

Courts and Tribunals (Judiciary and Functions of Staff) Bill – European Convention on Human

Rights

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Courts and Tribunals (Judiciary and Functions of Staff) Bill (“the Bill”). Where appropriate, the memorandum also addresses issues arising under the United Nations Convention on the Rights of the Child (“UNCRC”). On introduction in the House of Lords, The Rt Hon Lord Keen of Elie QC made a statement under section 19(1)(a) of the Human Rights Act 1998 (“HRA 1998”) that in his view the provisions of the Bill are compatible with Convention rights.
2. Only the clauses which contain substantive ECHR issues are discussed. The Government considers that the clauses of and Schedule to this Bill which are not covered by this memorandum do not give rise to any substantive ECHR issues.

Summary of the Bill

3. The Queen’s speech in June 2017 included a commitment to introduce legislation to modernise the courts system. The Bill provides for important reforms to the courts and judiciary.
4. Clause 1 makes provision enabling more flexible deployment of the judiciary including across jurisdictions, allowing judges to gain experience of different types of cases, which helps with their career progression. It also allows the judiciary more flexibility when it comes to handling case backlogs.
5. Clause 2 amends the title of the Chief Bankruptcy Registrar to Chief Insolvency and Companies Court Judge to bring it in line with the renamed court. It also adds certain titles to the list of judicial titles which the Lord Chancellor has the power to alter under section 64 of the Courts Act 2003.
6. Clause 3 and the Schedule provide for the authorisation of court and tribunal staff across the jurisdictions (with the exception of the Employment Tribunal system) to exercise judicial functions. The relevant procedure rule committees will have the power to determine which functions may or may not be undertaken by authorised staff in their respective jurisdiction. Statutory independence, and the immunities that currently apply to justices’ clerks, will now

apply to all authorised court or tribunal staff when exercising judicial functions. The post of justices' clerk will be removed from statute. Clause 3 also makes provision for powers to make consequential, transitional, transitory and saving provision in relation to the authorised staff provisions.

7. Clause 4 makes the necessary legal provision for the short-title of the bill, commencement and extent.

Authorised court and tribunal staff

8. Clause 3(1) and the Schedule provide for Her Majesty's Courts and Tribunals Service ("HMCTS") staff to be authorised to exercise judicial functions across all HMCTS courts and tribunals, save for employment tribunals. Relevant primary legislation already exists in most jurisdictions to deliver a limited authorised officer function, although the Crown Court is a notable exception. Greater and more flexible use of authorised staff in and across all the courts and tribunals for which HMCTS is responsible is an important element of the delivery of reforms to the justice system.
9. It is intended that these staff will be employed by HMCTS. The functions that they may exercise will be decided by the relevant procedure rule committee, and staff will be subject only to the direction of the Lord Chief Justice or his nominee (or Senior President of the Tribunals or his delegate).

Article 6

10. Article 6 ECHR (the right to a fair trial) 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'.
11. 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 (*Henryk Urban and Ryszard Urban v Poland*¹). In considering independence, the manner of appointment, the term of office, and guarantees against outside pressures are relevant – as is the question whether the body presents an appearance of independence (*Bryan v United Kingdom*²).

¹ (2010) App. No. 23614/08 §45

² (1995) 21 EHRR 342

12. However, compliance with Article 6 is generally assessed by reference to the proceedings as a whole, meaning that a process may be lawful even if it involves one or more stages that would not be compliant in themselves (*Le Compte v Belgium*³).
13. First, it is important to note that many case management decisions which it is proposed these authorised members of staff will be able to take will be uncontentious and not of sufficient importance to engage Article 6 in fact.
14. However, assuming again that *in principle* it is possible that Article 6 could be engaged to a greater or lesser extent depending on the decision, the Schedule provides that all court and tribunal staff who are authorised to exercise judicial functions will now be independent of the Lord Chancellor when doing so, and subject only to the direction of the Lord Chief Justice or his nominee (or Senior President of Tribunals or his delegate).
15. Finally, the procedure rule committees will be able to consider whether there is a need for procedures which provide for a 'de novo' review of any decision made by an authorised member of court or tribunal staff. In such circumstances, 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 in the Tribunal Procedure Rules and Civil Procedure Rules and it will be a matter for each jurisdictional rule committee as to whether such a procedure is put in place in the jurisdiction(s) for which it is responsible.
16. The Government is therefore content that no issue of compatibility with Article 6 ECHR arises in relation to these provisions in Clause 3(1) and the Schedule.

Ministry of Justice

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³ (1982) 4 EHRR 1 §51