

Courts and Tribunals (Judiciary and Functions of Staff) Bill House of Commons Second Reading

27 November 2018

Introduction

The Equality and Human Rights Commission (the Commission) has been given powers by Parliament to advise on the equality and human rights implications of laws and proposed laws. This briefing provides our advice for parliamentarians on the Courts and Tribunals (Judiciary and Functions of Staff) Bill.

Our priorities are to ensure the provisions in the Bill comply with the right to a fair trial protected under the Human Rights Act 1998 (Article 6 of the European Convention on Human Rights), and that they help rather than hinder courts and tribunals to meet the needs of those with characteristics protected under the Equality Act 2010.

The provisions in the Bill are part of a much broader programme to make significant changes to the justice system, including how and where court hearings take place. Proposed changes include the introduction of video hearings and online courts, underpinned by the closure of many court buildings across the estate. The Bill presents an opportunity to ensure

the Government's approach to court reform promotes compliance with human rights standards and equal access to justice.

Recommendations

We recommend that:

- the Bill should be amended to provide safeguards to ensure compliance with fair trial rights
- the programme of court reform should be accompanied by a sound evidence base and an assessment of the cumulative impact on access to justice for different groups sharing protected characteristics.

The legal framework

The key elements of the equality and human rights legal framework with which court reform must comply include:¹

- Article 6 of the European Convention on Human Rights (ECHR), which is given domestic effect by the Human Rights Act 1998, provides for the right to a fair trial in both civil and criminal proceedings.
- Article 6 ECHR provides that the determination of a person's civil rights and obligations or any criminal charge must be undertaken by an independent and impartial person.
- Under the Equality Act 2010 it is unlawful for the Ministry of Justice (MOJ) and its executive agency HM Courts and Tribunals Service (HMCTS) to discriminate in providing services or exercising public functions on the basis of the protected characteristics of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, or sexual orientation.

¹ We set out the full relevant legal framework against which the court reform proposals should be assessed in our [response to the consultation 'Fit for the future: transforming the court and tribunal estate.'](#)

- In exercising their functions, the MOJ and HMCTS are also required under the public sector equality duty to have due regard to the need to: eliminate unlawful discrimination, advance equality of opportunity (including having regard to the need to remove or minimise disadvantages) and foster good relations.

Our analysis

1. Ensuring compliance with fair trial rights

Clause 3 and the Schedule to the Bill would allow judicial functions to be delegated to authorised court and tribunal staff. This would allow decisions currently made by independent judges to be made by employees of HMCTS. The scope of the functions that could be delegated to non-judicial staff is not generally set out in the Bill, although a small number of functions are excluded. The relevant procedure rule committee (PRC) would otherwise be responsible for determining which functions are delegated.

The delegation of certain judicial functions already takes place in some jurisdictions, and we accept that enabling staff to take decisions where appropriate could increase efficiency and improve the experience of court and tribunal users. However, as we set out in our [briefing for Report Stage in the House of Lords](#), without sufficient safeguards, the delegation of judicial functions may result in decisions which have a significant impact on the outcome of a case being made by an employee of HMCTS rather than an independent judge.

As drafted the Bill does not include a right for individuals to apply for a decision made by a non-judicial officer to be reconsidered by a judge. Some protection is provided by a Government amendment made at Report Stage in the House of Lords, which directs PRCs to consider whether particular delegated functions should be subject to a right to reconsideration, and report their reasons if they decide it should not. We remain concerned, however, that the Bill is not sufficiently clear about the considerations PRCs should take into account when determining whether delegated functions should be subject to a right to reconsideration by a judge, and that individual rights may be at risk as a result.

We recommend that the Bill should be explicit that, when making rules to delegate judicial functions, PRCs must consider whether the function could have a material impact on the substantive rights of the parties. In our analysis this would provide an important safeguard and support compliance with Article 6 rights to a fair trial, including the right to ‘independent and impartial’ determination.

2. Analysing the cumulative impact of court reform on equality and human rights

The Bill is significantly narrower than the Prisons and Courts Bill 2016-17, which fell at the last General Election and which proposed a broad set of legislative provisions to take forward significant modernisation of the courts.² This included provisions to expand video hearings and introduce fully online courts. We are concerned that the reduced scope of the current Bill indicates a “drip-feed”³ approach to reform, where there are insufficient opportunities for parliamentary scrutiny and limited ability to assess the cumulative impact on equality and human rights.

The Commission recognises that modernising the courts may provide a number of opportunities to improve access to justice - for example, providing alternatives to attending court in person may increase accessibility for some disabled people. However, we have concerns about the potentially detrimental impacts, in particular that people with certain protected characteristics may be excluded by digital processes, and that video hearings and online courts may negatively affect access to justice and fair trial rights. We are also concerned that the Government has proceeded with the closure of more than 230 crown, county and magistrates courts before digital alternatives have been properly assessed and established.⁴ It is important that the proposals in this Bill are considered in the context of the wider reform programme and other recent changes to the justice system, including cuts to legal aid, so that the overall human rights and equalities implications are properly assessed.

² [Prisons and Courts Bill 2016-17.](#)

³ Joshua Rozenberg: [‘Sitting in Judgment on Flexible Courts’](#),

⁴ [Response to Parliamentary Question 136450.](#)

As the equality statement for the Bill accepts, the Government does not hold data on the profile of users of the civil courts and tribunals. We are concerned that this prevents a meaningful assessment of the impact of the provisions in the Bill on those with particular protected characteristics. We have also made this point in relation to the modernisation programme overall.⁵ The PSED requires an assessment of the impact of any new service or change to existing services on users who share protected characteristics. That impact can then be taken into account when developing proposals, including by identifying steps to mitigate any disadvantage. Adequate and accurate equality evidence, properly analysed, is at the root of effective compliance with the PSED.

We recommend:

- That the Government undertake a cumulative impact assessment to ensure it understands the practical impact of increased digitisation, court closures and the proposed increased delegation to non-judicial staff on court users - particularly those who may have different needs arising from characteristics protected under the Equality Act 2010 - and to ensure the changes are compliant with human rights obligations.
- That the Government collect comprehensive data about court users to enable a robust assessment of the equality impact of the Bill and of the modernisation programme as a whole.

Further information

The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. Find out more about the Commission's work on [the Commission's website at www.equalityhumanrights.com](http://www.equalityhumanrights.com).

⁵ EHRC response to MOJ consultation '[Fit for the future: transforming the court and tribunal estate](#),' (March 2018).

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