The Prisons and Courts Bill – European Convention on Human Rights

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the Prisons and Courts Bill ("the Bill"). Where appropriate, the memorandum also addresses issues arising under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("OPCAT") and the United Nations Convention on the Rights of the Child ("UNCRC"). On introduction in the House of Commons, the Justice Secretary made a statement under section 19(1)(a) of the Human Rights Act 1998 ("HRA 1998") that in her view the provisions of the Bill are compatible with Convention rights.

2. Only the clauses which contain substantive ECHR issues are discussed. The Department considers that the clauses of and Schedules to this Bill which are not covered by this memorandum do not give rise to any substantive ECHR issues.

Summary of the Bill

3. The Bill was announced in the Queen's speech and provides for important reforms to the prison system and the courts. The Bill is in six Parts.

4. Part 1 relates to prisons.
    - It sets out the purpose of prisons and the role of the Justice Secretary in relation to prisons. It makes provision for Her Majesty's Inspectorate of Prisons made up of the Chief Inspector of Prisons and staff who carry out functions on his behalf, places additional reporting requirements on the Chief Inspector in relation to prisons and provides powers of entry and powers to obtain information, in order to facilitate the Chief Inspector's functions.
    - It puts the Prison and Probation Ombudsman on a statutory footing and provides similar powers of entry and powers to obtain information.
    - It makes provision for prison security. It enables public communications providers, such as mobile phone network operators, to be authorised to interfere with wireless telegraphy in relevant institutions, and makes provision about the testing of prisoners for psychoactive substances.

5. Part 2 makes provision for new procedures in civil, family, tribunal and criminal matters.

- In relation to the criminal jurisdiction it enables defendants to provide information in writing (preferably online) including an indication of plea, and enables matters to be dealt with outside court such as mode of trial and sending to the Crown Court. It gives the magistrates' court a power to determine trial venue where the defendant does not engage online or attend allocation proceedings, and gives the Crown Court a new, general power to remit cases to the magistrates' court for trial or sentence. It also makes provision for the extended use of audio and video technology to enable hearings to be held in alternative formats and a delegated power to amend any existing legislation to facilitate pre-trial and enforcement decisions being made on the papers. It creates a new online procedure enabling an adult defendant to plead guilty and receive an automatic online conviction and standard statutory penalty.
- It makes provision which will apply across the civil, criminal and tribunal jurisdictions to maintain open justice for virtual hearings (subject to existing reporting restrictions), including the creation of new criminal offences to guard against abuse.
- It creates a new online procedure rules committee that will be able to create new online procedure rules in relation to the civil, tribunal and family jurisdictions.
- It makes provision about the cross-examination of vulnerable witnesses in family proceedings.
- It confers the power to make procedure rules for employment tribunals and the Employment Appeals Tribunal on the Tribunal Procedure Committee and extends the membership of the Committee to include an employment law practitioner and member of the employment tribunals or Employment Appeal Tribunal.

6. Part 3 makes provision about the organisation and functions of courts and tribunals.
    - It provides for authorisation of the exercise of judicial functions by court and tribunal staff across the jurisdictions. The relevant procedure rule committees will have the power to authorise functions to be undertaken by authorised staff in their respective jurisdiction. Statutory independence, and immunities that currently apply to justices' clerks, will now apply to all court or tribunal staff exercising judicial functions. The post of justices' clerk will be removed from statute.
    - It abolishes local justice areas to increase flexibility in the deployment of magistrates and where a case can be heard.
    - It brings arrangements for the composition of employment tribunals and the Employment Appeal Tribunal in line with that of the First-tier and Upper Tribunals.

- It makes other reforms to the court system, replacing statutory declarations with witness statements for certain traffic and air quality offences in the County Court, and giving the High Court the jurisdiction to make attachment of earnings orders in relation to judgment debts.

7. Part 4 makes changes to the judiciary, making provision for judicial leadership positions, and more flexible deployment. It brings the arrangements for the remuneration of judges and members of employment tribunals under the remit of the Lord Chancellor. It also extends the scope of persons whom the Lord Chancellor may ask the Judicial Appointments Commission to assist, and provides that those in receipt of that assistance may be charged.

8. Part 5 makes provision in relation to whiplash, subjecting damages for pain, suffering and loss of amenity for minor soft tissue injury claims arising out of road traffic accidents to a tariff and regulating the settlement of such claims.

9. Part 6 makes the necessary legal provision for the short-title of the Bill, the extent, orders, regulations and parliamentary procedures, and powers to make consequential, incidental etc provision.

Part 1

Her Majesty's Chief Inspector and Inspectorate of Prisons and the Prison and Probation Ombudsman

10. Clause 2 clarifies the role of the Chief Inspector of Prisons and reference is made to the exercise of his functions through his staff, who make up Her Majesty's Inspectorate of Prisons.

11. Clause 2(4) introduces powers of entry and powers to obtain information for the Chief Inspector. To date, entry to prisons and other places within the Chief Inspector's remit, and the disclosure of information during inspections, has been done by consent, both in public sector prisons and those operated by a private company under contract. This clause gives the Chief Inspector statutory powers to obtain from any person who holds "relevant information", which is information that relates to the running of a prison or prisoners detained in a prison and which is needed in connection with the inspection of a prison, and to require explanations of any of the information. In certain limited circumstances such information might be held not in the prison but on the business premises of a private company.

12. The powers of entry and to obtain information also apply to the functions of the Chief Inspector over immigration detention facilities and immigration escort arrangements and over areas of court detention and court escort vehicles.

13. Clauses 4 to 20 and Schedule 1 place the Prisons and Probation Ombudsman ("PPO") on a statutory footing. Clause 4(2) provides for the functions of the PPO to include investigating deaths and complaints of those in custody, immigration facilities or under immigration escort arrangements, and those subject to probation supervision. Clauses 5 to 8 make provision about investigations of deaths and require the PPO to produce a written report in relation to each death investigated.

14. Clauses 12 and 13 introduce broadly equivalent powers of entry and powers to obtain information for the PPO as for the Chief Inspector.

ECHR – Article 2

15. Article 2 (the right to life) is relevant given the functions of the PPO in relation to deaths in custody.

16. Article 2 imposes, in certain circumstances, a 'procedural obligation' on the state to conduct an effective investigation into any death where it is arguable that the state has breached its substantive obligation under Article 2 (*Humberstone v Legal Services Commission*[1]). However, it is arguable that the duty arises automatically for any death in custody given that the victim will have been in the care and control of the state (*Slimani v France*[2]).

17. To satisfy the requirements of an Article 2 investigation, the investigation must be: independent; effective; reasonably prompt; have a sufficient element of public scrutiny; the next of kin must be involved to an appropriate extent; and the state must act of its own motion and not leave it to the next of kin to take conduct of any part of the investigation (*Amin v Secretary of State for the Home Department*[3]). When someone has died in state custody, the duty to investigate will be particularly rigorous, and should consider measures to prevent future violations of Article 2 (*R (Middleton) v HM Coroner for West Somerset*[4]).

[1] (2010) EWCA Civ 1479
[2] (2004) App. No. 57671/00
[3] (2004) 1 AC 653
[4] (2004) 1 WLR 796

18. The Department considers that the role of the PPO in investigating deaths in custody does not, alone, discharge the procedural obligations under Article 2. However in practice the PPO's role can support and inform that of the Coroner's inquest, and in such cases the two functions together discharge the procedural obligation. At present the PPO operates without a statutory basis and investigates deaths without statutory powers. Whether an effective investigation into a death has taken place for Article 2 purposes is a question of fact and the PPO is part of that process at present. The Department does not consider it necessary for Article 2 purposes to place the PPO on a statutory footing. However, doing so and giving the PPO express statutory powers will ensure that the PPO can continue to assist in the effective investigation of deaths going forward.

ECHR – Articles 6 and 8

19. Article 8 ECHR (the right to respect for private and family life) may be relevant in relation to the powers of the Chief Inspector and the PPO to obtain relevant information.

20. Firstly, the exercise of the powers to obtain relevant information may result in the Chief Inspector or the PPO obtaining personal information from or about prisoners. This may include information about their offending, their medical history or their family life. They may also obtain information about prison officers or others working in prison. Most legal barriers to disclosure other than the Data Protection Act 1998 and the Investigatory Powers Act 2016 are disapplied, however access cannot be obtained to information that might incriminate the person providing it, legally privileged information or intelligence service information.

21. Secondly, through the exercise of these new powers, information may in limited circumstances be sought from businesses, or the business premises of a company. Certain professional or business activities and premises can fall within Article 8 and the protections for the individual against arbitrary interference by public authorities (*Niemietz v Germany*[5]).

22. However, the Department considers that any such interference would be in accordance with the law, given the statutory underpinning for the powers to obtain information. Further, the Code of Practice on powers of entry issued under section 48 of the Protection of Freedoms Act 2012 will apply to the exercise of these powers, and specific non-statutory protocols will be developed in relation to their exercise.

[5] (1992) 16 EHRR 97

23. The Department considers that any such interference would be in pursuit of the legitimate aims of ensuring that inspections and investigations, which form an essential safeguard in scrutinising the treatment of prisoners and other detained persons, and conditions in prisons and other places of detention, and in effectively investigating deaths and complaints, may be properly conducted; and that this is a proportionate means of achieving that aim. Moreover, in exercising such powers the Chief Inspector and the PPO will themselves be a public authority pursuant to section 6 of the Human Rights Act 1998 and so bound to act compatibly with the ECHR.

24. The new powers provide that the Chief Inspector or PPO may require the person in charge of an institution to allow private communications between a detained person, employee or worker, but this power does not impose an obligation on a person to communicate privately with the Chief Inspector or PPO. Further, there is specific provision that the Chief Inspector or PPO may not require the disclosure of information if the information might incriminate the person disclosing it, or is an item subject to legal privilege. Accordingly, the Department considers that the power of the Chief Inspector or PPO to obtain information or explanations of the information is consistent with Article 6 ECHR (the right to a fair trial).

25. The Department is therefore content that no issue of compatibility with Articles 6 or 8 ECHR arises as a result of the provisions in Part 1 relating to the powers of the Chief Inspector and PPO.

OPCAT

26. Clause 2(2) refers expressly to the functions of the Chief Inspector as being in accordance with the objective of OPCAT, adopted by the UN General Assembly in 2002. The objective of OPCAT is, as stated by Article 1, the establishing of a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. The Chief Inspector, together with 20 other statutory bodies, form the national preventive mechanism required under OPCAT.

27. The Department considers that the UK's national preventive mechanism is already OPCAT compliant and that there is no legal requirement under OPCAT for such a provision. This provision does however, recognise HMIP's role in relation to OPCAT, placing it beyond doubt.

28. A similar approach has been taken under the Prisons (Scotland) Act 1989 in relation to the Chief Inspector of Prisons for Scotland.

Interference with wireless telegraphy in prisons etc

29. Clause 21 and Schedule 2 amend the Prisons (Interference with Wireless Telegraphy) Act 2012 ("PIWTA 2012"), so as to allow the Secretary of State to grant an authorisation to public communications providers ("PCPs") such as mobile network operators. The authorisation will allow PCPs to effect interference with wireless telegraphy in relevant institutions in England and Wales as defined in PIWTA 2012[6], by deploying new technological techniques to disrupt the unlawful use of mobile phones. Under the current provision, authorisations can only be granted to governors of relevant institutions (or directors in private institutions), and so the PCP can only act as the 'agent' of such people. These amendments will allow for authorisations to be granted direct to the PCP.

30. Section 1(6) of PIWTA 2012 provides for the retention, use or disclosure of data collected as a result of an authorised interference.

Article 8

31. Article 8 ECHR (the right to respect for private and family life) may be engaged.

32. This is because, first, there may be some interference with prisoners' private and family life, in that they cannot use mobile telephones to call family members or other persons. Second, there may be inadvertent interference with private and family life of third parties, given the low risk of disruption to the communications of third parties outside of prison as a result of the steps the PCP is authorised to take. Finally, personal data may be collected as a result of interferences authorised under PIWTA 2012.

33. As regards interference with prisoners' Article 8 rights, this stems from the pre-existing prohibitions on mobile phone possession, not as a result of these amendments. In England and Wales it is an offence under section 40D Prison Act 1952 ("PA 1952") to possess a mobile telephone (or any device capable of transmitting or receiving images, sounds or information by electronic communications) in prison[7] without authorisation. It is an essential part of a

[6] In England and Wales these are prisons, young offender institutions, secure training centres and secure colleges.

[7] By virtue of section 43(3) Prison Act 1952 (and subject to certain exceptions) sections 1 to 42A and Schedule A1 apply to young offender institutions, secure training centres and secure colleges as they do to prisons and prisoners.

prisoner's right to respect for family life that prison authorities assist him in maintaining contact with his close family (*X v United Kingdom*[8]*)*; however detainees are able to maintain effective family ties through personal visits and letters provided for under the Prison Rules 1999, Young Offender Institution Rules 1999 and the Secure Training Centre Rules 1998 and through phone calls conducted through alternative, authorised methods.

34. The following safeguards are in place to ensure that low risk of third party communications of persons outside of the prison being disrupted is mitigated:
    - the statutory purpose of an authorised interference only extends to detecting or investigating the use of mobile phones that are within relevant institutions, not outside of them;
    - before authorising a PCP to interfere with wireless telegraphy, the Secretary of State must be satisfied that any equipment that will be used is 'fit for purpose'. This includes being satisfied that the technological solution to be deployed by the PCP adequately minimises the risk of third party communications outside of the prison being disrupted;
    - where the Secretary of State authorises an interference with wireless telegraphy, directions must be given to the PCP specifying the circumstances in which the use of the equipment must be modified or discontinued, and in particular directions aimed at ensuring that authorised interference will not result in disproportionate interference outside the prison. If it transpires that the level of interference generated outside of the prison is disproportionate, it follows that the use of the equipment may be modified or, ultimately, discontinued;
    - where the Secretary of State gives directions to the PCP, directions must also be given to the prison governor specifying descriptions of information to be provided to OFCOM at specified intervals. The purpose of this is to enable OFCOM to closely monitor any unintended interference with wireless telegraphy outside of the prison, as part of its ongoing regulatory functions;
    - both the PCP and the governor are under a statutory obligation to comply with these directions.

35. Authorised interference can include the collection of traffic data, and the authorisation permits the retention, use and disclosure of that data. As above, the Department considers that there are safeguards in place to ensure the risk of any collection of data relating to

[8] (1982) App. No.9054/80

persons outside of prison is minimised; and if any such data were collected it would not be retained or used. In relation to any prisoner data collected, the provisions in PIWTA 2012 contain stringent restrictions on the retention and disclosure of information obtained via the authorised interference with wireless telegraphy, which will apply equally to authorisations for PCPs. Any information obtained must be destroyed within 3 months of it being obtained unless further retention is authorised by the governor or director on specified listed grounds, including national security and the prevention, detection, investigation or prosecution of crime. Where information is retained beyond 3 months, its onward retention must be reviewed at 3 monthly intervals, and if it is no longer justified, the information must be destroyed. In addition, there are strict limits on who the information can be disclosed to, which mitigate the risk of any excessive or unjustified onward disclosure.

36. The Department believes that any interference with Article 8 rights would therefore be in accordance with the law, given this statutory underpinning and the safeguards provided for in sections 2 and 3 of PIWTA 2012 as amended by Schedule 2 to the Bill. Any interference would be in pursuit of the legitimate aim of preventing crime and disorder and ensuring good order in the secure estate, including the effective enforcement of existing criminal offences around the conveyance into prison and possession of unauthorised mobile telephones. Finally, any interference would be a proportionate means of achieving that aim; as above, statutory safeguards will be in place, as well as an updated Memorandum of Understanding between Ofcom, PCPs and the National Offender Management Service and all reasonable steps will be taken to prevent incidental interference.

Testing prisoners for psychoactive substances

37. Clause 22 amends the PA 1952 to extend the current power in section 16A to test those detained in prison for drugs. Currently a governor may authorise prison officers to require any prisoner to provide a sample of urine for the purposes of ascertaining whether he has any controlled drug in his body (within the meaning of the Misuse of Drugs Act 1971) or any specified drug (a drug which the Secretary of State has specified in a statutory instrument). Any psychoactive substances may be individually specified by the Secretary of State as a specified drug. As a result of this amendment, it will be possible to test for psychoactive substances generally, as defined in the Psychoactive Substances Act 2016.

Article 8

38. Article 8 ECHR (the right to respect for private and family life) may be engaged. This is because the taking of a urine sample from the prisoner is an interference with the prisoner's physical integrity.

39. However, the Department believes that any interference with Article 8 rights would be in accordance with the law, given this statutory underpinning and published policy on mandatory drug testing which contains important multi-layered procedural safeguards[9]. Further, any interference would be in pursuit of the legitimate aims of ensuring good order in the secure estate, ensuring prisoner safety and the protection of prisoner health, and the prevention of crime and disorder. Any interference would be a proportionate means of achieving that aim, given the importance of the aim pursued and the safeguards in place around drug testing in prisons. Mandatory sample taking may be justifiable as a legitimate and necessary measure for the prevention of crime and disorder (*Peters v Netherlands*[10]).

40. The Department is therefore content that no issue of compatibility with Article 8 ECHR arises as a result of the provisions in Part 1 relating to prison security.

Part 2

Conducting preliminary proceedings in writing: criminal courts; Conduct of certain criminal proceedings on the papers; audio and video technology: criminal courts

41. Clauses 23 to 30, Schedule 3, and clause 46 enable various procedural steps in a criminal case to take place in writing (preferably online) outside of a physical court room, by removing statutory requirements for hearings at which the defendant must be present and by establishing alternative written (or online) procedures which the defendant can choose to follow instead. The relevant procedural steps which may be conducted through an out of court, written procedure are as follows:
    - indicating a plea;
    - allocating either way offences to the magistrates' court or Crown Court (although adult defendants always maintain the right to elect a Crown Court trial). This procedure includes allocating youth cases to the Crown Court where exceptions to the general rule of summary trial in the youth court apply;

[9] PSO 3601 https://www.justice.gov.uk/offenders/psos
[10] (1994) App. No.21132/93

- sending of indictable cases (whether indictable only or either way offences allocated to the Crown Court) to the Crown Court for trial;
- enabling the Crown Court to return offences to the magistrates' court, including the youth court, for trial and/or sentence.

42. Indicating a plea in writing for all offences and determining venue in writing for either way offences require the consent of the defendant. If the defendant does not engage in writing or appear at the allocation hearing, the magistrates' court may proceed to allocate the case in the defendant's absence on the basis of an assumed not-guilty plea but adult defendants continue to have a right to elect jury trial.

43. Remitting cases from the Crown Court to the magistrates' court (including the youth court) for trial, where the Crown Court consider that the magistrates would on conviction have sufficient sentencing powers to deal with the case, requires the consent of the defendant where the defendant is an adult at the point of that decision to remit[11]. In this way, the right to elect jury trial is unaffected. The defendant's consent is not required for remitting an offence for sentence or for remitting summary only offences which have been sent to the Crown Court on the basis of being linked or joined to a main, indictable offence as there is no right to elect in these circumstances.

44. Clause 31 provides for a delegated power for the Lord Chancellor, with the concurrence of the Lord Chief Justice, to make secondary legislation (subject to the affirmative resolution procedure) to enable or facilitate the making of pre-trial or enforcement decisions on the papers. The intention is to use this to amend any existing legislation which would otherwise preclude the court directing that certain pre-trial and enforcement matters be determined without a hearing. This is so as to give the criminal courts the maximum flexibility as to how to conduct their proceedings.

45. The overall aim is to enable the courts to dispose of uncontentious procedural hearings more efficiently and to allow case management steps to be taken in advance of the first in-court hearing. The first hearing in a physical court room can, in the event of an indicated not guilty

[11] Defendants who are under 18 at the time mode of trial is determined do not have the right to elect for Crown Court trial since there is a presumption that they will be tried in the Youth Court save for specific offences or circumstances: see section 46(1) Children and Young Persons Act 1933. This remains unchanged. However if a defendant turns 18 by the time the Crown Court is considering whether or not to remit the case for trial to the magistrates' court, their agreement is required.

plea, be the trial and, in the event of an indicated guilty plea, a hearing to convict and sentence.

46. Clauses 32 and 33 and Schedules 4 and 5 are intended to expand the use of video and telephone live link and conference technology to give magistrates' courts, the Crown Court and the Court of Appeal more flexibility in managing criminal proceedings.

47. Where the court is satisfied that it is in the interests of justice, and has considered any representations from the parties (and, in youth cases, the youth offending teams), it will be able to direct that one or more participants attend a courtroom hearing and/or give evidence by way of live audio or video link; or that there be a "virtual hearing", where there is no courtroom as such and all participants join the hearing via telephone or video conference ("wholly audio hearing" or "wholly video hearing"). There are limitations however, including that contested bail decisions[12] (where the grant or continuation of bail is in dispute), sentencing and trial will not be able to be done by wholly audio hearing or with attendance via live audio link. A court will also not be able to commit a defaulter to custody if any person is attending through a live audio link. In addition, the defendant cannot give evidence by live audio link. Criminal Procedure Rules will also set out any further safeguards or arrangements which are to be put in place to ensure that technology is only used under appropriate circumstances and that the defendant is afforded a fair hearing.

Automatic online conviction and standard statutory penalty: criminal offences

48. Clauses 35 and 36 and Schedule 7 respectively amend section 29 of the Criminal Justice Act 2003 and introduce new sections 16G to 16M to the Magistrates' Courts Act 1980 ("MCA 1980") which make provision for certain summary only, non-imprisonable offences which are specified in secondary legislation to be eligible for an automatic online conviction procedure. These are offences which are relatively simple and straightforward, and should be dealt with in a more proportionate way. Within that category currently, many plead guilty, are given a routine fine, and no significant discretion is used around sentencing. These provisions only apply to defendants aged 18 or over at the date of the offence.

49. Under this procedure, defendants who enter a guilty plea online will be able to choose to be convicted and accept a set penalty all online, without the involvement of a court.

[12]In this instance, video technology may be used to make the bail decision. Where the dispute relates to conditions of bail, then telephone or video technology may be used. Bail decisions here include remands to local authority accommodation in relation to under 18s.

50. An offence will only be specified where it does not have an identifiable victim, is relatively straightforward and a standard penalty may be appropriate. Offences will be specified in secondary legislation subject to the affirmative resolution procedure.

51. Where an offence is specified as eligible for this procedure, prosecutors will still maintain a discretion not to make the procedure available if a particular case is unsuitable in light of the evidence, for example, or if aggravating factors are present such as repeat offending.

52. The penalty imposed when the defendant accepts the offer of an online conviction will consist of a fine of an amount specified in secondary legislation; a surcharge of an amount specified in secondary legislation; prosecutors' costs of an amount set by the prosecutor; where the offence is specified in secondary legislation as eligible for compensation, compensation of an amount set by the prosecutor which will be below a cap specified in secondary legislation; and where the offence is specified in secondary legislation as eligible for penalty points, penalty points of an amount specified in secondary legislation. A penalty imposed via this procedure will be enforced as if it had been imposed by the court.

53. New section 16M MCA 1980 gives the court a wide discretion to set aside a conviction imposed via this procedure, or to resentence a defendant so convicted, if it considers the conviction or sentence to be unjust.

Online procedure: the civil and family courts and the tribunals

54. Clauses 37 to 45 and Schedules 8 and 9 make provision for a new online procedure capable of applying to civil, family and tribunal proceedings specified by the Lord Chancellor. A new online rules committee will provide new, simplified rules to support the online procedure. Initially it is intended that the new committee will deliver the rules required to support a new civil 'online procedure' to provide an online dispute resolution for low value money claims up to a value of £25,000, as recommended by Briggs LJ in the final report of his Review of Civil Court Structures published in July 2016.

55. In respect of the civil 'online procedure' it is likely that the procedure will consist of:
    - an 'investigatory' stage, in which the online system will gather the essential facts and evidence from all parties so as to enable them and the court to understand the respective cases;

- a 'conciliation' stage, in which the parties will be encouraged to mediate (including by case offices); and
- simple case management (conducted by case officers), including the possibility of ordering cases into the ordinary county court process; and
- determination by a judge either on the papers if the parties agree, or by video or telephone live link if the judge considers it appropriate.

56. The intention is as far as possible to make the online procedure the required procedure for starting and defending cases within its remit. However, this will not be the only means of accessing the court in these cases. Paper channels will remain available for those who need them:
    - the Lord Chancellor will have the power to, by secondary legislation, provide for the circumstances in which the new online rules committee may make parallel rules, where necessary, for paper based procedures, so that proceedings may be retained within the scope of the online procedure and utilise other aspects of it, such as court referrals to mediation;
    - the Lord Chancellor will have the power to, by secondary legislation, provide for the circumstances in which the new online rules committee may make rules to transfer cases out of the online procedure and into the traditional court process where the complexity or importance of a case makes that appropriate;
    - the Lord Chancellor will have the power to specify in secondary legislation the circumstances in which a party initiating proceedings may use either the online procedure or the standard current procedures; and the circumstances in which the online procedure will cease to apply to particular proceedings.

Article 6

57. All of the above clauses raise issues under Article 6 ECHR (the right to a fair trial).

58. For the purposes of this memorandum, the Department has assumed that *in principle* it is possible that Article 6 is engaged throughout the process by which criminal charges, rights or obligations are ultimately determined. Whether *in fact* Article 6 is engaged at any particular stage of the process depends on the particular case and the decision in question.

59. In so far as it will be possible for certain decisions under the new civil online procedure to be made by authorised court and tribunal staff, the ECHR implications are considered separately below.

Article 6 and the right to an oral hearing

60. In relation to oral hearings:

- In criminal proceedings, the determination of a criminal charge will generally require an oral hearing, but there are exceptions, even at the stage of a substantive determination (*Jussila v Finland*[13]). The determination of a criminal charge includes the trial itself, and probably also any prior decision which has an important effect on the proceedings as a whole (*Salov v Ukraine*[14]). However a prior decision which does not have such an effect does not require an oral hearing.
- The accused has the right to examine witnesses against him or her and to have witnesses give evidence on his behalf, in particular where credibility is in issue (*Van Mechelen v Netherlands*[15])
- In civil proceedings, there is no presumption under Article 6 that an oral hearing is necessary. The need for an oral hearing is a fact sensitive issue. It will depend on the importance of the proceedings and the questions considered at those proceedings and whether the determination is such as to require an oral hearing (*Fischer v Austria*[16]); and in the case of interlocutory proceedings it will depend on whether those proceedings are themselves determinative of a civil right or obligation (*Micallef v Malta*[17]).
- There is no reason why a hearing which takes place remotely via virtual hearing or live link should be any less capable in principle of being fair than a hearing at which all parties are physically present (see *Polanski v Conde Nast Publications Ltd*[18]).
- However where there is a significant conflict of evidence, it is unlikely that a live audio link or wholly audio hearing would be appropriate as it would not be possible for the parties or the court to consider that evidence properly, particularly if cross-examination is required.

[13] (2007) 45 EHRR 39 §41, 42
[14] (2007) 45 EHRR 51
[15] (1997) 25 EHRR 647, §59-65
[16] (1995) 20 EHRR 349 §44
[17] (2010) 50 EHRR 37
[18] (2005) 1 WLR 637 HL §14

61. The Department considers that in relation to criminal proceedings, sufficient safeguards are in place across our proposals to ensure compatibility with the Article 6 right to an oral hearing.

62. It is already possible for the court to deal with matters without any hearing at all. The Criminal Procedure Rules detail how certain matters may be considered without a hearing. These are largely pre-trial and enforcement matters. Clause 31 enables the Lord Chancellor to amend any inconsistent legislation so as to facilitate pre-trial and enforcement matters being decided on the papers, so that more such matters may be decided in this way. Pre-trial and enforcement matters do not generally have an important effect on the proceedings as a whole. The option of holding a hearing will remain, however, and it will remain the case that in deciding whether to conduct any particular matter without a hearing, the court must act in accordance with the overriding objective of the Criminal Procedure Rules made by the Criminal Procedure Rules Committee to deal with cases justly, which explicitly includes recognising the rights of a defendant, particularly those under Article 6 (see Rule 1.1(2)(c)). Finally, as a court is a public authority pursuant to section 6 of the Human Rights Act 1998 it must act compatibly with the ECHR, and therefore the court will have to order an oral hearing if Article 6 requires one.

63. If a matter is heard through audio or video live links or conference technology, then there should generally be no issue as to compatibility with Article 6 given that an oral hearing is still taking place, albeit through remote means.

64. However, the court will only be able to order that a matter is dealt with virtually or through a live-link if it is satisfied that it is in the interests of justice to do so, after considering any representations from the parties. Again the court will act in accordance with the overriding objective of the Criminal Procedure Rules in doing so, and as a public authority the court will be required to ensure that any live-linked or virtual hearing is compatible with Article 6.

65. A specific concern may arise in relation to whether the giving of witness evidence by live audio link is compatible with Article 6 rights, given the importance of cross-examination to challenge conflicting evidence. The court will only be able to order this where no suitable video facilities are available, the defendant consents and the court is satisfied that this is in the interests of justice (see the discussion of waiver below).

66. In relation to civil proceedings, decisions on the papers will only be made where all parties consent (see the discussion of waiver below). The decision as to what alternative type of

hearing will be available will be taken by the court with relevant considerations to be included in the online rules. As above, the Department considers that there should therefore be no issue as to compatibility with Article 6.

67. The Department is therefore content that these provisions in Part 2 do not give rise to an issue of compatibility with Article 6 ECHR, in so far as the right to an oral hearing is concerned.

Article 6 and waiver

68. In relation to the ability to waive Article 6 rights:
    - It is possible in principle for a defendant to waive his or her rights to the protections guaranteed by Article 6, either expressly or impliedly, as long as that is done clearly and unequivocally, given freely on the basis of proper information as to the right being waived, and with such safeguards as are necessary in light of the significance of the right being waived (*Tolmachev v Estonia*[19]).
    - On the criminal law side, the waiver can include the waiver of the right to a fair trial altogether and a court determining the defendant's guilt, at least where the defendant pays a fine in settlement (*Deweer v Belgium*[20]).
    - Before a defendant can be said to have impliedly waived an Article 6 right, it must be shown that the defendant was aware of the right, could reasonably have foreseen what the consequences of his or her conduct would be, and has chosen not to exercise them (*Jones v United Kingdom*[21] and *Colozza v Italy*[22]).

69. Most of the proposals in Part 2 are based on the informed consent of the affected parties, with alternatives for those who do not consent.

70. As a general point it is important to note that people who cannot, or may find it difficult to, engage with digital processes will not be disadvantaged. There will be assisted digital channels through which defendants would be able to seek help to engage with the procedures if they wished; and engagement online is not mandatory.

71. The Department considers that, where consent is relied on, these new procedures will ensure that affected parties are given enough information to make a proper decision to waive their

[19] Judgment of 9 July 2015 §49
[20] [1980] ECC 169 §49
[21] (2003) EHRR CD269
[22] (1985) 7 EHRR 516

Article 6 rights; and that there will be adequate safeguards to protect against the consequences of the procedures applying in any case where the consent is invalid or open to doubt (for example, in the case of vulnerable defendants who may not understand the implications of engaging in this way). As such the Department considers that these new procedures are compatible with Article 6.

72. Consent is particularly important in so far as the proposals relating to criminal procedure changes and the new automatic online conviction procedure are concerned.

73. In relation to the criminal procedure changes, a defendant can choose to indicate their plea in writing for all offences, and, for adults charged with either way offences or young defendants whose case is to be allocated[23], also to have the trial venue determined in writing. For those cases which require an allocation decision, if the defendant does not engage with the written procedure, and also does not appear before the court, the decision on venue may be made in the defendant's absence if the court is satisfied that the defendant has been properly served; however an adult defendant retains a right to elect jury trial until the start of summary trial[24].

74. For adult defendants charged with either way offences, the core information to be provided is set out in new sections 17ZA(2), 17F(2)and 22A(1A) MCA 1980, and for children it is set out in new 24ZA MCA 1980, and includes information that allocation decisions can be dealt with in the defendant's absence if he or she does not engage online or attend court. For other offences the Criminal Procedure Rules and Criminal Practice Directions will set out what explanations or information the court is required to send to the defendant. For defendants under 18 this information is also to be given to a parent/guardian where reasonable to do so. Before the defendant is asked to indicate any online plea, the system will ask them to confirm they understand the consequences.

75. The following safeguards will apply:

    - The defendant is able to change their indicated plea. When the defendant attends court in person, which may either be for a hearing to convict and sentence in respect

[23] These are the cases which fall within section 24A Magistrates' Courts Act 1980 (so not those which must be sent to the Crown Court (for example, homicide or firearms offences)) and those where there is: an adult co-defendant being sent to the Crown Court; or a "serious offence" for which if found guilty the Youth Court's sentencing powers may be inadequate; or a related offence to be sent up to the Crown Court together with a main offence.

[24] (1913) UKHL 2

of an anticipated guilty plea or for a trial in respect of an anticipated not guilty plea, then the defendant will be required to enter an actual plea. Accordingly, the court is able to assess the extent to which the defendant is making an informed decision.

- To address any concerns that a plea may be entered on a person's behalf without his or her knowledge or consent, the court will be able set aside any steps of the proceedings of which the defendant was unaware.
- Further, in circumstances where earlier steps in the proceedings are set aside (for example, a written or online indication of a guilty plea) on the grounds that decisions taken in accordance with the written information have been based on incomplete information or a lack of informed consent to the written procedure, there are evidential restrictions in place which ensure that any prejudicial decisions are not admitted by the prosecution.

76. In relation to the automatic online conviction and standard penalty, defendants will need to actively opt-in to be convicted via this new procedure, by entering a guilty plea online and accepting the conviction and penalty. This new procedure will not apply to defendants who do not engage and pleading not guilty will mean the case is automatically listed for trial. If the defendant wishes to plead guilty but does not wish to accept the standard penalty or the online conviction they can instead choose to have a magistrate consider that information via the Single Justice Procedure or have their case heard in court. In addition:
    - Defendants will be presented with a range of information to allow them to make an informed decision to go down this route, including all the relevant evidence against them and the potential consequences of accepting the conviction and penalty, such as the disclosure regime. They will be given full details of the prospective fixed fine (and additional elements such as the surcharge, costs and compensation and penalty points if relevant) and details of the enforcement regime
    - The court will have the power to set aside a conviction, in the event that the court is satisfied that the defendant did not understand the consequences of their decision or the conviction was in any other way unjust. The court will also have the power to resentence the defendant in the event that they find the conviction should stand, but a different sentence should be imposed.

77. The Department is therefore satisfied that, where waiver is relied upon, defendants will be effectively waiving their Article 6 rights and sufficient safeguards are in place to protect vulnerable defendants who may not be able to do so.

Article 6 and open justice

78. In relation to open justice:
    - Both the common law (*Scott v Scott*[25]) and Article 6 ECHR (*Axen v Germany*[26]) require that hearings be in public, because of the public interest in scrutiny of the judicial procedure.
    - It is not enough that the proceedings are theoretically open to the public, practical steps must be taken to ensure that the public in informed and effective access is granted (*Riepan v Austria*[27]).
    - The principle of open justice is applies to interlocutory hearings as well as final hearings (*Graiseley Properties Ltd v Barclays Bank plc*[28]), although they are of course likely to be of less interest to the public or press.
    - Where there is no hearing, open justice will be served by the public having access to the court's decisions

79. Clause 34 and Schedule 6 provide that, where proceedings are conducted virtually (wholly video or wholly audio), the court can direct that the proceedings are to be broadcast for the purposes of enabling members of the public to see and/or hear the proceedings.

80. The intention is that there will be viewing screens in court premises to facilitate access. Virtual hearings will also be accompanied by listing practice which enables interested members of the public or press to attend an observation suite. These practical steps meet the requirement of publicity.

81. The current statutory safeguards that apply to youths and proceedings in the youth court will remain. Therefore, for example, the court may not decide to utilise viewing screens in court premises in respect of proceedings in the youth court in light of section 47 of the Children and Young Persons Act 1933 ("CYPA 1933").

82. The Department is therefore content that in relation to the provisions in Part 2 no issue of compatibility with Article 6 ECHR arises in so far as open justice is concerned.

[25] (1913) UKHL 2
[26] (1983) 6 EHRR 195
[27] Judgment of 14 November 2000 §29
[28] (2013) EWHC 67 (Comm) §16

UNCRC

83. The provisions relating to conducting preliminary proceedings in writing (or online), and use of audio and video technology in the criminal courts also apply to under 18s in any criminal court, including the youth court.

84. In making these changes the Department has considered the requirements of the UNCRC. Safeguards are in place to ensure the best interests of the child are primary and protected.

85. Where the defendant is under 18, the relevant youth offending team must have the opportunity to make representations to the court before any direction on the use of audio or video technology is made. The Criminal Procedure Rules will detail factors which the court must take into consideration when satisfying itself that it is in the interests of justice to direct a virtual hearing. This will include whether any of the parties or witnesses are vulnerable (for example, on the grounds of age) such that their effective participation or engagement in the case (with appropriate support or legal advice) can be ensured by such a hearing or whether it is better managed by a physical hearing in a court room.

86. In relation to engaging with preliminary criminal procedures in writing, defendants will have access to information and legal advice to assist them in making this decision. Further, there are provisions to involve the parent or guardian of any child or young person charged with an offence: see amendments to section 34A CYPA 1933. The procedural safeguards which apply to the youth court (for example, automatic reporting restrictions, an appropriately authorised Bench, and use of age appropriate language) will continue to apply in respect of online procedures.

Prohibition of cross-examination in family proceedings

87. Clause 47 inserts new Part 4B into the Matrimonial and Family Proceedings Act 1984 ("MFPA 1984") to make provision about the cross-examination of vulnerable witnesses in family proceedings.

88. New section 31R MFPA 1984 provides that no party to family proceedings who has been convicted of, or is charged with, a specified offence may cross-examine in person a witness who is the victim, or alleged victim of that offence. Relevant offences will be specified in secondary legislation. In turn, the (alleged) victim may not cross-examine the person convicted or charged. The provision will not apply where a person has a spent conviction.

89. New section 31S MFPA 1984 provides that no party against whom an on-notice protective injunction is in force may cross-examine the person protected by the injunction, or vice versa.

90. In any family proceedings where a statutory prohibition does not apply, the court has the discretion in specified circumstances to give a direction prohibiting a person from cross-examining a particular witness.

91. Where a person is prohibited from cross-examining another in person, new section 31V MFPA 1984 makes provision for the court to consider whether there are satisfactory alternatives to cross-examination in person. If the court considers there are none, then it must invite the person to arrange for a qualified legal representative to act for him or her for the purpose of cross-examining the witness. If the person does not do so, then the court must consider whether it is necessary in the interests of justice for the witness to be cross-examined by a qualified legal representative appointed by the court to represent the interests of the person. If the court appoints such a qualified legal representative, the reasonable costs of the representative will be met from the public purse. This will be provided for in secondary legislation made under new section 31W MFPA 1984.

Article 6

92. Private law family disputes may fall within the scope of Article 6 (the right to a fair trial) (*Keenan v Ireland*[29]); the right of access to and custody of one's child has been held to constitute a 'civil right' for the purposes of Article 6 (*R v United Kingdom*[30]), although more distant relatives such as grandparents will not necessarily be able to establish equivalent 'civil rights' (*W v United Kingdom*[31]).

93. The Department has assumed that *in principle* it is possible that Article 6 is engaged throughout the process by which family law rights or obligations are ultimately determined. Whether *in fact* Article 6 is engaged at any particular stage of the process depends on the particular case and the decision in question. Consideration has been given to the position of both the party who would undertake cross-examination and the witness who would be cross-examined.

[29] (1994) 18 EHRR 342
[30] (1987) 10 EHRR 74 §82 and 83
[31] (1987) 10 EHRR 29 §72 to 79

94. Currently, the court does not have the express power to prevent a party from cross-examining in person a witness, nor to order the appointment of a publicly funded legal representative to undertake cross-examination on behalf a party. The current position does not amount to a breach of Article 6 rights (*Re K and H (Private Law: Public Funding)*[32]); it is evident from legislation and case law (*Re W*[33]) that the court can use other case management options as alternatives to allowing a party to, in person, cross-examine a witness, such as the court asking questions of the witness.

95. Clause 47 imposes a bar on a party cross-examining in person a witness in specified circumstances; and gives a discretion to the court to prohibit cross-examination in person in specified circumstances. The Department does not consider that this is incompatible with the Article 6 rights of the party who would undertake the cross-examination.

96. The court will only exercise its discretion to prohibit cross-examination in person to improve the quality of a witness's evidence on cross-examination, or where it is satisfied that cross-examination in person would cause significant distress to the witness. Additionally, the prohibition can only be applied where it would not be contrary to the interests of justice.

97. Where a party is barred from cross-examining in person, the court will have to actively consider if there are suitable alternatives to such cross-examination. If there are none, then the court must invite the party to arrange for a qualified legal representative to undertake the cross-examination. If the party does not do so, the court will have the power to appoint a qualified legal representative to undertake cross-examination if it considers this to be in the interests of justice, paid from public funds. These provisions should ensure that the person's case is not prejudiced because he or she cannot undertake the cross-examination in person.

98. The rights of others parties (including the person who is to be cross-examined if that person is a party) will be better protected as the quality of evidence and conduct of the hearing will be improved as a result.

99. The Department does not consider these provisions in Part 2 amount to a limitation on Article 6 rights; rather they are ensuring a fair hearing for all parties.

[32] (2015) EWCA Civ 543
[33] (2010) UKSC 12

Article 8 ECHR

100. Article 8 ECHR (the right to respect for private and family life) may be engaged is so far as these proposals may interfere with the right to respect for family life. Whether family life exists in a given case or not will depend on the nature of the relationship between the individuals involved in a matter, not upon their legal status: it is a question of fact, depending on the real existence of close personal ties (*K v UK*[34]).

101. Where family life exists, there may be positive obligations inherent in an effective respect for that family life; and effective respect for family life may require the provision of civil law remedies (*Rasmussen v Denmark*[35]). However, the State has a wide margin of appreciation as to the need for, and content of, any measures taken to ensure respect (*Abdulaziz, Cabakes and Balkandali v UK*[36]).

102. The Department considers that, to the extent that it is necessary, the court's existing powers to make orders in relation to the protection of family life already protect Article 8 rights. For example, the Children Act 1989 gives the court powers which could be exercised to ensure a child has contact with his father where that is in the best interests of the child[37].

103. Where protection can be sought from the courts, Article 8 may oblige a State to make this means of protection effectively accessible, where appropriate, to anyone who may wish to have recourse to it (*R (Gudanaviciene and Others) v Director or Legal Casework and Another*[38]). However, again the State has a wide margin of appreciation as to the need for, and content of, any measures taken to ensure respect for private and family life (*Abdulaziz, Cabakes and Balkandali v UK* [39]).

104. The Article 8 rights of the party who would undertake any cross-examination, and of other parties (whether they are to be cross-examined or not), are best protected by the court coming to the 'right' decision. This is best achieved if all witnesses are able to give the best quality evidence. The Department therefore considers that this clause ensures that the Article 8 rights of all involved in the case are protected.

[34] (1986) App. No. 11468/85.
[35] (1984) 7 EHRR 371.
[36] (1985) 7 EHHR 471.
[37] See sections 1 and 8 Children Act 1989.
[38] (2014) EWCA Civ 1622 §70 as cited in *Re K & H (Private Law: Public Funding)* § 50
[39] (1985) 7 EHHR 471.

Part 3

Authorised court and tribunal staff

105. Clause 50 and Schedule 11 make provision for Her Majesty's Courts and Tribunals Service ("HMCTS") staff to exercise the functions of courts, judges and tribunals in cases where procedure rules so provide, across all courts and tribunals for which HMCTS is responsible. Relevant primary legislation already exists in every jurisdiction to deliver a limited authorised officer function, except in the Crown Court.

106. It is intended that these staff will be employed by HMCTS. The functions that they may exercise will be decided by the relevant procedure rule committee, and they will be subject to the direction of the Lord Chief Justice or his nominee (or Senior President of the Tribunals or his delegate) through practice directions and practice statements.

Article 6

107. Article 6 ECHR (the right to a fair trial) provides that that the determination of a person's civil rights and obligations or any criminal charge must be undertaken by 'an independent and impartial tribunal established by law'.

108. The requirements of independence apply not only to the 'tribunal' but also to any judge or other officer authorised by law to exercise judicial power (*Henryk Urban and Ryszard Urban v Poland*[40]). In considering independence, the manner of appointment, the term of office, and guarantees against outside pressures are relevant – as is the question whether the body presents an appearance of independence (*Bryan v United Kingdom*[41]).

109. However, compliance with Article 6 is generally assessed by reference to the proceedings as a whole, meaning that a process may be lawful even if it involves one or more stages that would not be compliant in themselves (*Le Compte v Belgium*[42]).

110. First, it is important to note that many case management decisions which it is proposed these authorised officers will be able to take will be uncontentious and not of sufficient importance to engage Article 6 in fact.

[40] (2010) App. No. 23614/08 §45
[41] (1995) 21 EHRR 342
[42] (1982) 4 EHRR 1 §51

111. However, assuming again that *in principle* it is possible that Article 6 could be engaged to a greater or lesser extent depending on the decision, Schedule 11 provides that all authorised court and tribunal staff will now be independent of the Lord Chancellor when exercising authorised functions, and subject only to the direction of the Lord Chief Justice or his nominee (or Senior President of Tribunals or his delegate). The model for this, and additional protections such as indemnities and immunities, are those which currently apply to justices' clerks (sections 29 and 31 to 35 of the Courts Act 2003 ("CA 2003")).

112. Finally, the procedure rule committees will be able to consider whether there is a need for procedures which provide for a 'de novo' review of any decision made by an authorised member of court or tribunal staff. In such circumstances, any party affected by the decision of an authorised member of court or tribunal staff will have the right to have the decision considered afresh by a judge. This is currently provided for in the Tribunal Procedure Rules and Civil Procedure Rules and it will be a matter for the rule committees as to whether such procedures are put in place.

113. The Department is therefore content that no issue of compatibility with Article 6 ECHR arises in relation to these provisions in Part 3.

Part 4

Judges with roles in the leadership of the judiciary

114. Clause 56 and Schedule 15 make provision relating to judicial leadership posts. They provide that certain statutory leadership posts can be held on a fixed term basis; ensure that those leadership judges have a role to hold at the end of their fixed term leadership position; and provide the power to pay allowances on top of salary where this is not possible. These are purely enabling provisions; it is proposed that additional remuneration will be paid by way of an allowance for leadership functions, however this will be considered in detail after the Senior Salaries Review Board's major review.

115. Judicial leadership in both the courts and tribunals is currently conducted on a piecemeal basis. Some leadership roles are purely non-statutory (such as resident judge positions) relying on delegated powers from the Lord Chief Justice and Senior President of Tribunals for their authority; others (such as the senior judges of some courts) are statutory appointments or designations of existing office holders to undertake existing functions. Some of these positions are subject to a Judicial Appointments Commission competition and some

are not. A small number of leadership positions, particularly at the most senior level (such as Head of Division), are separate statutory offices. Some leadership positions, irrespective of their nature, are placed in a higher paid group – for example, senior circuit judges are in a higher salary group than circuit judges. These provisions ensure consistency and clarity.

116. The power to pay judicial office holders a salary is found in the legislation establishing each office. It is a constitutional principle based on judicial independence that a judge's salary can be increased but not reduced. For courts judiciary this is reflected in the applicable legislation (see, for example, section 12(3) of the Senior Courts Act 1981). Salaries paid to judicial office holders in the tribunals and fee paid office holders are treated as protected even though there is no statutory provision to that effect. There is usually also an accompanying statutory power (relating to the different types of judicial office holders) for the Lord Chancellor to pay judicial office holders allowances and/or expenses.

Article 6

117. The same considerations in relation to judicial independence and Article 6 (the right to a fair trial) apply as set out above.

118. The Department does not consider that giving the Lord Chancellor the power to pay additional sums for performance of roles beyond the core judicial functions cuts across judicial independence and/or salary protection. The additional remuneration will be paid for judges' non-judicial functions, and will be paid as an allowance on top of their salary.

119. The Department therefore considers that no issue of compatibility with Article 6 ECHR arises in relation to these provisions in Part 4.

Part 5

Whiplash

120. Clauses 61 to 63 make provision for compensation for pain, suffering and loss of amenity ("PSLA") for soft tissue injury ("whiplash") claims with an injury duration of up to two years arising out of road traffic accidents to be subject to a tariff. The amounts specified in the tariff will be subject to an increase to be capped at a specified percentage (for example, 10%) at the court's discretion, if satisfied that there are exceptional circumstances for doing so.

121. Clauses 64 to 67 make provision regulating the settlement of such claims in advance of receipt of a medical report.

122. These provisions are intended to tackle the high incidence of claims for whiplash injuries following road traffic accidents which the Government considers are minor (and may be exaggerated or fraudulent). By reducing levels of compensation payment for this head of damages, the intention is to reduce the size and volume of claims, saving money for insurers which, it is intended, they should pass on to consumers in the form of lower motor insurance premiums.

123. It is important to note that only PSLA losses are affected – these provisions do not affect other areas where damages may be awarded, for example claims for medical fees or lost earnings.

Article 1 Protocol 1 ECHR

124. Article 1 Protocol 1 (protection of property) may be relevant, in so far as a civil claim can be 'property' and it could be argued that limiting PSLA damages amounts to depriving the possible claimant of possessions.

125. However, these changes will be prospective in effect. It will only apply to new claims where the cause of action is complete after the point at which the changes come into force. Only once a cause of action has crystallised (usually at the point the damage occurs, in a tort claim) will Article 1 Protocol 1 be engaged (*Pressos Compania Naviera SA v Belgium*[43]).

126. The Department does not therefore consider that Article 1 Protocol 1 is engaged by the provisions in Part 5.

New criminal offences

127. Clause 34 and Schedule 6 make provision for public access to virtual hearings and create offences to prevent unauthorised recording or transmission of:

- any image or sound broadcast (new section 85B(1) CA 2003); and
- any image of, or sound made by, another person observing the broadcast (new section 85B(2) CA 2003).

[43] (1995) 21 EHRR 301

128. The two offences attempt to recreate in part the existing prohibitions on photography (which includes video recording) and sound recording under section 41 of the Criminal Justice Act 1925 and section 9 of the Contempt of Court Act 1981 respectively. These provisions apply to physical hearings, and are somewhat dated in their drafting, but they reflect the long-held and widely accepted view that participants in court proceedings require a level of protection, and that the court requires control over wider public observation. It should be noted that both of these original offences are subject to strict liability, at least in part, and no defence is provided for. An offence under section 41 is subject to a fine not exceeding level 3 on the standard scale. A contempt under section 9 is capable of resulting in imprisonment and a fine, the severity of which depends on the court dealing with the contempt.

129. A defence is provided to the new offences under new section 85B CA 2003. Whilst the evidential burden is on the prosecution to prove that the accused made an unauthorised recording or transmission, it will be for accused to prove, on the balance of probabilities, that they were not in a designated premises, and he or she did not know, and could not reasonably have known, that the image or sound was of an section 85A broadcast, or of a person observing such a broadcast.

130. There is a further offence in new section 85C CA 2003 of making, or attempting to make, an unauthorised recording or transmission of a person's participation through a live-link. This is where a physical court is open to the public but one or more participants use a live audio or video link. The same defence as set out above applies.

131. Equivalent offences are created for the First-tier Tribunal and Upper Tribunal in new section 29A to 29D of the Tribunals, Courts and Enforcement Act 2007; and for the employment tribunals and the Employment Appeals Tribunal in new sections 39A to 39D of the Employment Act 1996.

132. Article 6(2) of the ECHR is engaged when the burden of proof is reversed. The Department believes that, taking account the nature of the offence and level of penalty (*R v Johnstone*[44]), that placing a legal burden upon the accused is both justified and proportionate (*R v Lambert*[45]) so as not to infringe the presumption of innocence. The overall burden of establishing guilt remains with the prosecution (*Lingens and Leitgens v Austria*[46]) who will

[44] (2003) 1WLR 1736
[45] (2001) UKHL 37
[46] (1981) 4 EHRR 373

have to produce the evidence of an unauthorised recording or transmission. It should in most cases be very clear that recording or transmission is prohibited. Indeed, the defence anticipates this as it only applies to recordings or transmissions made outside of designated premises. If a person makes a recording or transmission in a designated premises the prohibitions will be so clear as not to merit any defence. This reflects the position in section 41 of the Criminal Justice Act 1941 where there is no mens rea and no defence.

133. Outside of designated premises, it is acknowledged that there is the possibility for inadvertent recording or transmission, but given the well-known and long-standing public policy to restrict court broadcasting to protect the participants and the proceedings, it is reasonable once it is established that an unauthorised recording or transmission occurred, for the burden of proof to be reversed (*Salabiaku v France*[47]). In most circumstances the person will have been given warnings that the images should not be transmitted when accessing the sounds and images in the first place and he or she will therefore be aware and can take steps to avoid making such a recording or transmission. However, if their particular circumstances were such that for some reason they were unaware, it will uniquely be in their knowledge as to the circumstances in which they came to make the recording or transmission.

Ministry of Justice

23 February 2017

[47] (1988) 13 EHRR 379