

Judicial Review and Courts Bill

Equalities Statement

Policy change summary

1. This Equality Statement considers the impact of the Government's proposals to legislate for several judicial review and court procedure measures, as set out below.

Judicial Review

2. The substantive proposals that MoJ intends to pursue in respect of reform of judicial review are:
 - a. A narrow ouster clause to overturn the *Cart* decision and oust from the jurisdiction of the High Court (and High Court of Northern Ireland and Court of Session in certain circumstances) decisions of the Upper Tribunal in respect of applications for permission to appeal from the first-tier Tribunal, except on jurisdictional grounds and where there has been severe procedural unfairness;
 - b. Providing the courts with two new mechanisms for modifying quashing orders as a means of adding remedial flexibility in judicial review cases. The two new modifications will:
 - i. Give the Courts a discretion to suspend Quashing Orders for a period of time in certain circumstances. This discretion will include a non-exhaustive list of factors to consider.
 - ii. Give the Courts a discretion to provide prospective-only remedies. This will include a list of non-exhaustive factors to consider.
3. The policy intention behind proposal (i) is to eliminate a significant inefficiency in the system. Since coming into being in 2012 the proportion of *Cart* JRs in which the claimant has received a successful outcome is very low when compared to the proportion in other types of JR. Therefore, it is difficult to justify continuing to direct significant resource at such a large number of cases for a very small number of successful outcomes.
4. The policy intention behind (ii) is to create additional flexibility for the courts in terms of the remedies available to them in judicial review cases. Presently the courts can quash an unlawful action/decision or they can simply issue a declaration of unlawfulness but leave the unlawful action/decision in place. Our approach will allow the courts to be more nuanced in ordering remedial action in response to successful judicial review claims.

Criminal Courts

5. The Bill contains a number of criminal court measures which seek to help address the backlog across the criminal courts, and continue to modernise the delivery of justice and improve efficiency. This will be achieved by providing for greater jurisdictional flexibility in the allocation of cases, streamlining preliminary steps in criminal proceedings and removing unnecessary hearings, saving court time and reducing delay.

6. To achieve these objectives, the following criminal court measures are included in the Bill:
 - a. Introducing a new automatic online conviction and standard statutory penalty (AOCSSP) procedure, which will give defendants who wish to plead guilty and accept a specified fine to minor summary-only (SO), non-imprisonable offences, the option to have their entire case resolved online without the involvement of the court.
 - b. Making greater use of the Common Platform by providing defendants with the option to indicate a plea and engage with the trial allocation decision procedure (to establish the most suitable venue for trial) for triable either-way (TEW) cases in writing/online, without the need for a magistrates' court hearing.
 - c. Providing magistrates' courts with the opportunity to bypass the trial allocation decision procedure for TEW cases by providing defendants with an earlier additional opportunity to elect for jury trial at Crown Court.
 - d. Enabling magistrates' courts to proceed with the trial allocation decision procedure for TEW cases in the absence of defendants who fail without good cause to appear at court for their allocation hearing.
 - e. Enabling magistrates' courts to direct indictable cases to the Crown Court for trial or for sentencing, without the need for a first hearing at magistrates' court where appropriate.
 - f. Enabling the Crown Court to return TEW cases to back to magistrates' court for trial (with a defendant's consent) or for sentencing where the Crown Court considers that magistrates have jurisdiction.
 - g. Removing the jurisdictional boundaries of magistrates' courts, known as local justice areas (LJAs), which currently restrict work and magistrates from being moved easily between courts in different areas.
 - h. Enabling documents to be served in accordance with the Criminal Procedure Rules (CrimPR), so that the most appropriate means of service (including by electronic means via the Common Platform) can be used.
 - i. Enabling written applications for witness summonses and the lifting of reporting restrictions to be determined without the need for a hearing, so that decisions can be made on the papers instead.
 - j. Creating a power for Ministers to vary, by regulations, the limit on magistrates' court sentencing powers, between maxima of 6 months and 12 months imprisonment.

Online Procedure Rule Committee (OPRC)

7. Legislate to establish an Online Procedure Rule Committee (OPRC) that would be able to make Online Procedure Rules in relation to civil and family proceedings and tribunals (including Employment Tribunals).

Coroner's courts

8. The Bill contains five measures which will streamline processes in coroner's courts, saving time and money for local authority run coroner services and supporting coroner's courts' recovery post Covid-19.
9. These measures will allow :
 - a. Discontinuance of an investigation where a natural cause of death becomes clear before an inquest;
 - b. Power to conduct non-contentious inquests in writing;
 - c. Rules to be made permitting audio or video links at inquests;
 - d. Suspension of requirement for jury at inquest where coronavirus (as a notifiable disease) is suspected to be the cause of death ;

Phased transition to new coroner areas. ***Registration of Deaths***

10. The Bill will contain provision to help ensure all deaths are registered, by enabling a registrar to request registration information from a coroner where they have discontinued an investigation, issued paperwork to facilitate disposal of the body and a qualified informant (ordinarily a family member of the deceased) is subsequently unable or unwilling to come forward to provide the relevant information.

Employment Tribunals

11. The Bill will contain measures to transfer the responsibility for the making of Employment Tribunals (ETs) procedure rules from the Secretary of Business, Energy and Industrial Strategy to the Tribunal Procedure Committee (TPC) and transfer responsibility for procedure rules in the Employment Appeal Tribunal (EAT) from the Lord Chancellor to the TPC.
12. Alongside this, the bill contains provisions to widen rule-making powers for the ET and EAT to better match the TPC's existing rule making powers for the unified system. It also provides for two additional members to be appointed to the TPC; the delegation of judicial functions to legal officers; ; making the Lord Chancellor responsible for laying down the statutory framework governing composition of the employment tribunals and EAT.; and transferring responsibility for the remuneration of ET judges to the Lord Chancellor.

Pro bono costs orders

13. The Bill will extend the effect of section 194 of the Legal Services Act 2007 to allow pro bono costs orders to be made in the First-tier Tribunal, the Upper Tribunal, an employment tribunal, the Employment Appeal Tribunal and the Competition Appeal Tribunal. The Bill will also create a power for the Lord Chancellor to add further tribunals to the list of tribunals in which pro bono costs orders can be made through secondary legislation.

14. The Bill also makes pro bono costs orders available in leap-frog appeals directly from the Upper Tribunal to the Supreme Court and also in appeals to the Supreme Court from appeal courts in Northern Ireland.
15. The Bill allows the Access to Justice Foundation to continue acting as the “prescribed charity” in relation to existing section 194 of the Legal Services Act 2007, as well as to be the “prescribed charity” for the purposes of new sections introduced by the Bill. However, it also allows for the possibility of prescribing a different UK-wide charity in the future, to cover for any eventuality in which that could conceivably become necessary.

City of London Courthouses

16. The HMCTS and the City of London Corporation have reached agreement on a scheme where two courthouses and accommodation are to be closed and replaced by a new combined courthouse and accommodation on a different site. The new court building will provide significantly improved court provision in the Square Mile, suitable for the needs of modern justice.
17. Technical changes to legislation are required to repeal provisions which currently place duties on the Corporation to provide county and magistrates court capacity at the current locations. Although the Bill will only facilitate this technical change, due consideration has been made to the Public Sector Equality Duty for the construction of the new court building, and those considerations are referenced below.

Equality duties

18. Section 149 of the Equality Act 2010 (“the Act”) requires Ministers and the Department, when exercising their functions, to have ‘due regard’ to the need to:
 - a. eliminate unlawful discrimination, harassment, victimisation and any other conduct prohibited by the Act;
 - b. advance equality of opportunity between different groups (those who share a relevant protected characteristic and those who do not); and
 - c. foster good relations between different groups (those who share a relevant protected characteristic and those who do not).
19. In carrying out this duty Ministers and the Department must pay “due regard” to the nine “protected characteristics” set out in the Act, namely: race, sex, disability, sexual orientation, religion or belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

Equality considerations

Direct discrimination

Judicial Review

20. The proposal to overturn the *Cart* decision applies uniformly to everyone and we do not consider that the proposals would result in people being treated less favourably on account of any particular protected characteristic. We therefore do not consider there is a risk of direct discrimination as a result of the policy to overturn the *Cart* decision and oust from the jurisdiction of the High Court (and High Court of Northern Ireland and Court of Session in certain circumstances) decisions of the Upper Tribunal in respect of applications for permission to appeal from the first-tier Tribunal except on jurisdictional grounds and where there has been severe procedural unfairness.
21. The proposal to introduce the additional remedial flexibility applies uniformly to everyone and we do not consider that the proposals would result in people being treated less favourably on account of any particular protected characteristic. We therefore do not consider there is a risk of direct discrimination as a result of the policy

Criminal Courts

22. We do not consider that any of the criminal court measures in this Bill will result in people being treated less favourably because of their protected characteristics, as they will apply equally to those with and without protected characteristics. There is therefore no direct discrimination within the meaning of the Equality Act.

Registration of Deaths

23. We do not consider that the provision enabling registrars to request information for a death registration from coroners will result in people being treated less favourably because of their protected characteristics, as they will apply equally to those with and without protected characteristics. There is therefore no direct discrimination within the meaning of the Equality Act.

Employment Tribunals

24. We do not consider that any of the Employment Tribunal measures in this Bill will result in people being treated less favourably because of their protected characteristics. While it cannot be known what rules the Tribunal Procedure Committee will seek to amend or introduce, the intent of the change is to allow for a quicker response to the need to introduce, amend or revise ET procedure rules. These will apply equally to those with and without protected characteristics. There is therefore no direct discrimination within the meaning of the Equality Act.

Pro Bono Costs Orders

25. We do not consider that the pro bono costs orders provision in this Bill will result in people being treated less favourably because of their protected characteristics, as they will apply equally to those with and without protected characteristics. There is therefore no direct discrimination within the meaning of the Equality Act.

Coroner's Courts

26. The coroner's courts measures will apply to all coroner's courts, and we expect the Chief Coroner will provide further guidance to all coroners to ensure that they fully understand them. We do not consider that any of the coroner's courts measures in this Bill will result in anyone being treated less favourably because of any protected characteristics, as they apply equally to those with or without protected characteristics. There is therefore no direct discrimination within the meaning of the Equality Act.

City of London Courthouses

27. We do not consider that any of the City of London Courthouses measure in this Bill will result in people being treated less favourably because of their protected characteristics.

Indirect discrimination

Judicial Review

28. The definition of indirect discrimination under the Equality Act 2010 is where a provision, or practice in relation to a relevant protected characteristic, is applied uniformly (to everyone), but has the effect of putting those with the protected characteristic at a particular disadvantage when compared to those who do not share the protected characteristic. The removal of the *Cart* JR route is applied uniformly to any attempt to challenge a permission to appeal decision of the UT regardless of the subject matter at issue, the chamber of the First-tier Tribunal from which the appeal originates, or the protected characteristics of the claimant.
29. We acknowledge, on the basis of the evidence and analysis above, that there will potentially be a large number of claimants with certain protected characteristics of race and religion or belief in the affected group - i.e. those who are presently entitled to bring *Cart* JRs and would no longer be able to. However, these indirect impacts are likely to be very small given the low number of these cases in which the claimant achieves a successful outcome. We further consider that the policy will achieve significant efficiency gains in the justice system from administering and deciding on the huge number of unsuccessful claims brought through this route. We therefore consider overall that the policy is a proportionate means of achieving our legitimate aim of tackling inefficiency in the system.
30. Regarding introducing additional remedial flexibility, we do not anticipate any indirect discrimination from these proposals since they are not likely to put anyone with a protected characteristic at a particular disadvantage

when compared to those who do not share the protected characteristic. Whilst we do not have data on this, we are not aware that any particular groups with specific protected characteristics bring judicial reviews any more frequently than the general population at large or that where they do bring such cases the courts will be any more or less likely to apply the additional remedial flexibility as opposed to applying a remedy that existed previously. We are also aware that there may be a possibility of other differential impacts on those with particular protected characteristics, for example where non-governmental organisations bring challenges that end up with a different outcome than they might have had previously that impacts on third parties within the group of individuals they represent. Overall, however, we do not consider that the changes from these proposals would likely result in any particular disadvantage in relation to any of the protected characteristics.

Criminal Courts

31. We do not believe that any of the criminal court measures in this Bill will result in any indirect discrimination since the proposals are not considered likely to cause any particular disadvantage to people with protected characteristics compared to those who do not. However, as is the case more generally across England and Wales, there is over-representation of certain people in the criminal justice system with protected characteristics, which will affect some of the proposed measures. The majority of our analysis below is based on data from 2019 as this is the best pre-pandemic measure for the impact the criminal court provisions will have.
32. Despite the above, we do not expect these changes to have a negative impact on any particular group, as the majority of these measures are designed to make the criminal court process easier for all court users by offering additional ways in which people can engage with the court that will significantly improve user experience and reduce user costs. Furthermore, we consider the proposals are a proportionate means of achieving the legitimate aim of supporting members of the public to obtain justice more swiftly, whilst reducing the costs of the courts to the taxpayer.
33. We do recognise that the digitisation and automation of Her Majesty's Courts and Tribunal Service (HMCTS) systems could indirectly affect users according to protected characteristics. For example, such changes have the potential to have adverse effects on the basis of age, disability, and ethnicity (linked to socio-economic disadvantage) to the extent that some groups are less internet or digitally enabled than others. We will be mitigating these effects by ensuring that there is reasonable provision of assisted digital support for those who may struggle or would not otherwise be able to use the service.

Introduce a new automatic online conviction and standard statutory penalty process:

34. The new AOCSSP will be an entirely optional process and will only be available to adults who wish to plead guilty. However, in addition to the digital and automated nature of this process indirectly affecting users according to protected characteristics, it has another potential effect on those with protected characteristics with regard to income. The standardised nature of the penalties issued by this new process will mean that those on a higher income may be offered the option of a lower fine than

they would under the current procedure. Those on a lower income could not be means tested under this new procedure and may therefore be offered the option of a higher fine than they would receive under the current procedure.

35. This issue is likely to affect those with protected characteristics, such as disability, race and sex, who are disproportionately found to have lower incomes. However, the automatic online system will provide defendants with all the information they need in order to make an informed decision, which include full details of the prospective penalty. They will also be made aware that the penalty amount could be different if they were to opt out of this online system, and the factors that a magistrate would take into account when determining the penalty amount (such as the defendant's means) would also be made clear. As such, defendants on a lower income should be motivated to opt out of this new online system.
36. This new online process will only be available to defendants who wish to plead guilty, and we know from the Lammy Review that Black defendants have little trust in the Criminal Justice System (CJS). As such, where an out of court disposal (OOCd) hinges on an admission of guilt, this can mean some people would be less likely to admit guilty and therefore receive an early intervention via an OOCd, and more likely to be prosecuted. There is therefore a risk that this may indirectly discriminate against those who are Black since this online process will not be an option without an admission of guilt. Work is ongoing to help improve Black defendants' trust in the criminal justice system through the implementation of Lammy Review provisions.

Alternative written/online pre-trial procedures for indication of plea and trial allocation:

37. In addition to ensuring that there is assisted digital support for those who may struggle with or would otherwise not be able use these alternative written and online procedures, these measures include a number of features and safeguards that will further mitigate any indirect effects on users with protected characteristics.
38. For example, it will be completely optional for defendants to indicate a plea or have the allocation decision for their case dealt with in writing/online. Therefore, where a defendant is invited to proceed with the new online procedures for plea and allocation in writing/online but does not want to opt-into the new process (or fails to engage with it), they will be required to attend a traditional court hearing as normal. Moreover, defendants will not have direct access to the online procedure for indication of plea and allocation because they will need to instruct a legal representative to do this on their behalf, who will ensure they fully understand the process and will be able to identify any vulnerabilities.
39. In 2019, 2% of defendants proceeded against at magistrates' court (including youth court) and 2% of defendants dealt with at the Crown Court were under the age of 18 years. The alternative written/online procedures will be applicable to children in the criminal courts, and as we have given consideration to whether the measures would be discriminatory to them. When a defendant of any age makes their first appearance at court having provided a written/online indication of plea, the court will ensure that they have understood the charges and the implications of the plea before

proceeding any further; and this process will be especially important for defendants under the age of 18 years.

40. Considering their age and immaturity, alongside what we know about risk factors that can increase the likelihood of offending behaviour, there is a particular emphasis on communication with and participation of children in court proceedings in the youth justice system. Courts will, unless it is unreasonable to do so, make holders of parental responsibility aware of pre-trial matters being dealt with in writing/online for defendants under the age of 16 years (and consider making them aware for defendants aged 16 – 17 years). Furthermore, such matters that would proceed through the youth court, will continue to do so.

Enabling allocation of TEW cases in the absence of defendants who fail to appear at court without good cause:

41. The current law requires that defendants prosecuted for TEW cases who are taken to be pleading not guilty must appear at a magistrates' court hearing in order for the court to reach a trial allocation decision as to whether the case should be tried summarily in a magistrates' court or by a jury in the Crown Court. There are only a few exceptions to this rule such as, if a defendant's disorderly conduct before the court means it is not practicable to proceed in their presence or if they have consented to a legal representative proceeding on their behalf. This means that the timely progression of a case through the criminal justice system (CJS) can stall indefinitely if a defendant fails to appear at the hearing because they abscond on bail or refuse to leave their cell when held on remand in custody; creating uncertainty and lengthy waiting times for victims and witnesses of crime. The Bill will amend the law so that magistrates' courts will be able to allocate TEW cases for trial when a defendant fails to appear at court in a wider range of circumstances where that is in the interests of justice.
42. The MoJ and HMCTS currently publish experimental statistics on failure to appear arrest warrants issued by magistrates' courts when a defendant fails to appear for a hearing.¹ Whilst these statistics do not currently provide a breakdown of defendants by protected characteristics, nor do they provide information about the stage in the proceedings at which the defendant failed to appear, they do provide a general idea of the number of occasions defendants fail to appear at magistrates' court. The numbers of failure to appear warrants issued by magistrates' courts across England and Wales fell from around 92,000 in 2010 to just under 75,000 in 2012, and since then has remained broadly stable at between 70,000 and 77,000. In the 12 months to December 2019, there were approximately 509,000 hearings in magistrates' courts for TEW offences, of which 9% (just over 46,000) resulted in the issue of a failure to appear warrant.²

¹ See 'Experimental Statistics: FTA warrants report and tables' available at *Criminal court statistics quarterly: October to December 2019* - GOV.UK (www.gov.uk)

² A hearing is counted each time a case has been listed in a courtroom session, regardless of whether the defendant is required to attend the hearing. For example, single justice notice cases listed for first hearing do not require defendant attendance or a physical hearing in a courtroom. Also, where a

43. However, the MoJ also publish criminal justice statistics on the remand status of defendants in England and Wales, which includes data about those defendants who failed to appear at court.³ Whilst this data can be broken down further by ethnicity, it still cannot tell us at which stage in the proceedings the defendant failed to appear (for example, if they failed to appear at a sentencing hearing having previously appeared for the allocation hearing and trial). Of the 250,387 adult defendants scheduled to appear at magistrates' court for a TEW offence in 2019, 41,968 defendants had a recorded outcome of failing to appear.⁴ Further analysis of this data provides us with a rough indication of the proportion of adult defendants within each ethnic group who fail to appear at magistrates' court for TEW cases; 17% of White defendants, 16% of Chinese and Other defendants, 15% of Black defendants, 15% of Mixed defendants, and 12% of Asian defendants. The proportions are closely aligned, with White defendants more likely to fail to appear than any other ethnic group.
44. The MoJ also publish data on defendant's election rates for jury trial at Crown Court.⁵ The majority of defendants prosecuted for TEW offences who are sent to the Crown Court for a jury trial are sent there by a magistrates' court rather than by the defendant electing, with magistrates' courts sending 32,262 defendants prosecuted for TEW offences to the Crown Court for a jury trial in 2019. With regards to TEW offences where a magistrates' court did not send the case to the Crown Court for a jury trial, 5,277 defendants elected for their case to be tried by a jury at Crown Court that same year.
45. However, despite the above, we know that the election rate differs between ethnic groups; approximately 16% of Black defendants, 15% of Asian defendants, and 13% of 'Chinese or Other' defendants elected to have their TEW offence tried by a jury at the Crown Court in 2018. This 3 to 6 percentage points higher than the election rate for White defendants recorded at 10%.⁶ Therefore, given that an allocation hearing is an adult defendants primary opportunity to elect for a jury trial, this particular measure may pose a risk of indirect discrimination against Black, Asian, and 'Chinese or Other' defendants. However, we consider this measure to be a proportionate means of achieving the legitimate aim of supporting members of the public to obtain justice more swiftly, as it will prevent defendants who abscond and/or disengage from criminal proceedings from delaying justice in the hope that victims and witnesses will withdraw their support for the prosecution. Furthermore, this measure will include multiple features and safeguards that will significantly mitigate the risk of indirect discrimination as detailed below.

case is listed for a hearing in a morning session and is adjourned to an afternoon session at the same court on the same day, each hearing will be counted.

³ See 'Remands: Magistrates' Court Data Tool' available at *Criminal justice system statistics quarterly: December 2019 - GOV.UK* (www.gov.uk)

⁴ Please note that defendants who were recorded as failing to appear may be double counted in the data if their case was subsequently completed in the same calendar year.

⁵ Published data available at <https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-january-to-march-2020>

⁶ See page 38 of the *Statistics on Race and the Criminal Justice System 2018* (publishing.service.gov.uk)

46. First, where a magistrates' court allocated a case in the defendant's absence for summary trial at magistrates' court, the defendant will be assumed to have plead not guilty and will retain the right to elect for a jury trial up until the start of the summary trial depending on the reasons why they failed to attend and if it was in the interest of justice. Defendants with legitimate reasons for failing to appear will therefore, still have the opportunity to elect before a summary trial commenced. In cases where a magistrates' court allocated a case in the defendant's absence for trial at Crown Court, the defendant would not have been asked to consent to this decision even if they had appeared at the hearing, as consent is never required.
47. Second, magistrates' courts will have the discretion to adjourn the proceedings instead of proceeding in absence on a case-by-case basis (for example, by issuing a failure to appear warrant for their arrest), so that allocation decision can be dealt with in the defendant's presence at a later court hearing where the court considers this to be more appropriate.
48. Third, there will be a number of existing means of legal recourse available to defendants where the case proceeds in their absence. For example, if a defendant is not aware of a criminal prosecution that is brought against them through a summons or requisition until after a magistrates' court began to try the case, they will be able to make a statutory declaration to restart the proceedings from the very beginning, which will provide them with another opportunity to elect for a jury trial.⁷ Magistrates can revoke a conviction at any time if they consider it has been made in error, including where a defendant was not at fault in not attending. Defendants will also retain their right to apply to the court to re-open a conviction, or appeal any conviction to the Crown Court.
49. Finally, although children do not have the same right as adults to elect for a jury trial at Crown Court, this measure will provide for the allocation of children's case in their absence that acknowledges their increased vulnerability in the CJS and thus, features the additional safeguards present in the youth justice system. Courts will, unless it is unreasonable to do so, make holders of parental responsibility aware of pre-trial matters being dealt with in writing/online for defendants under the age of 16 years (and consider making them aware for defendants aged 16 – 17 years). Furthermore, such matters that would proceed through the youth court, will continue to do so.

Enabling certain cases to be returned to the magistrates' court for trial or sentencing:

50. In cases where the defendant has been charged with a TEW offence, it is proposed that the Crown Court should be able to return such cases to a magistrates' court in certain circumstances. It is expected that this policy will affect more males should cases move from the Crown Court to the magistrates' court, with 90% of TEW offences heard at the Crown Court in 2020 involving males.⁸ This could arguably have an impact on defendants,

⁷ See section 14 of the Magistrates' Court Act 1980.

⁸https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/987717/prosecutions-and-convictions-2020.xlsx

as when it comes to acquittal and conviction rates, MoJ statistics show that magistrates' courts have a higher conviction rate for TEW offences when compared with jury trials at the Crown Court. However, with the mitigation that a defendant would have to consent to have their case sent back to the magistrates' court for trial, we do not believe the effect of this measure will cause any disadvantage to this group.

The removal of LJAs:

51. The boundaries between the existing 75 local justice areas mean that court users cannot always attend the magistrates' court closest to them because it sits within another LJA. These boundaries also make it difficult to transfer defendants' cases to a court in a different LJA, which may have more listing time available. This means that cases are not always heard at the earliest opportunity or at the most convenient court location.
52. With the removal of LJAs, the barriers which could have increased both the time and distance travelled for victims and witnesses will no longer exist. As a result, we expected individuals across all the protected characteristics to benefit equally.

Variable limit for magistrates' courts sentencing powers

53. This measure is designed to complement existing legislation which extended magistrates' courts sentencing powers from a maximum of 6 months to 12 months imprisonment for a single TEW offence. The measure will allow for the sentencing limit to be varied back to 6 months should the need arise, or increased again to 12 months if identified issues are addressed.
54. This measure is intended to provide flexibility in the future, should significant unsustainable pressures on the criminal justice system or unforeseen impacts on defendants arise as a direct result of extending magistrates' courts sentencing powers. This measure therefore provides mitigation against any potential discriminatory impacts of extending sentencing powers.
55. A separate full Equality Impact Assessment was published at the time of commencement of these powers.

Online Procedure Rule Committee

56. We do not believe that the proposed OPRC will result in any indirect discrimination against users of the justice system, since it is not considered likely to result in a worse effect for people with protected characteristics. The OPRC would be responsible for drafting rules to underpin the new online procedure. Although it is not possible to pre-empt what rules the committee will make, it is the policy intention that they will make the process easier for all court users by removing unnecessary complexity and making rules easier to follow for non-lawyers. We are aware that there may be some users who may not have the means or skills to access digital services. As a result, we will provide these users with assisted digital support designed to prevent those who have difficulty engaging with digital services from being excluded.

Employment Tribunals

57. We do not believe that any of the Employment Tribunal measures will result in any indirect discrimination since the proposals are not considered likely to cause any particular disadvantage to people with protected characteristics compared to those who do not. While it cannot be known what rules the Tribunal Procedure Committee will seek to amend or introduce, the intent of the change is to allow for a quicker response to the need to introduce, amend or revise ET procedure rules and we expect individuals across all the protected characteristics to benefit equally from these changes.

Pro Bono Costs Orders

58. We do not consider that the pro bono costs orders provision will lead to any indirect discrimination as the measure is unlikely to put anyone with a protected characteristic at a particular disadvantage when compared to those who do not share the protected characteristic. We do not hold evidence to suggest the policy would impact some groups more than others.

Coroners' Courts

59. We do not believe that the following coroner's courts measures will lead to any indirect discrimination as they are unlikely to put anyone with a protected characteristic at a particular disadvantage when compared to those who do not share the protected characteristic :
- Discontinuance of an investigation where the cause of death is natural and becomes clear before an inquest;
 - Power to conduct non-contentious inquests in writing;
 - Suspension of requirement for jury at inquest where coronavirus suspected as the cause of death;
60. We recognise that the implementation of the measure to allow rules to be made permitting the use of audio and video links at inquests could potentially indirectly disadvantage people with a protected characteristic compared to those without.
61. When devising the rules which will permit the use of audio and video links at inquests, we will consider any equality issues further and in particular, mitigate any impacts among particular groups who may be at a disadvantage.
62. We will also work with the Chief Coroner to ensure that the rules permitting the use of audio and video links at inquests and guidance to coroners addresses any concerns.
63. In relation to phased transition to new coroner areas, there would be a bespoke consultation which would need to consider and respond to any equality issues raised (e.g. accessibility).

The policy intent of the measures is to reduce unnecessary processes in coroner's courts and minimise the distress of bereaved people regardless of their protected characteristics status.

Registration of Deaths

64. We do not believe that the proposed changes to facilitate a death registration through information from the coroner will result in any indirect discrimination since the proposal is not considered likely to cause any particular disadvantage to people with protected characteristics compared to those who do not. The intent of the change is to help ensure that all deaths are registered and additionally the measure will provide support for the bereaved as more deaths may now be registered where qualified informants are unable or unwilling to come forward.

City of London Courthouses

65. We do not believe that the City of London Courthouses measure will result in any indirect discrimination since the proposals are not considered likely to cause any particular disadvantage to people with protected characteristics compared to those who do not. There is no aspect of the new Courthouse that, compared to the courts it replaces, would adversely impact those of any particular group.

Discrimination arising from disability and duty to make reasonable adjustments

Judicial Review

66. As identified above there is the potential for those with the protected characteristic of disability to be impacted by this policy proposal to the extent that there are currently any successful *Cart* JRs that emanate initially from appeals to the Social Entitlement Chamber of the FtT. Our analysis suggests that in the event that there are currently successful challenges in relation to disability they are extremely rare – Since 2012, 8 non-immigration *Cart* JRs have been successful in the High Court which is a proportion of 1.7%. Therefore the highest possible proportion of successful non-immigration *Cart* JR applications is 1.7% even if one assumes all 8 of these JRs resulted in the Upper Tribunal hearing in favour of the claimant at their appeal. As a result we consider the policy a proportionate means of achieving our objective.
67. While it is possible that claimants with disabilities may be bringing judicial reviews where the courts could apply the new remedies, if the nature of the claimant's disability and the nature of the claim are such that one of the new remedies would be discriminatory the courts will still have the discretion to apply other remedies that already exist in those circumstances. We will continue to ensure reasonable adjustments are made for court and tribunal users and staff.

Criminal Courts

68. We recognise that it remains important to continue to make reasonable adjustments for courts and tribunals users, court staff and the judiciary with disabilities, to help ensure that appropriate support is given to enable

fair access to justice.

69. The proposal to provide Assisted Digital support for future online and digital procedures is a reasonable adjustment in itself. Participants with certain disabilities may in fact find that proposed measures have a positive impact as they will reduce the need to travel to court unnecessarily. The number of disabled people using the internet is increasing; statistics show that in 2020, the number of disabled adults who were recent internet users reached almost 11 million for the first time, accounting for 81% of disabled adults.⁹
70. However, the assisted digital services will address the digital access needs of individuals who are unable to engage with online services, ensuring they can still access justice, and will mitigate any risk of discrimination arising from digitising our services.

Online Procedure Rule Committee

71. The proposal to provide Assisted Digital support for future online and digital procedures is a reasonable adjustment in itself. We recognise that it remains important to continue to make reasonable adjustments for courts and tribunals users, court staff and the judiciary with disabilities, to help ensure that appropriate support is given to enable fair access to justice. Participants with certain disabilities may in fact find that proposed measures have a positive impact as they will reduce the need to travel to court unnecessarily. The assisted digital services will address the digital access needs of individuals who are unable to engage with online services, ensuring they can still access justice, and will mitigate any risk of discrimination arising from digitising our services. This proposal is therefore considered an appropriate means to achieving our legitimate aim of modernising the courts and tribunals system and delivering a service which is more accessible for everyone.

Employment Tribunals

72. We do not consider there to be a risk of discrimination arising from disability and/or a duty to make reasonable adjustments as a result of these measures.

Pro Bono Costs Orders

73. We do not consider there to be a risk of discrimination arising from disability and/or a duty to make reasonable adjustments as a result of these measures.

Coroner's Courts

74. Implementing the provision to allow rules to be made permitting the use of audio and video links at inquests may lead to possible risk of discrimination arising from disability. However, we will mitigate this risk by working with the Chief Coroner to ensure that guidance to coroners takes

⁹<https://www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/bulletins/internetusers/2020>

account of the need to consider bereaved families' concerns on remote hearings when directing use of this provision.

75. We do not consider that either a risk of discrimination arising from disability or a duty to make reasonable adjustments arises in relation to the other coroner measures.

Registration of Deaths

76. We do not consider there to be a risk of discrimination arising from disability and/or a duty to make reasonable adjustments as a result of this provision.

City of London Courthouses

77. Given the historic nature of the current county and magistrates' courts, and the legal requirement for the new building to comply with Equality Act legislation, the new facilities will present a significant improvement for staff, judges and users.

78. Lifts will be provided in the central atrium to give access to all public areas as well as separate secure lifts for jurors and judiciary with large walking areas to allow for wheelchair users to navigate. All lifts will be designed to ensure they are fit for purpose, accessible and do not discriminate against any disability. As part of the fire exit strategy some lifts will be designed to enable the emergency evacuation of wheelchair users and other disabled people who need to use a lift to exit the building. The court design layout will include a number of disabled and ambulant toilets to support those with additional needs. Access to all courtrooms for judicial office holders, jurors and witnesses will be provided via means of ramped walkways with handrails designed to accommodate wheelchair accessibility. On the public side of the building all areas will be at the same level, giving unencumbered access. Therefore, we do not consider there is a risk of discrimination arising from disability.

Harassment and victimisation

Judicial Review

79. We do not consider there to be a risk of harassment or victimisation as a result of the policy to remove the *Cart* JR route. It is worth making clear that under our proposals the High Court (and High Court of Northern Ireland / Court of Session in certain circumstances) will retain jurisdiction to hear a judicial review against a decision of the UT to refuse permission to appeal on the basis of serious procedural error. So in the unlikely event that a claimant has not been treated fairly by the system or there are legitimate grounds to suggest a decision maker is biased against a claimant in taking a decision there will still remain a residual ground of judicial review.

80. We do not consider there to be a risk of harassment or victimisation as a result of the policy to introduce additional remedial flexibility in Judicial Review proceedings.

Criminal Court provisions

81. We do not consider there to be a risk of harassment or victimisation as a result of these measures.

Online Procedure Rule Committee

82. We do not consider there to be a risk of harassment or victimisation as a result of these new measures.

Employment Tribunals

83. We do not consider there to be a risk of harassment and/or victimisation as a result of these measures.

Pro Bono Costs Orders

84. We do not consider there to be a risk of harassment and/or victimisation as a result of these measures.

Coroner's Courts

85. We do not consider there to be a risk of harassment or victimisation as a result of these measures., when implemented.

Registration of Deaths

86. We do not consider there to be a risk of harassment or victimisation as a result of these new measures.

City of London Courthouses

87. We do not consider there to be a risk of harassment and/or victimisation as a result of these measures.

Advancing equality of opportunity

Judicial Review

88. We do not consider that the judicial review proposals would have any significant impact on the achievement of this objective.

Criminal Courts

89. Consideration has been given to how the proposals impact on the duty to advance equality of opportunity, and we do not believe it is likely to be of particular relevance to these measures. However, one of the effects of removing LJAs is that magistrates and court users will be able to attend courts which are closer to where they live, because allocation of cases will not be restricted by the LJA boundaries.

Online Procedure Rule Committee

90. We have considered the objective of advancing equality of opportunity, and we have concluded that it is unlikely to be of particular relevance to this proposal.

Employment Tribunals

91. We do not consider that these measures would have any significant impact on the achievement of this objective.

Pro Bono Costs Orders

92. We do not consider that these measures would have any significant impact on the achievement of this objective.

Coroner's Courts

93. We do not consider that these measures would have any significant impact on the achievement of advancing equality of opportunity.

Registration of Deaths

94. We do not consider that revised provision enabling coroners to provide information for a death would have any significant impact on the achievement of this objective

City of London Courthouses

95. We have considered the objective of advancing equality of opportunity, and although this legislative measure itself will not impact this objective, the subsequent building will. Due consideration has been paid to each protected characteristic in the design process, including, but not limited to: the facilities for disabled court users outlined above, provision for young families and older people (such as signage), gender-neutral toilets and provision of baby changing facilities.

Fostering good relations

Judicial Review

96. We do not consider that the judicial review proposals would have any significant impact on the achievement of this objective.

Criminal Courts

97. Consideration has been given to how the proposals impact on the duty to advance the fostering of good relations between people who have a protected characteristic and those who do not; however, it is unlikely to be of any relevance to the proposed measures.

Online Procedure Rule Committee

98. We do not consider that the OPRC proposals would have any significant impact on the achievement of this objective.

Employment Tribunals

99. We do not consider that these measures would have any significant impact on the achievement of this objective.

Pro Bono Costs Orders

100. We do not consider that these measures would have any significant impact on the achievement of this objective.

Coroner's Courts

101. We do not consider that these measures would have any significant impact on the achievement of this objective.

Registration of Deaths

102. We do not consider that the OPRC proposals would have any significant impact on the achievement of this objective.

City of London Courthouses

103. We do not consider that these measures would have any significant impact on the achievement of this objective.

Mitigation

Criminal Courts

104. As previously detailed in the relevant sections of this EIS above, the criminal court measures will feature a number of features and safeguards that will mitigate any indirect discrimination against people with protected characteristics. This includes ensuring that there is a reasonable provision of assisted digital support for those who may struggle or would not otherwise be able to use these new online processes; the requirement for a legal representative in order to access the new online procedures for indication of plea and allocation in writing/online; ensuring that defendants will always have the right to request a traditional court hearing as normal; and the variable limit for magistrates' courts sentencing powers.

Equality Impact analysis

Judicial Review

i. Ouster to overturn the *Cart* decision

1. *Cart* JRs can emanate from challenges to a decision of the Upper Tribunal in respect of permission to appeal from any of the seven first tier-tribunals that make up the unified tribunal system. These are:
 - a. War Pensions and Armed Forces Compensation Chamber;
 - b. Social Entitlement Chamber;
 - c. Health, Education and Social Care Chamber;
 - d. General Regulatory Chamber;
 - e. Tax Chamber;
 - f. Immigration and Asylum Chamber;
 - g. Property Chamber.
2. The total number of *Cart* Judicial Review cases brought to the Administrative Court against the Upper Tribunal (Immigration and Asylum Chamber) decisions from 1 Jan 2018 - 31 Dec 2019 was 1,249 excluding cases pending a UT Appeal decision. Of these, 92 resulted in the Upper Tribunal decision being quashed. In the relevant period the Upper Tribunal gave permission to 85 cases post-remittal (excluding cases pending a decision). Of the 85, to date 42 have been successful, 43 unsuccessful. 13 cases are still awaiting a decision by the Upper Tribunal.
3. In summary, on the basis of the data we are able to say that the ‘success rate’ of *Cart* cases is substantially lower than the average success rate for other types of Judicial Review which is typically in a range of 30% to 50%. For *Cart* Judicial Review, the ‘success rate’ is around 3.4% - ie the number of cases found in favour of the claimant by the Upper Tribunal in an appeal which followed a remitted grant of permission following a *Cart* Judicial Review, divided by the total number of applications for a *Cart* Judicial Review in the period in question. A more detailed breakdown of the Ministry of Justice’s methodology in assessing ‘success’ in *Cart* Judicial Review is included in at Annex E of its consultation response document.
4. While we do not have detailed breakdowns of the characteristics of the individuals who brought those challenges as around 90% are made as challenges against the Upper Tribunal’s refusal for permission to appeal from the Immigration and Asylum Chamber of the First-tier Tribunal (IAC FtT) it is reasonable to assume, given the nature of the decisions being challenged, that a very significant proportion will have particular protected characteristics, most likely in respect of race and/or religion or belief. In addition, while we have no specific data available (because the data on *Cart* JRs is only broken down between immigration and non-immigration) our assumption is that a number of the 132 non-immigration *Cart* JRs brought in the relevant period – which represents about 10% of the total – could be from other individuals with particular protected characteristics, particularly judicial reviews emanating from permission to appeal decisions of the UT in respect of cases originating in the Social Entitlement Chamber of the First-tier Tribunal (SEC FtT) which deals with social security appeals. This may include individuals with disabilities, although the numbers are clearly somewhat smaller in this case than in relation to the IAC FtT.
5. As part of the Judicial Review Reform Consultation, published on 18 March 2021, we sought views from consultees as to the likely equality impacts of the proposals on which we consulted – particularly in respect of *Cart* JRs. Respondents accepted the Government’s acknowledgement in the

consultation document that there was potential for indirect discrimination in respect to the policy on *Cart* because of the number of claimants who are likely to possess a particular protected characteristic in relation to race and/or religion or belief (particularly those from the IAC FtT, which will include by the nature of the appeals many people born abroad and of different ethnicities, seeking permission to appeal to the UT). Respondents also made clear that in order to properly comply with its obligations under the Equality Act 2010, the Government needed to make the case that the proposal on *Cart* was a proportionate means of meeting the policy objective and to properly assess the extent to which it advances equality of opportunity and fosters good relations.

6. However, in assessing the level of the impact on those individuals of removing the *Cart* JR route we must also consider the nature of the challenges being brought and the relative success rate of those challenges. As set out in paragraphs 7 & 8 very few *Cart* challenges succeed. In addition, such cases are only brought after a claimant has appealed a decision made by a public body to the respective chamber of the First-tier Tribunal, had that appeal refused, and sought permission to appeal to the respective chamber of the Upper Tribunal. Only at the point where the Upper Tribunal refuses that permission to appeal and the normal appeal rights have been exhausted could a claimant seek to bring a *Cart* JR in respect of that permission refusal. The normal appeal rights are unaffected by this change.

ii. Additional remedial flexibility

7. It is difficult to provide detailed or specific analysis as to the types of case in which the courts may use the additional remedial flexibility that the government is seeking to provide. It is also not possible to identify the specific protected characteristics of claimants that are likely to be affected by this policy change.
8. We know that a number of judicial reviews are brought by non-governmental organisations or campaign groups that represent interests of those with particular protected characteristics. For example, we know from their submissions to the IRAL Call for Evidence that Access Social Care is an organisation that brings JRs in respect of social care issues which may include issues around disability, and that the Centre for Women's Justice brings JRs on specific women's issues where there is alleged discrimination on the basis of gender.
9. In a judicial review, brought by such a group, where the court would previously have quashed a decision immediately but where it now suspends that quashing for a period of time there could be an impact on that claimant and/or those individuals that the campaign group represents. Similarly, where in such a case a court ordered a prospective only quashing it may result in a less favourable outcome for the claimant. However, in all cases, any risk may be mitigated by the factors the court has to take into account in considering whether to use these new remedial powers. We are also aware that anecdotally there are cases where the courts issue declarations of unlawfulness but not an immediate quashing order because they are conscious that immediate quashing could result in disproportionate

administrative chaos. In these cases, our proposals could result in a more flexible outcome for claimants because the result could be that the action or decision they were challenging could be quashed, even if the effect of the quashing was suspended or prospective only. There is also the prospect of impact on third parties affected by the additional remedial flexibility, however, we would expect that impact to also be mitigated by making potential impact on third parties a factor the courts have to take into account when deciding which remedy to apply.

10. It remains up to the court to decide what (if any) kind of remedy would be appropriate – suspending or altering the retrospective effect of a quashing order may afford the defendant time to remake their decision and help deliver better public administration. The diverse circumstances of possible cases make it difficult to assume that any one remedy or combination of remedies would be most appropriate in all circumstances.

Pro Bono Costs Orders

11. The MoJ does not collect data on the size and number of costs awards across all tribunals.