

Courts and Tribunals (Judiciary and Functions of Staff) Bill

House of Lords Second Reading

18 June 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 advice for parliamentarians on the Courts and Tribunals (Judiciary and Functions of Staff) Bill.

The issues we have identified have implications for Article 6 (the right to a fair trial) under the European Convention of Human Rights, and are relevant to the requirements of the public sector equality duty under the Equality Act 2010. 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.

Key recommendations set out in this briefing include:

- **Assessing the cumulative impact of the broader courts modernisation programme:**
 - The provisions in the Bill, while relatively narrow, are part of a much wider programme of changes to the way courts work

including how and where court hearings take place. The Government should undertake a cumulative impact assessment to ensure it understands the impact of those changes 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.

- **Building a sound evidence base on the impact of proposed changes on court users with protected characteristics:**
 - There is a lack of data about court users with protected characteristics. The Government should 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.
- **Ensuring the delegation of judicial functions to non-judicial staff in clause 3 of the Bill meets the needs of those with particular characteristics protected by the Equality Act 2010 and is Article 6 ECHR compliant:**
 - While delegating some judicial functions may make the courts easier and more efficient for court users, the Government should clarify how it will ensure that decisions about which judicial functions to delegate and the authorisation of staff to carry out those functions will be made with due regard to the aims of the Public Sector Equality Duty and in particular to meeting the needs and removing barriers to court users with protected characteristics under the Equality Act 2010.
 - That a requirement for a right to a de novo review by a judge of any delegated decision should be included in the Bill to ensure compliance with the Article 6 ECHR requirement for decisions by an independent and impartial person.

Relevant Legal Framework

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”¹. In summary:

- Article 6 of the European Convention on Human Rights (ECHR) sets out the right to a fair trial in both civil and criminal proceedings. Read with Article 6, Article 14 of the ECHR guarantees freedom from discrimination in relation to the right to a fair trial. Most rights in the ECHR, including the right to a fair trial, have been given domestic effect by the Human Rights Act 1998 (HRA). Section 6(1) of the HRA provides that public authorities must not act incompatibly with the incorporated rights.
- Article 6(1) ECHR sets out the right of effective access to civil and criminal courts and tribunals. The European Court of Human Rights has established that litigants should have a ‘clear, practical and effective opportunity’ to go to court.
- Article 6 ECHR also 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’. 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.²
- Articles 6(2) and (3) ECHR guarantee specific minimum rights for those charged with criminal offences. These include the rights to be informed in a language which they understand, and in detail, of the nature and cause of the accusations against them; and to have adequate time and facilities for the preparation of a defence and to examine witnesses against them.
- As well as complying with the UK’s obligations under the ECHR, proposals for court reforms should also reflect other international human rights obligations. Of particular relevance is the UN

¹ EHRC response to MOJ consultation “Fit for the future; transforming the court and tribunal estate” (29 March 2018) (available at https://www.equalityhumanrights.com/sites/default/files/reponse_to_the_consultation_on_the_strategy_to_transform_the_courts_and_tribunal_estate.pdf).

² This is explained at paras 10-16 of the MOJ’s ECHR memorandum on the Bill (available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710509/CTJFS-bill-ECHR-memo.pdf).

Convention on the Rights of People with Disabilities (UNCRPD) and the Convention on the Elimination of all forms of Discrimination against Women (UNCEDAW). Also relevant are the Convention on the Elimination of all forms of Racial Discrimination (UNCERD) and the International Covenant on Civil and Political Rights (ICCPR), which includes the protection of fair trial rights. UNCEDAW and UNCERD require effective access to justice free of discrimination. UNCRPD requires effective access to justice for persons with disabilities on an equal basis with others, to facilitate their effective role as participants in all legal proceedings.

- It is unlawful under the Equality Act 2010 for both 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.
- Discrimination can take a number of forms, including direct and indirect discrimination, discrimination arising from disability, and a failure to make reasonable adjustments. The duty to make reasonable adjustments is anticipatory, which means that organisations must think in advance and on an ongoing basis about the requirements of disabled people and the adjustments that may have to be made for them.
- In exercising their functions, the MOJ and HMCTS are also required under the public sector equality duty (PSED) 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.

We have used that legal framework to assess specific aspects of this Bill and the approach to the modernisation programme more generally.

Our Analysis

1) The cumulative impact of the broader courts modernisation programme

The Bill is much reduced compared to the previous Courts and Prison Bill 2016-17, which proposed legislative foundations for significant modernisation of the courts including the expansion of video-link hearings and the introduction of online pleading and fully online courts. We recognise that the need to prioritise the EU Withdrawal Bill and related matters means there is limited Parliamentary time for other legislation. However, we are concerned that what one respected commentator has called a “drip-feed” approach to courts reform³ may reduce parliamentary scrutiny of proposals and increase the risk that an understanding of the cumulative human rights and equalities impacts is lost.

The Commission recognises that modernising the courts may provide a number of opportunities to improve access to justice, for example by improving accessibility for some disabled people by providing alternatives to attending court in person. However, we have concerns about the potentially detrimental impacts, in particular that people with certain protected characteristics are excluded by digital processes, and that video-link hearings and online courts negatively affect access to justice and fair trial rights. There are also implications for principles of open justice and for public confidence in the justice system.

While the proposals in this Bill are narrow, it is important that they are considered in context so that the overall human rights and equalities implications are properly assessed. This relates both to the wider modernisation programme and to other recent changes to the justice system, in particular cuts to legal aid.

Our more general concern is that the “drip feed” approach to courts reform risks losing sight of the need to assess the cumulative impact of

³ Joshua Rozenberg: “Sitting in Judgment on Flexible Courts”, Law Society Gazette 5 June 2018 (available at <https://www.lawgazette.co.uk/commentary-and-opinion/sitting-in-judgement-on-flexible-courts/5066276.article>).

legislative and practical changes (such as to the court estate) against the relevant legal framework. It may in particular risk the equality impact of changes being assessed in isolation from each other rather than as parts of a set of changes which may interact and have knock on effects on each other. For example, we have previously expressed our concern that court closures have proceeded before the impact of digital alternatives has been adequately assessed.⁴ The Government has closed more than 200 courts since 2011⁵.

Our recommendation

The Commission recommends:

- That the Government should 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.

2) Building a sound evidence base on the impact of proposed changes on court users with protected characteristics:

Compliance with the PSED requires assessing 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, for example by identifying steps to mitigate any disadvantage which changes may cause to those sharing protected characteristics under the Equality Act 2010. The Commission has published technical guidance on the PSED, which provides practical approaches to complying with the duty.

⁴ EHRC response to MOJ consultation “Fit for the future; transforming the court and tribunal estate” (29 March 2018) (available at https://www.equalityhumanrights.com/sites/default/files/reponse_to_the_consultation_on_the_strategy_to_transform_the_courts_and_tribunal_estate.pdf).

⁵“HMCTS reveals eight proposed new court closures”, Law Society Gazette 18 January 2018 (available at: <https://www.lawgazette.co.uk/news/hmcts-reveals-eight-proposed-new-court-closures/5064421.article>)

Adequate and accurate equality evidence, properly analysed, is at the root of effective compliance with the PSED. Meaningful equality impact assessment should consider not only the proportion of individuals with protected characteristics but how different groups may be differently affected. The Government is required to identify and address any gaps in evidence that are necessary to meeting the general duty.

We remain concerned that, by its own admission, the Government does not hold comprehensive data on court users to allow a meaningful assessment of how the provisions in the Bill and the modernisation programme overall affect people with particular protected characteristics. The Commission made this point in response to the consultation on transforming the courts and tribunals estate, which assessed the impact of court closures on the assumption that the court user cohort is representative of the general population.⁶ In fact, as the Bill's equality statement confirms, there is overrepresentation of some protected characteristics among defendants, victims and witnesses, and in the family courts, and these groups will be affected by the changes to a greater extent. As the equality statement accepts, data is not available on the profiles of users of civil courts and tribunals, so the proportion of users possessing protected characteristics is unknown⁷.

Our recommendation

The Commission recommends:

- 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.

⁶ EHRC response to MOJ consultation "Fit for the future; transforming the court and tribunal estate" (29 March 2018) (available at https://www.equalityhumanrights.com/sites/default/files/reponse_to_the_consultation_on_the_strategy_to_transform_the_courts_and_tribunal_estate.pdf).

⁷ Paragraph 26 of MOJ Equality Statement (available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710510/CTJFS-bill-final-authorized-staff-measures-equalities-statement.pdf)

3) Clause 3 of the Bill – delegating judicial functions to court staff

Clause 3 and the Schedule to the Bill provide for some judicial functions to be delegated to staff across criminal, civil and family courts and tribunals.

We accept that enabling appropriate decisions to be made by authorised staff could mean the users of the courts and tribunals will experience a more efficient service which would be welcome. We acknowledge that the delegation of some judicial functions to court and tribunal staff already takes place in some jurisdictions. For example, in the First-tier Tribunal (Immigration and Asylum Chamber), caseworkers are authorised by the Senior President of Tribunals to exercise various case management functions such as allowing amendments to pleadings, adjourning or postponing hearings and striking out appeals for non-payment of fees.⁸ There are currently exceptions to this, however, such as the Crown Court.⁹

Decisions on which judicial functions will be delegated to authorised staff will be made by the relevant procedure rule committee (PRC). The PRCs will also decide what qualification or experience staff must have before they can be authorised to carry out delegated functions. The Lord Chief Justice, Senior President of the Tribunals or their delegates will have to approve staff before they are authorised to carry out delegated judicial functions. PRCs are advisory non-departmental public bodies sponsored by the Ministry of Justice. They consult on proposed changes to procedure rules and any rules made are subject to the negative resolution procedure.¹⁰

Although the Ministry Of Justice's (MOJ) EHRC memorandum on the Bill suggests that case management decisions which it is proposed these

⁸ Senior President of Tribunals: Practice Statement authorising Tribunal Caseworkers First-tier Tribunal (Immigration and Asylum Chamber) to carry out functions of a judicial nature (available at <https://www.judiciary.uk/wp-content/uploads/2018/05/ps-iac-2018.pdf>).

⁹ See para 33 of the Delegated Powers Memorandum on the Bill (MOJ, May 2018)(available at: http://data.parliament.uk/DepositedPapers/Files/DEP2018-0495/Courts_and_Tribunals_etc_Bill_Delegated_Powers_Memorandum.pdf).

¹⁰ See, for example, the Civil Procedure Rules Committee Annual Report (November 2015) (available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/481111/civil-procedure-rule-committee-annual-report-2015.pdf).

authorised members of staff will be able to take will be uncontentious and not of sufficient importance to engage Article 6, the Bill does not set any restrictions on the judicial functions which can be delegated. The MOJ's factsheet on delegation to staff says that in future, it expects that authorised staff will be able to carry out a range of functions and responsibilities, including case management powers and some mediation roles. It says they are unlikely to involve contested matters.¹¹

However, case management decisions can have a significant impact in shaping the issues and progress of a case and, ultimately, the outcome of a case. The reference in the factsheet to staff carrying out mediation also suggests that it is envisaged they will have a role beyond merely making non-contentious decisions on purely procedural matters such as hearing dates.

While we accept the need for decisions about practice and procedure to be left to PRCs rather than being set out in detail in the Bill we are concerned that the Bill does not set any human rights or equality framework for matters which should be delegated.

Our specific concerns are:

- the impact of delegation on court users with protected characteristics, specifically those who have particular needs arising from those characteristics such as some disabled people. The MOJ has published an equality statement¹² relating to the Bill. We welcome the commitment to ensure that authorised officers receive general training on disability awareness and on the duty to make reasonable adjustments (under the Equality Act 2010). However, that statement does not appear to assess the equality impact of providing no restrictions in the Bill on which judicial functions can be delegated. There is no indication, for example, of how the Government will ensure PRCs will be enabled to comply with the PSED in making their

¹¹ Courts and Tribunals (Judiciary and Functions of Staff) Bill Factsheet: Authorised Court and Tribunal Staff: legal advice and judicial functions (Ministry of Justice). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710515/CTJFS-factsheet-authorised-staff.pdf

¹² Courts and Tribunals (Judiciary and Functions of Staff) Bill Equalities Statement: Authorised staff: legal advice and judicial functions (available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710510/CTJFS-bill-final-authorised-staff-measures-equalities-statement.pdf)

decisions on which functions will be delegated. The acknowledged lack of data about court users and their protected characteristics raises concerns that the PRCs may not have an adequate evidence base to understand the impact of its decisions on court users.

- how the Bill will ensure decisions made by authorised staff rather than judges meet the requirement in Article 6 ECHR that determination of rights are made by an independent and impartial person. As the MOJ¹³ acknowledges, in considering independence, guarantees against outside pressures are relevant – as is the question whether the body presents an appearance of independence. 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. As the Government’s Human Rights memorandum on the Bill¹⁴ 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 will have 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 currently included as a requirement in the Bill. As the Bill is currently drafted, a PRC could decide not to include a right to reconsideration by a judge in relation to staff-made decisions.

Our recommendations

The Commission recommends:

- That the Government clarify how it will ensure that decisions about which judicial functions to delegate and the authorisation of staff to carry out those functions will be made with due regard to the aims of the PSED and in particular to meeting the needs and removing barriers to court users with protected characteristics under the Equality Act 2010.
- That a requirement for a right to a de novo review by a judge of any delegated decision should be included in the Bill.

¹³ MOJ – Memorandum Courts and Tribunals (Judiciary and Functions of Staff) Bill – European Convention on Human Rights (May 2018) (available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710509/CTJFS-bill-ECHR-memo.pdf)

¹⁴ Ibid.

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 at: www.equalityhumanrights.com

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