Judicial Review and Courts Bill – Part 2
Briefing for Peers – Second Reading

About us

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Executive Summary

This briefing note addresses Part 2 of the Judicial Review and Courts Bill and a separate briefing note has been put together to address Part 1 (Judicial Review). We have worked with the Criminal Bar Association (CBA) on Chapter 1 (Criminal Procedure). The Bar Council has some concerns and observations to make about the provisions in this Bill.

The Bill

<u>Part 2 – Courts, Tribunals and Coroners</u>

Chapter 1 – Criminal Procedure

The following section of the Bill was reviewed by the CBA on behalf of the Bar Council to form a joint response.

The primary concern is that the Bill makes provision for a change from in-person (which are now often remote) hearings to a written procedure for a number of specified types of hearing, including for the prosecution of young people. We are fundamentally opposed to the change, for the reasons below:

1. The proposal does not take account of the complexity of the case, the ability of the accused to represent themselves and the seriousness of any sanction.
2. Any move to a written plea must make provision for interpreters, youth offending teams, liaison with healthcare professionals or social care authorities or access to such before any relevant written authority.
3. The individual must have the right to withdraw any written authority. We understand that matters become known during representation which alert those in the criminal justice system to issues not identified before. The measure would be the equivalent of withdrawal of plea. The consequences cannot mean that a guilty plea is irrevocable and the procedure for an application to vacate plea as set out in part 39.3 of the Criminal Procedure Rules cannot be undermined.
4. Representation must be granted, as present, where the individual would be likely to lose his liberty or livelihood or suffer serious damage to his reputation; where the determination of any question may involve consideration of a substantial question of law; where the individual may be unable to understand the proceedings or state his own case;

or where it is in the interests of another person that the individual be represented (para 5(2) Schedule 3 Access to Justice Act 1999).

5. Any such move in relation to the prosecution of children and young people would impede the fair administration of justice in the criminal prosecution of children and youths and should not be countenanced.

6. In relation to adults, any move to written procedures for hearings other than those already mandated (e.g. fine only and driving offences) will similarly undermine the fair administration of justice and impede access to justice, and should either:

    a. not be countenanced, or could only be countenanced for adults where a legal representative:

        i. is on record;

        ii. is in a position to confirm that they have met with the adult in conference (remote or in person);

        iii. has instructions to proceed by way of the written procedure and that the adult has waived, in a signed authority, what would otherwise remain a right, enshrined within the relevant legislation, to an in-person hearing.

7. Courts provide an opportunity (presently barely utilised after decades of cuts) for multi-agency interventions for a cohort of individuals with needs that often include (but are not limited to) health (particularly mental health), education (particularly literacy), housing, abuse (particularly domestic and sexual abuse) and financial pressures. Limiting the opportunities for attendance at court (or even remotely, with all the limitations that itself entails) in the company of a legal representative, given the current regime for legal aid, will in due course translate into not only an undermining of the right to legal advice but also lost opportunities for intervention and support packages, in which criminal solicitors are often pivotal by way of referrals and signposting, to divert repeat offenders away from the criminal courts, a cost saving exercise for society overall.

8. The funding regime for legal aid, and the declining numbers of criminal solicitors and barristers, has now brought the system to its knees. It is not presently a properly functioning system. Those working within it are unable to manage the quantities of work and are insufficiently remunerated for the pressures of that work. These are interlinked issues and help to explain the flight from both professions and the difficulties in recruiting a new generation of legal aid criminal defence lawyers. Moving to a written procedure, within this climate, will foreseeably result, even for represented defendants, in a decline in the quality of service they receive and a reduction in the opportunity for them to meet with a legal representative, particularly so given that the current funding regime for criminal legal aid is structured around hearings (with limited funding, for advocates at least, for work conducted out of court).

9. In consequence of 4), we advise that input is received from the London Criminal Courts Solicitors' Association (LCCSA) and Criminal Law Solicitors' Association (CLSA) on behalf of criminal defence solicitors, given that the proposed changes will impact defendants at point of entry into the magistrates' court.

Overall, we anticipate that the proposed changes will increase discrimination within the criminal justice system, particularly race discrimination, by further impeding access to justice for the most vulnerable cohorts of defendants and those reliant upon legal aid.

It is also worth bearing in mind that, if all of the steps set out in the relevant clauses (for example re: mode of trial) are followed, the result is likely to be a relatively protracted chain of correspondence (with all the attendant risks of delayed / lost mail). That would take the place of a system in which plea and mode of trial are routinely dealt with, in the space of a few minutes in court (following the required conference time before the hearing for counsel / defence solicitors). This does not seem to be a particularly efficient way of proceeding, which is another reason (along with the more fundamental access to justice concerns we have already raised) why these provisions are undesirable.

Clause 4 – Guilty plea in writing: extension to proceedings following police charge

Clause 4(3)b proposes '*the accused [has] attained the age of 16 when charged*'. If such a provision is to be introduced, we propose the appropriate threshold be that the accused has attained the age of 18 when charged.

Clause 6 – Written procedure for indicating plea and determining mode of trial: adults

Indicating plea and determining mode of trial should remain an in-person hearing. Moving to a written procedure would ultimately impede access to justice for defendants who are often vulnerable due to a range of additional needs, and a disproportionate number of whom (relative to the overall population) have literacy issues, and some of whom may not speak or read English as a first language.

Any criminal charge is serious, an either way offence self-evidently so. Moving to a written procedure for an indication of plea and mode of trial increases the probability of defendants, even if entitled to legal advice, suffering a disadvantage. Consequently, there is good reason to question the fairness of such written procedures and we do not believe therefore that it would be in the overall interests of justice or efficiency to adopt such a new approach.

A criminal solicitor or junior barrister in the magistrates' court regularly acts as a key sign-poster/referrer of vulnerable defendants to additional agencies/mental health services to the benefit both the individual and the society (in terms of reducing offending rates for persistent offenders with multiple needs, e.g., mental health, housing, drug addiction).

Further, the early plea and mode of trial hearings are some of the most procedurally complex in the criminal justice system. In order to ensure that defendants are able properly to navigate the various issues which such hearings present, it is essential that they are able to secure representation at the moment at which they are required to make – and inform the court of – key decisions.

Clause 8 – Written procedure for indicating plea and determining mode of trial: children

We do not accept that a written procedure for indicating plea or determining mode of trial in the case of children will do anything other than impede access to justice for the most vulnerable cohort of defendants within the criminal justice system.

It has long been the position of the CBA and the Bar Council that the prosecution of children and young people requires wholesale overhaul to ensure that they only enter into the criminal justice system as a very last resort, if diversion and other interventions are unsuitable. Representation

of children and young people, and the courts that administer youth justice, need to be properly funded, regulated and restructured in order to be fit for purpose.

At present, these courts are not fit for purpose, and all too often act as a gateway for vulnerable youths into more serious offending. It follows that moving to a written procedure will compound the situation, limiting the opportunities for lawyers working under a legal aid system to meet with vulnerable defendants and their families, signpost interventions by other appropriate agencies and identifying children and youths with additional needs. It will also impede the child and youth's understanding of the seriousness of the process into which they have entered.

Clause 12 – Powers of youth court to transfer cases if accused turns 18

Clause 12(3) inserts a new subsection 1D in section 47 of the Crime and Disorder Act 1974, empowering the youth court to transfer the proceedings if the accused turns 18 without an in-person hearing. We do not accept that proceedings in the absence of the accused (by a written procedure) are appropriate for the reasons outlined above.

Clause 14 – Involvement of parent or guardian in proceedings conducted in writing

Many parents of children coming into the criminal justice system have literacy issues and are often themselves vulnerable adults. Securing their involvement in writing, as a 'safeguard' for a child or youth, who is also to be dealt with by way of a written process, is an insufficient safeguard for the administration of criminal justice.

Face-to-face hearings that require the attendance of the parent / guardian / responsible adult mark the gravity of the proceedings and also allow for further opportunities for appropriate intervention by relevant agencies on behalf of vulnerable children and youths, or in support of parents / guardians that need help and guidance, for which the legal representative is often the point of referral.

Chapter 2 – Online Procedure

The provisions in the Bill set up powers to make Online Procedure Rules (OPR) for specified proceedings in civil, employment, family and tribunals to be started, conducted, progressed or disposed of by 'electronic means' (at §18(1)(b)). These means are **not** defined.

The regulations that determine which proceedings are covered are subject to concurrence and affirmative resolution procedure (§19(3) and (4). The detail will be in the Rules themselves, however the criteria are:

- that practice and procedure under the Rules are accessible and fair,
- that the Rules are both simple and simply expressed,
- that disputes may be resolved quickly and efficiently under the Rules, and
- that the Rules support the use of innovative methods of resolving disputes.

This is a new set of Rules, which is not intended to overlap with any other Rules. There is no provision for co-operation with other rule-making bodies, but they may consult anyone before making rules.

The OPR are paramount. They can amend all other procedural rules, so these other rules effectively become subordinate to the OPR. This is apparent from the amendments to those rules see e.g., Schedule 4 ¶2:

“(4) Civil Procedure Rules must be framed so as not to apply to proceedings that are governed by Online Procedure Rules except to such extent as may be provided by—

(a) Online Procedure Rules,

(b) directions under paragraph 1 of Schedule 3 to the Judicial Review and Courts Act 2021, or

(c) regulations under section 20(1)(b) of that Act.”

And also §18(10):

“Online Procedure Rules may provide:

(a) for circumstances in which excluded proceedings [i.e., Not specified proceedings] -

(i) are to be governed by Online Procedure Rules, or

(ii) are to be governed again by Online Procedure Rules, and

(b) for the proceedings to cease to be governed by the applicable standard rules.”

This means that proceedings can be removed from the standard Civil Procedure Rules (CPR) and OPR applied to them – consent doesn’t seem to be required from the parties

It seems also the OPR will provide for proceedings to be heard under OPR even if standard rules would say otherwise. This suggests that this includes specialist lists unless hearing in that jurisdiction is dictated by law (but this is subject to the Lord Chancellor [LC] amending that law).

This gives the LC extensive powers to amend other laws and rules by secondary legislation. The below looks to be a Henry VIIIth-type clause:

“§26

(1) The Lord Chancellor may by regulations amend, repeal or revoke any enactment to the extent that the Lord Chancellor considers necessary or desirable in consequence of, or in order to facilitate the making of, Online Procedure Rules.

(2) In subsection (1), “enactment” means any enactment whenever passed or made, including an enactment comprised in subordinate legislation within the meaning of the Interpretation Act 1978.

[…]

(5) Regulations under this section that amend or repeal any provision of an Act are subject to affirmative resolution procedure (see section 45(3)).

(6) Any other regulations under this section are subject to negative resolution procedure (see section 45(4)).”

The LC has to consult LCJ and Senior President Tribunals under §26 but not §28.

The LC is also given wide power to do the same – consequential or supplementary to the above, without consulting LCJ/SPT – this is under the negative resolution procedure:

“§28

Power to make consequential or supplementary provision

(1) The Lord Chancellor may, by regulations, make consequential or supplementary provision in relation to any provision of this Chapter.

(2) The regulations may, in particular, amend, repeal or revoke—

a) any provision of an Act passed before this Act or in the same Session, or (b) any provision contained in subordinate legislation within the meaning of the Interpretation Act 1978 (whenever the legislation was made or the Act under which it was made was passed)"

The LC has a duty to arrange for the provision of such support as they think appropriate and proportionate for 'persons who require online procedural assistance'.

These persons are defined:

"'persons who require online procedural assistance' means persons who, because of difficulties in accessing or using electronic equipment, require assistance in order to initiate, conduct, progress or participate in proceedings by electronic means in accordance with Online Procedure Rules."

It is unclear if "persons who require online procedural assistance" is a socio-economic, physical, mental or other difficulty. This seems to raise potential Equality & Diversity issues.

Chapter 4 – Coroners

In the preamble, the Bar Council would like to align with the recommendations of the Justice Committee's wide ranging report on the Coroner Service.

Clause 38 – Discontinuance of investigation where cause of death becomes clear

The provision is likely to capture only a limited number of cases. Despite the explanation in the Explanatory Notes, the cause of death is unlikely to become clear other than through a post-mortem. The rationale for this (saving of costs and distress to the bereaved) may be equally achieved through a written inquest (see Clause 38). As a result, it is hard to see why both clauses 37 and 38 are required. However, the amendment proposed does not seem harmful, just overly optimistic. There could be some alternative form of investigation through which it becomes clear e.g. toxicology or other tests are conclusive and no post-mortem is warranted. The possibility of subsequent emergence of evidence or a change once existing evidence is tested though could make this a risky discretionary power with potentially harmful outcomes.

Clause 39 – Power to conduct non-contentious inquests in writing

Provided the "Interested Persons" are given the opportunity to make representations on this issue, which they are on the current draft of the clause, this seems a sensible step to avoid the need for a court to be assembled for the purpose of a coroner to read through evidence and pronounce findings. However, the lack of opportunity for members of the public to attend a written inquest could present some problems (e.g. open justice, accountability and transparency). Unrepresented bereaved families may find it hard to advance "reasonable grounds" as to why a hearing should take place. However ultimately, subject to the above, this measure does make sense.

Clause 40 – Use of audio or video links at inquests

This clause effectively mirrors the "remote juries" provision the Government have included in the current *Police, Crime, Sentencing and Courts Bill*. Together with the Law Society, the Bar Council opposes the introduction of remote juries.

In line with our position regarding criminal trials, we are in favour of a presumption that proceedings before a jury are conducted in a room in which the key Interested Persons are able

to be physically present, and in which the coroner also sits. However, there may be some sense in allowing Pre-Inquest Review Hearings to be conducted wholly remotely, though careful thought would need to be given in any event as to whether, in the particular circumstances of any inquest, this would be appropriate. There is massive latitude regarding how a Coroner sits/hears evidence in any event. This provision simply enables rules to be made without providing any substance of the rules.

The proposal is that if a jury is to attend remotely then they must be together i.e. "present in the same place". If a remote hearing is to take place, then (a) Interested Persons must be allowed to make submissions as to whether this should happen and (b) the general presumption ought to be that the Coroner makes arrangements for the key Interested Persons to be physically present where the Coroner and jury are.

In civil proceedings, senior judicial guidance has been not to place undue weight on demeanour and how someone presents in court in terms of assessing credibility. It follows as many objections were raised to remote hearings on the basis that there was contentious witness evidence and 'issues of credibility'. The safeguards, in particular the physical presence of the bereaved family, should be incorporated into any rules. The overarching principle of public hearings / open justice also applies here and that should not be undermined by inconsistent application of the rules by different coroners.

For these reasons, it is out belief that this measure should not become law without thorough research, evaluation and consideration of the impact on the administration of justice and justice outcomes.

Clause 41 – Suspension of requirement for jury at inquest where coronavirus suspected

This simply continues the operation of a provision that has been in force since March 2020, rendering Covid a non-notifiable disease, and thereby meaning that no inquest is required, which makes practical sense on capacity grounds. This provision dispenses with the automatic requirement of a jury in Covid deaths, rather than doing away with inquests in these cases altogether. The prime example of an automatic jury is death in custody.

Clause 42 – Phased transition to new coroner areas

The clause relates to logistical arrangements for amendment of coronial areas and is not of any great importance, provided it does not result in fewer Coroners, Deputy Coroners and Deputy Assistant Coroners covering greater areas.

The Bar Council
February 2022