

# Courts and Tribunals (Judiciary and Functions of Staff) Bill House of Lords Report Stage

16 October 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 analysis of the following proposed amendment to the Courts and Tribunals (Judiciary and Functions of Staff) Bill:

- **Amendment 8**, which provides for a right to apply for judicial reconsideration of a decision made by an authorised non-judicial officer.

As we explained in our [Second Reading Briefing](#),<sup>1</sup> the Bill presents an opportunity to address the Government's approach to reforming the courts system and to consider how it can ensure human rights compliance and equal access to justice. We set out the relevant legal

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<sup>1</sup> [EHRC Second Reading briefing on the Courts and Tribunals \(Judiciary and Functions of Staff\) Bill \(June 2018\)](#).

framework against which the court reform proposals should be assessed in full in our response to the consultation '[Fit for the future: transforming the court and tribunal estate](#).'<sup>2</sup> Our focus in this briefing is on Clause 3 and the Schedule to the Bill, which allow for delegation of some judicial functions to authorised non-judicial staff.

The Bill would allow authorised staff of HM Courts and Tribunals Service (HMCTS) to exercise some judicial functions. We accept that enabling staff to take decisions where appropriate could mean that those who use the courts and tribunals experience a more efficient service, which would be welcome. Delegation of some judicial functions to court and tribunal staff already takes place in some jurisdictions. Our concern is that the Bill does not provide sufficient safeguards around the delegation of judicial functions, which may result in decisions that have a significant impact on the outcome of a case being made by an employee of HMCTS rather than an independent judge, with no provision for the decision to be reconsidered.

Our priorities are

- **ensuring that delegation does not prejudice the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR) as protected by the Human Rights Act, in particular the requirement that rights are determined by an independent and impartial person**
- **ensuring that such delegation helps rather than hinders courts and tribunals to meet the needs of those with particular characteristics protected by the Equality Act 2010.**

We have focused on an amendment to the Bill that supports these priorities.

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<sup>2</sup> [EHRC response to MOJ consultation "Fit for the future: transforming the court and tribunal estate" \(March 2018\)](#).

# **Right to apply for judicial reconsideration of a decision made by authorised staff**

## **Commission’s recommendation**

**Support Amendment 8**, which provides the right to apply for judicial reconsideration of a decision made by authorised staff.

## **Why is the Amendment needed?**

Clause 3 and the Schedule to the Bill provide for judicial functions to be delegated to authorised staff across the criminal, civil and family courts and tribunals. This would allow decisions that are currently made by independent judges to be made by employees of HMCTS. The scope of the functions that can be delegated to non-judicial staff are not set out in the Bill and would be determined by the relevant procedure rule committee (PRC). As currently drafted, the Bill does not include provision for a right to apply for decisions made by non-judicial staff to be reconsidered by a judge.

Amendment 8 would ensure the power to delegate judicial functions is compliant with fair trial rights as protected by the Human Rights Act, in line with our first priority set out above.

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 tribunal established by law’. 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.<sup>3</sup> As the Ministry of Justice (MOJ)<sup>4</sup> acknowledges, in considering independence, guarantees against outside pressures are relevant – as is the question of whether the officer presents an appearance of independence.

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<sup>3</sup> This is explained at paras 10-16 of the [MOJ’s ECHR memorandum on the Bill](#).

<sup>4</sup> [MOJ – Memorandum on the Courts and Tribunals \(Judiciary and Functions of Staff\) Bill – European Convention on Human Rights \(May 2018\)](#).

The Bill provides that authorised staff will be independent of the Lord Chancellor when carrying out delegated judicial functions, but they remain court staff and do not take the judicial oath of independence. The Government’s Human Rights memorandum on the Bill<sup>5</sup> suggests that should Article 6 be engaged in any of those decisions, the independence it requires is guaranteed by the provisions in the Schedule, which provide that authorised staff will be independent of the Lord Chancellor and subject only to the direction of the Lord Chief Justice when taking such decisions. As the Government’s Human Rights memorandum on the Bill<sup>6</sup> acknowledges, one way of ensuring that decisions are Article 6 compliant is to ensure that any party affected by the decision of an authorised member of court or tribunal staff has the right to have the decision considered afresh by a judge. This is currently provided for, for example, in the Tribunal Procedure Rules, but it is not included as a requirement in the Bill as drafted. A proposed Government amendment (Amendment 7) directs PRCs to consider whether new rules of court should include a right to reconsideration. Under this Amendment, where a PRC decides not to include a right to reconsideration, it should inform the Lord Chancellor of its decision and its reasons for reaching this decision.

The Commission considers that an Amendment guaranteeing a right to reconsideration offers stronger protection for the right to a fair trial. This approach would guarantee the ‘independent and impartial’ determination required by Article 6.

We are aware of two objections to this approach, which can each be addressed as follows:

- first, it has been said that including a requirement for a right to reconsideration on the face of the Bill unnecessarily fetters the ability of the PRCs to set their own rules. We recognise that each PRC has the relevant expertise in practice and procedure for its jurisdiction, and accept the need for decisions about detailed practice and procedure to be left to PRCs. However, we believe that Parliament has a legitimate role in ensuring that the new

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<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

system of delegation proposed in the Bill includes a backstop protection for the right to a fair trial.

- second, it has been suggested that a dissatisfied party will inevitably apply for reconsideration by a judge, which would negate the benefits of delegating decisions to staff. This objection was dealt with by Lord Briggs in the Final Report of his Civil Court Structure Review.<sup>7</sup> He accepted that an unfettered right to reconsideration was a “necessary long stop” and cited evidence from real-life precedents suggesting that where such a right exists elsewhere, the numbers of reconsideration applications are low. That should be the case particularly if, as the MOJ suggests, the decisions being made by authorised staff are properly “non-contentious”.<sup>8</sup>

We do not consider these objections strong enough to outweigh the importance of ensuring the independent judicial scrutiny of decisions as required by Article 6, particularly given the nature of decisions that may be delegated. In its human rights memorandum on the Bill,<sup>9</sup> the MOJ suggests that the intention is for authorised staff to make only uncontentious case management decisions that are not of sufficient importance to engage Article 6. Case management decisions can, however, have a significant impact in shaping the issues and progress of a case and, ultimately, its outcome. For example, a decision on the appropriate timescales within which a party should take a step in proceedings may be significant, as failures to comply with that timescale can subsequently lead to some or all of a party’s case being struck out.

Furthermore, the MOJ’s factsheet on the delegation of functions to non-judicial staff<sup>10</sup> says that it expects authorised staff will be able to exercise a range of functions and responsibilities, including case management powers and some mediation roles. This suggests it is envisaged they will have a role beyond merely making non-contentious decisions on purely procedural matters in the future. The Government’s amendment (Amendment 5) excludes some functions from delegation, but indicates

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<sup>7</sup> [Civil Courts Structure Review: Final Report by Lord Justice Briggs, July 2016](#). The issue is specifically dealt with at paras 7.7-7.9.

<sup>8</sup> This applied to the Salford Legal Advice Project referred to by Lord Briggs at para 7.9 of his report.

<sup>9</sup> MOJ – Memorandum on the Courts and Tribunals Bill.

<sup>10</sup> [MOJ – Factsheet: Authorised court and tribunal staff: legal advice and judicial functions \(2018\)](#).

that others, which may be significant to the progress and outcome of a case, could be delegated to non-judicial staff – for example, the issuing of a warrant for a person’s arrest to secure their attendance at court.

It is our view that the right to judicial reconsideration of decisions made by authorised staff provides an important backstop protection. We therefore recommend supporting Amendment 8.

## **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).

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