

i Opinions expressed in this report are those of the author and should not be taken to be those of The Legal Education Foundation.



A court without laws?

I have already explained why the Prisons and Courts Bill was so important to reform of the courts and tribunals. However, it was assumed that the general election of June 2017 would do little more than delay the bill's passage onto the statute book by a few months.

Theresa May's failure to obtain the increased majority she had been expecting was certainly a matter of concern to the bill's supporters. But they were relieved to see that there was still a courts bill in the new government's legislative programme. The clauses dealing with prisons, which would have had little practical effect without greater financial investment, were simply dropped. But, in the Queen's Speech on 21 June 2017, the government promised that legislation would be introduced "to modernise the courts system".

Explaining these proposals, the Ministry of Justice said¹ its bill would "reform the courts system in England and Wales to ensure it is more efficient and accessible, and in doing so utilise more modern technology". The bill would also "introduce digital services which will allow businesses to pursue their cases quickly, enabling them to recover debts more easily". So there seemed to be no cause for concern.

As the legislation had already been drafted, you might have thought the government would have reintroduced its bill shortly after the election. But nothing appeared before parliament adjourned for its summer break towards the end of July. During the summer, it became clear that something had gone badly wrong.

The government's business managers were said to be worried that the bill would prove to be a hostage to fortune. Although uncontroversial in itself, its scope was wide enough to allow hostile amendments on legal aid. To limit the risk that the bill would get bogged down, or even defeated, ministers were asked to consider limiting its scope to criminal cases – where legal aid was still available. The impression given was of a government running scared of its own legislative programme.

Towards the end of March 2018, the lord chancellor David Gauke told me that although a courts bill was imminent it would not be published until after Easter. The following month, he told parliament: "I think we need to bring forward a number of aspects of that to help to modernise our court system. I hope to be able to make progress on that in the coming months."²

A day later, the lord chief justice said he hoped the legislation would be back before parliament “fairly soon”. Without it, Lord Burnett of Maldon told the Lords constitution committee, some of what the judges did would remain “trapped in the mid-20th century”.³

Asked to explain, Lord Burnett added this:

In the criminal part of the bill, for example, changes are proposed that mean that it will not be necessary for people to attend physically in magistrates’ courts as they are required to do by statute at the moment. That needs primary legislation. We can all think of examples, either through the media or personal experience, of utterly pointless personal attendances at court in circumstances where no serious business was going to be transacted. That is an example.

The ability in the civil field to have dedicated rules created by a rules committee for online courts requires legislation, for example. Many other features contained in the old bill were simply designed to unclog the arteries of what has been going on for a very long time. That is why I very much hope that legislation will be back relatively soon.⁴

Two weeks later,⁵ it was David Gauke’s turn to answer the constitution committee’s questions. Lord Beith wanted to know when the bill would be published. The justice secretary said this was a matter for discussions with the government’s business managers:

I hope we can make progress on this before very much longer. There are a number of things we can do in this area which are non-legislative but there are also some things which are best done in a legislative way. Without being able to give the committee a timetable today, I am keen to make progress on that before very much longer.

A courts bill would save the government a great deal of money. According to the NAO report published on the same day,⁶ HMCTS had assessed the cost of having to introduce the reforms through rules rather than primary legislation. It said the value of benefits could fall by between £72m and £95m each year and funding from the sale of estates could be reduced by up to £62m – presumably because more buildings would be required.

And then, just when everyone was beginning to think it might never happen, a bill was published as parliament was about to rise for the Whitsun recess. But this turned out to be a pale shadow of its former self.

References

1. <https://www.gov.uk/government/publications/queens-speech-2017-background-briefing-notes>

2. <https://goo.gl/b71UeR>

3. <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/lord-chief-justice/oral/82108.pdf>

4. <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/lord-chief-justice/oral/82108.pdf>

5. 9 May 2018.

6. <https://www.nao.org.uk/report/early-progress-in-transforming-courts-and-tribunals/> paragraph 1.26.

© 2018 The Legal Education Foundation

© Joshua Rozenberg

Opinions expressed in this report are those of the author and should not be taken to be those of The Legal Education Foundation.