initiate, conduct, progress or participate in proceedings by electronic means.

Clause 9: Power to require rules to be made

23. The appropriate Minister, with the concurrence of the Lord Chief Justice, may give the OPRC written notice that he or she thinks that the online rules should include provision to achieve a specified purpose. The Committee must make the rules within a reasonable period and in accordance with the procedure for making rules, outlined above in respect of clause 8. Although rarely used, it is a matter of expediency that the appropriate Minister should be able to direct the Committee to make rules, which might be required as a matter of urgency, without additional procedure.

Clauses 10: Power to make amendments to the Online Procedure Rules

24. This clause enables the Lord Chancellor, with the concurrence of the Lord Chief Justice and having consulted the Senior President of Tribunals, to amend, by regulations, primary and secondary legislation in consequence of Online Procedure Rules and to amend primary legislation made prior to the commencement of this clause, or secondary legislation made before the regulations come into force, to facilitate the making of Online Procedure Rules. It is anticipated that this will be used to make minor revisions to legislation in order, for example, to regularise and modernise terminology to match that in new rules.

Clause 11: Consequential and transitional provision etc

25. This clause allows the Secretary of State or Lord Chancellor to make regulations which make consequential, supplementary, incidental, transitional, transitory or savings provision in relation to any provisions of the Bill.
26. Regulations may amend, repeal or revoke primary and secondary legislation, but may only amend, repeal or revoke provision of an Act passed before this Bill is passed or in the same session or any secondary legislation made before the regulations come into force.
27. Under *subsections (3) and (4)*, regulations made under this section will be subject to the negative resolution procedure in Parliament unless they amend primary legislation, in which case they will be subject to the affirmative resolution procedure.

Clause 12: Amendments of other legislation

28. Clause 12 gives effect to Schedule 2.

Clause 13: Regulations

29. This clause provides that regulations under the Bill are to be made by statutory instrument. Regulations made under clauses 2 and 3 are subject to the concurrence requirement.
30. *Subsections (6) and (7)* provide that where regulations are made under this Bill (apart from Commencement regulations), those regulations may make consequential, supplementary, incidental, transitional, transitory or savings provision. *Subsection (6)(a)*

also allows regulations to make different provision for different purposes or areas.

Clause 14: Interpretation

31. Clause 14 defines terms used in this Bill and Schedules 1 and 2.

Clause 15: Short title, commencement and extent

32. Subsection (1) confirms the short title of the Bill.

33. The provisions in clauses 10, 11 and 13 to 15 will come into force on the day that the Bill receives Royal Assent. All other provisions will come into force on such day as the Lord Chancellor or Secretary of State for BEIS may by regulations appoint.

34. *Subsection (4)* allows for regulations to appoint different days for different purposes or areas and to make transitional, transitory or saving provision.

35. *Subsection (5)* sets out the extent of the Bill (see commentary at paragraphs 12 and 13 above and Annex A for further information).

Schedules

Schedule 1: Practice Directions

36. Part 1 of this schedule allows the Lord Chief Justice or his nominee, with the approval of the Lord Chancellor, to issue practice directions in civil and family proceedings to which online procedures apply. The Lord Chancellor's approval of a practice direction is not required where the practice direction consists of guidance about the application and interpretation of the law or the making of judicial decisions. Such directions require consultation with the Lord Chancellor as well as the approval of the Lord Chief Justice. Part 2 of Schedule 1 sets out similar procedures in respect of the First-tier and Upper-tier tribunals and Part 3 of Schedule 1 sets out similar procedures in respect of Employment and Employment Appeal Tribunals (in respect of which, the approval of, or consultation with, the appropriate Minister is required). Practice directions in Parts 2 and 3 which require 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.

Schedule 2: Amendments relating to the online procedure in courts and tribunals

37. Schedule 2 provides amendments to existing legislation as a result of the new online procedure in courts and tribunals. In particular, these amendments provide that the standard civil, family and tribunal procedure rules do not apply to proceedings which are subject to the Online Procedure Rules, but will do so if the Online Procedure Rules should cease to apply. Part 2 contains other consequential amendments.

Commencement

38. Clauses 10, 11, 13, 14 and 15 of the Bill come in to force on the day of which the Act receives Royal Assent. The remaining provisions in the Bill will be brought into force by means of regulations made by the Lord Chancellor or Secretary of State.

Financial implications of the Bill

39. As enabling measures, the provisions in the Bill do not deliver any direct savings. However, they will help drive efficiencies in the system and enable delivery of wider court reform savings of approximately £237m benefits in steady state from 2024/25.

Parliamentary approval for financial costs or for charges imposed

40. The annual running costs for the Online Procedure Rules Committee are expected to be £10,000, which will be met by the Ministry of Justice. With Clause 4 of the Bill, at steady state in 2024/25, Assisted Digital will cost c£5.5m a year (nominal prices, including optimism bias). These are not new costs created by the Bill as HMCTS is committed to offering this service to users and costs are part of the Court Reform Programme. The costs are not divided into jurisdictions and therefore it is not possible to isolate or attribute all costs directly to this Bill.

Compatibility with the European Convention on Human Rights

41. The Lord Chancellor has made the following statement under section 19(1)(a) of the Human Rights Act 1998:
"In my view, the provisions of the Courts and Tribunals (Online Procedure) Bill are compatible with the Convention rights."
42. The Government has published a separate ECHR memorandum with its assessment of compatibility of the Bill's provisions with the Convention rights: this memorandum is available on the Government website:
<https://www.gov.uk/government/publications/courts-and-tribunals-online-procedure-bill>.

Related documents

43. The following documents are relevant to the Bill and can be read at the stated locations:
- Civil Justice Council - Online Dispute Resolution Advisory Group report into Online Dispute Resolution: <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>

- Lord Justice Briggs' report into the Civil Courts Structure:
<https://www.judiciary.gov.uk/civil-courts-structure-review/civil-courts-structure-review-ccsr-final-report-published>

Annex A - Territorial extent and application in the United Kingdom

44. Clauses 1 to 14 and Part 2 of Schedule 1 extend and apply to England and Wales and in part to Northern Ireland and Scotland; Part 3 of Schedule 1 extends and applies to England, Wales and Scotland. Clause 14(5) provides that this Bill extends to England and Wales, and to Scotland and Northern Ireland in so far as it applies to the First-tier Tribunal and the Upper Tribunal; and to Scotland in so far as it applies to the employment tribunals and Employment Appeal Tribunal and otherwise to England and Wales only.⁷

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Clause 1	Yes	Yes	In part	In part	N/A	N/A	N/A	No
Clause 2	Yes	Yes	In part	In part	N/A	N/A	N/A	No
Clause 3	Yes	Yes	In part	In part	N/A	N/A	N/A	No
Clause 4	Yes	Yes	In part	In part	N/A	N/A	N/A	No
Clause 5	Yes	Yes	In part	In part	N/A	N/A	N/A	No
Clause 6	Yes	Yes	In part	In part	N/A	N/A	N/A	No
Clause 7	Yes	Yes	In part	In part	N/A	N/A	N/A	No
Clause 8	Yes	Yes	In part	In part	N/A	N/A	N/A	No
Clause 9	Yes	Yes	In part	In part	N/A	N/A	N/A	No
Clause 10	Yes	Yes	In part	In part	N/A	N/A	N/A	No
Clause 11	Yes	Yes	In part	In part	N/A	N/A	N/A	No
Clause 12	Yes	Yes	In part	In part	N/A	N/A	N/A	No
Clause 13	Yes	Yes	In part	In part	N/A	N/A	N/A	No

⁷ References in this Annex to a provision being within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly are to the provision being within the legislative competence of the relevant devolved legislature for the purposes of Standing Order No. 83J of the Standing Orders of the House of Commons relating to Public Business.

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Clause 14	Yes	Yes	In part	In part	N/A	N/A	N/A	No
Clause 15	Yes	Yes	In part	In part	N/A	N/A	N/A	No
Schedule 1	Yes	Yes	In part	In part	N/A	N/A	N/A	No
Schedule 2	Yes	Yes	In part	In part	N/A	N/A	N/A	No

THE COURTS AND TRIBUNALS (ONLINE PROCEDURE) BILL [HL]

EXPLANATORY NOTES

These Explanatory Notes relate to the Courts and Tribunals (Online Procedure) Bill [HL] as brought from the House of Lords on 3 July 2019 (HL Bill [AUTOGENERATED]).

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These Explanatory Notes relate to the Courts and Tribunals (Online Procedure) Bill [HL] introduced to the House of Lords on 1 May 2019.