

# BAR COUNCIL PARLIAMENTARY BRIEFING



## PRISONS AND COURTS BILL HOUSE OF COMMONS SECOND READING 20 MARCH 2017

1. This is a briefing from the General Council of the Bar of England and Wales (the Bar Council) on the Second Reading of the Prisons and Courts Bill on Monday 20 March 2017.

### 2. Overview

2.1 There is much to support in the Prisons and Courts Bill. Reform and investment in our courts and tribunals is long over-due. Information and communications technology has the potential to enhance our system of justice and to improve the experience of its users. Where they can deliver efficiencies and savings alongside other improvements, such as simplification of procedures, such innovations should be advanced.

2.3 These benefits notwithstanding, the use of online and written processes in place of physical hearings has the potential, unless appropriate safeguards are in place, to undermine the quality of justice and to damage the high regard in which our system of justice is held.

2.4 The Bar Council invites parliamentarians to consider our concerns and recommendations relating to the following areas of the Bill:

- a) **Case allocation and online indication of plea: Clauses 23, 25-30:** When inviting defendants to indicate guilty pleas or have mode of trial dealt with online or in writing, care should be taken to ensure they are aware of their right to legal advice, and of the consequences of a guilty plea. We do not believe that allocation is suitable for a written or online procedure in cases where magistrates are called on to make a decision.
- b) **Virtual Hearings: Clauses 32-33; Schedules 4-5:** Virtual hearings in criminal proceedings should be the exception, rather than the norm.
- c) **Online Conviction and Statutory Standard Penalty: Clauses 35-36:** Issuing convictions online should be limited to non-recordable offences such as those analogous to offences which attract a Fixed Penalty Notice.

- d) **Functions of courts and tribunal staff: Clause 50; Schedule 11:** More detail is required on proposals to reform roles performed by court and tribunal staff. Current proposals are expressed vaguely, but could undermine the independence of our judiciary and the nature of our adversarial system of justice.
- e) **Whiplash: Clauses 61-67:** Whiplash tariffs are set too low; the Government's proposals risk creating a two-tier system.

### **3. Case allocation and on-line indication of plea: Clauses 23, 25-30**

3.1 The Bar Council supports the elimination of hearings which are unnecessary and cause delays, and which serve only to increase stress for all parties. This support extends to sending indictable-only cases to the Crown Court without a hearing.

3.2 Cases where Magistrates are called upon to make a decision about case allocation, are not appropriate for a written or on-line allocation procedure, however. Allocation in these cases is more than the neutral processing of information, and proper consideration of the relevant factors and representations by the parties cannot be reproduced without a hearing.

#### **Recommendation: Defendants must be aware of their rights and implications of guilty plea**

3.3 The Bill must mandate that defendants be made aware of their right to take legal advice before indicating a plea through a written or online procedure. They must also be made aware of the consequences of a guilty plea (such as a criminal record or being placed on the Sex Offenders Register).

#### **Recommendation: Defendants should be offered a choice**

3.4 Even in cases where the defendant is clear on which plea they wish to indicate, they must be able to make a genuine choice about whether to use a written or on-line procedure, or not. In some cases, such as where the defendant or their counsel believe the wrong charge has been selected, the online procedure is not appropriate because it is through the discussion that takes place at the hearing that such points can be raised.

3.5 Additionally, defendants must not be pressurised into indicating a written or online plea, or having mode of trial decided in this way, by being made to wait an unreasonable time for an in-person hearing where they would prefer this option.<sup>1</sup>

#### **Recommendation: On-line procedures not to replace Magistrates' decisions on allocation**

3.6 Cases in which Magistrates are called upon to make a decision about case allocation are wholly unsuited to a written or on-line procedure. The Bar Council would welcome amendments to the Bill to reflect this principle.

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<sup>1</sup> The Bill as currently drafted explains at Clause 25(2) that defendants would only be able to access an in-person hearing once the time period for entering a written or online plea has expired. There must be clarity as to what limits will apply to this time period, if any.

#### **4. Virtual Hearings: Clauses 32-33; Schedules 4-5**

4.1 The Prisons and Courts Bill effectively proposes that live audio or video link direction should become the default<sup>2</sup> for some criminal hearings (although not for trials).

4.2 The Bar Council's view is that a standard requirement for a fair hearing is that all participants are in the same room, unless there is a clear reason why this is not possible, in which case alternative forms of communication should be used.<sup>3</sup>

4.3 The experience of members of the Bar is that virtual hearings diminish the ability of parties to follow proceedings and to understand each other. This inevitably will have serious consequences on the quality of justice as it is done and as it is seen to be done.

4.4 The Court relies on the parties obeying the etiquette of proceedings in not interrupting, and making their submissions sequentially. Court etiquette is harder to follow with a telephone hearing in particular, as it is difficult to determine who is speaking at any given moment. Absent visual non-verbal cues, this presents a particular challenge for litigants-in-person who do not know the procedures.

4.5 We have seen no evidence in the Impact Assessment, or elsewhere, to support the assertion<sup>4</sup> that virtual hearings confer benefits on victims and witnesses. Whilst some may be less likely to have to travel to court, it is not clear what proportion of victims and witnesses would instead prefer to have their "day in court".

#### **Recommendation: Presumption of physical proceedings**

4.6 Virtual hearings should not be used in criminal proceedings other than where there is a clear reason. The Bar Council would, therefore, support an amendment<sup>5</sup> requiring reasons to be given for issuing live link directions, rather than for *not* giving them.

#### **5. On-line Conviction and Statutory Standard Penalty: Clauses 35- 36**

5.1 The Bar Council broadly supports proposals for an on-line conviction and statutory standard penalty process, subject to the need to ensure that appropriate digital support is included for those with additional needs in accessing the internet.

5.2 Our concerns with the current drafting of this part of the Bill include:

- a) Lack of provisions for ensuring defendants' knowledge of their right to legal advice
- b) The range of offences included in the scope of this scheme, and
- c) The powers of the Secretary of State to place new offences in scope.

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<sup>2</sup> Since courts will be required to give reasons for not giving such a direction, instead of the other way round.

<sup>3</sup> We make no distinction between "virtual-enabled" hearings and "fully virtual hearings" in this respect.

<sup>4</sup> Joint Statement (p.8) [Transforming our Justice System](#), September 2016

<sup>5</sup> To Schedule 4, paragraph 2(7), and the appropriate provisions of Schedule 5

5.3 Many defendants will not know, for example, that an offence such as fare evasion, which would currently be in scope for the on-line process, is significantly more serious than minor motoring offences because of the intention to evade payment. The risk is that without legal advice, defendants may not grasp the gravity of the offence before pleading guilty.

**Recommendation: The right to seek legal advice**

5.4 Defendants must be made aware explicitly of their right to seek legal advice, and of the implications of pleading guilty. The Bar Council would support amendments to this effect.<sup>6</sup> Not providing such information could have serious consequences for defendants' rights to a fair trial and the quality of justice they receive.

**Recommendation: Scope of the scheme**

5.5 The scope of this scheme should be limited to non-recordable offences analogous to those eligible for the Fixed Penalty Notice scheme. As alluded to in para 5.3, including, for example, fare evasion in the scheme may give a misleading impression to defendants as to the gravity of the offence.

**Recommendation: Powers of the Secretary of State**

5.6 The Bill as drafted gives the Secretary of State the authority to specify that any summary offence not punishable by imprisonment can be eligible for online conviction. Any extension of the range of offences beyond those which attract Fixed Penalty Notices should be made the subject of consultation (at which stage a full evaluation of the existing scheme should be provided).

## **6. Functions of staff of courts and tribunals: Clause 50; Schedule 11**

6.1 The Bar Council is concerned about the lack of clarity around reforms to the roles and qualifications expected of HMCTS staff who will be authorised to take on more of the case management functions of a court or tribunal.

6.2 Without clear limits on the expanded role of these "authorised staff", these provisions have the potential to create a fundamental shift in the nature of UK justice towards an inquisitorial system and a career judiciary.

6.3 Our adversarial system requires independent judges. This is not compatible with a "career" judiciary. A move towards such a system would not match the expectations held by members of the public about the level of experience and independence of the judiciary and those acting in a judicial capacity.

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<sup>6</sup> Whilst there is an undertaking in the Explanatory Notes (para 245) that included a notification to defendants. However, this undertaking should appear on the face of the Bill or in the Criminal Procedure Rules.

## **Recommendation: Legislative scrutiny of court staff reforms**

6.4 The Bar Council recommends that Parliament be provided with more detail on the nature and extent of the suggested jurisdiction of “authorised staff”.

6.5 Legislators should know, for example, if these staff members will have the power to determine the outcome of any matter which is contested by the parties and, if so, what rights of appeal would then lie and to whom, and whether will this be consistent across all jurisdictions. Will staff be legally trained, and what will be the level of their authority?

## **7. Whiplash: Clauses 61-67**

7.1 The Bill as drafted will prevent litigants who suffer whiplash injuries from recovering their legal costs from the losing party using the costs-shifting rule. The consequence will be a massive increase in unrepresented claimants.

7.2 The Bar Council’s view is that there is no evidence and no logical reason why this should reduce fraud. If anything, these reforms will likely increase rather than decrease the number of fraudulent claims because paying a fixed sum for injury would make it more cost-effective for insurers to pay out on claims than challenge them.

7.3 The Bar Council has additional concerns relating to the proposed tariff structure.

## **Recommendations: Support to unrepresented litigants and provide information to victims**

7.4 A mechanism is required to ensure that the victims of road traffic accidents are provided with accurate and comprehensive information on how to obtain compensation. There should also be a strict code of conduct for motor insurers dealing with such claims.

## **Recommendations: Tariffs**

7.5 There are significant problems with the proposed tariffs which require amendment. First, it is set too low and second, it bears no close relationship with current awards for general damages in cases of this kind.<sup>7</sup> (See ANNEX 1 Whiplash tariff table).

7.6 This disparity risks creating a two-tier system. On one tariff, damages are determined by judges with reference to the Judicial College Guidelines, taking into account changes in living standards and the individual circumstances of the claimant. The other tariff is set at an artificially low level and has no regard for the individual circumstances of the claimant. Such a two-tier system will undermine public confidence in the court system.

7.7 The Bar Council has suggested specific amendments in ANNEX 2 below.

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<sup>7</sup> See for example the research conducted by PIBA at §§ 73-81 of its response, [https://d3n8a8pro7vhm.cloudfront.net/piba/pages/13/attachments/original/1483617564/PIBA\\_response\\_to\\_whiplash\\_SCT\\_consultation\\_FINAL\\_4-1-17.pdf?1483617564](https://d3n8a8pro7vhm.cloudfront.net/piba/pages/13/attachments/original/1483617564/PIBA_response_to_whiplash_SCT_consultation_FINAL_4-1-17.pdf?1483617564)

## ANNEX 1 – Whiplash tariff table

<b>Injury Duration</b>	<b>2015 average payment for PSLA – uplifted to take account of JCG uplift (industry data)</b>	<b>Judicial College Guideline (JCG) amounts (13th edition) Published September 2015</b>	<b>New tariff amounts</b>
0–3 months	£1,750	A few hundred pounds to £2,050	£225
4–6 months	£2,150	£2,050 to £3,630	£450
7–9 months	£2,600	£2,050 to £3,630	£765
10–12 months	£3,100	£2,050 to £3,630	£1,190
13–15 months	£3,500	£3,630 to £6,600	£1,820
16–18 months	£3,950	£3,630 to £6,600	£2,660
19–24 months	£4,500	£3,630 to £6,600	£3,725

## ANNEX 2 – Proposed whiplash amendments

### Clause 62(1) (b)

Clause 62(1) (b) the duration of whiplash injury is defined at (ii) as

*Would have been, or would be likely to be, no more than two years but for the claimant's failure to mitigate the whiplash injury*

The definition of whiplash injury for the purposes of these reforms must be strictly set by time, otherwise it will cause significant prejudice to claimants. 'Mitigation' is usually used in the context of a failure to reduce the effects of financial loss, it is less used in the context of a failure to reduce the consequences of injury, in effect the failure to seek medical treatment. Many victims of road traffic accidents do not seek medical treatment, but live with the consequences of their injury. Such claimants should not have their compensation reduced because of their stoicism.

This clause would work better if it simply defined the period of time and (1) (b) (ii) were removed.

### Clause 62(3)

Clause 62(3) refers to 'minor psychological injuries'.

Minor psychological injuries should be defined in the Act so as to make clear that this applies to psychological injuries which fall short of a diagnostic psychological condition, for example a definition which would include 'shock' and travel anxiety, but not depression or post-traumatic stress disorder.

The Government's Response to the Consultation said: "*A definition will be developed to reduce the scope for affected claims to be displaced into other categories of claim. The Government accepts that the definition should not cover more serious psychological illnesses, for example, depression and post- traumatic stress disorder, which are diagnosable using international standards. The Government therefore proposes to limit the scope of this measure to minor psychological injuries, such as 'travel anxiety' and 'shock.'*"

A definition of minor psychological injuries should be included at clause 62(3). The BC's suggestion is as follows:

*"Minor psychological injury" is a psychological injury which is not capable of diagnosis by international diagnostic standards.*

#### **Clause 62(4)**

In making regulations under 62(4) the Lord Chancellor should be required to have proper regard to decided cases and the relevant brackets for damages in the Judicial College Guidelines. The clause should be amended to require the Lord Chancellor to have specific regard to such sources, so after Clauses 4 and 5, the following new clause 62(6) should be added:

*In determining the total amounts of damages for pain suffering and loss of amenity in accordance with (4) and (5) above, the Lord Chancellor shall have regard to the levels of damages awarded by the court and the assessment provided by the Judicial College in its Guidelines for General Damages.*

A fundamental and difficult point is that the tariff must be subject to change and review. It would be unworkable to suggest a fixed time frame for review. The most sensible course would be for a review of the tariff limit to coincide with new editions of the Judicial College Guidelines, but it is difficult to see how such a clause could be drafted or included in the Bill.

#### **Current Clause 62(6)**

This clause should be removed for the reasons set out in relation to Clause 62(1)(b) above

#### **Bar Council March 2017**

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