Proposal to amend the Composition Statements of the following Chambers of the First-tier Tribunal:

- General Regulatory Chamber;
- Social Entitlement Chamber;
- Property Chamber; and
- Health, Education and Social Care Chamber

Consultation by
Rt. Hon. Sir Ernest Ryder, Senior President of Tribunals

18 February 2020
Introduction

1. This consultation, on behalf of the Senior President of Tribunals (SPT) seeks your views on amending the composition statements for the following Chambers of the First-tier Tribunal:

   a. General Regulatory Chamber;
   b. Social Entitlement Chamber;
   c. Property Chamber;
   d. Health, Education and Social Care Chamber.

2. The aim of the Presidents of those Chambers is to ensure that each jurisdiction can provide the most effective service to its users. The SPT will decide whether in each case the President's proposals are likely to achieve this.

3. Views are requested from individuals and organisations. They should be sent to the email address SeniorPresidentTribunalsOffice@judiciary.uk by 5pm on 31 March 2020.

Background to panel composition

4. The SPT is responsible for determining panel composition by virtue of The First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008, which was made by the Lord Chancellor under section 145(1) of, and paragraph 15 of Schedule 4 of, the Tribunals, Courts and Enforcement Act 2007.

5. The Order contains the following provisions:

   ‘Number of members of the First-tier Tribunal

2.—

(1) The number of members of the tribunal who are to decide any matter that falls to be decided by the First-tier Tribunal must be determined by the Senior President of Tribunals in a practice direction in accordance with paragraphs (2) and (3) below.

(2) The Senior President of Tribunals must determine whether the tribunal consists of one, two or three members.

(3) The Senior President of Tribunals must have regard to—
   (a) the nature of the matter that falls to be decided and the means by which it is to be decided; and
   (b) the need for members of tribunals to have particular expertise, skills or knowledge.’

6. The SPT is considering the composition changes set out in detail below, and wishes to consult on the proposed changes of practice before coming to a final decision.

7. On 1 November 2019, the SPT issued a Practice Direction in relation to composition requirements for new appeal and application rights in the First-tier Tribunal, General Regulatory Chamber. He did this on a pilot basis, for a period of six-months. As part of this Consultation, he wishes to consult on the panel composition requirements for those new
appeal and application rights, before deciding whether the pilot arrangements should be altered or made permanent.

8. The SPT’s decision on composition for each tribunal chamber is recorded in a Practice Direction, which must be approved by the Lord Chancellor. The President of each Chamber, under delegated powers, determines the composition of a particular panel within the framework of that statement.

9. A former SPT, Sir Robert Carnwath, set out his approach to composition in his First Implementation Review in 2008:

   http://www.judiciary.gov.uk/publications-and-reports/reports/Tribunals/spt-first-implementation-review

10. He said at paragraph 66:

   “The composition of the tribunal for individual hearings will be governed by an order made by the Lord Chancellor under paragraph 15 of Schedule 4 of the TCE Act [Tribunal, Courts & Enforcement Act 2007]. Where that order provides me with discretion as to the composition of a tribunal, it is my intention to start in general with a policy of maintaining established principles for different categories of case, unless and until there is shown to be good reason for change. I will expect Chamber Presidents in due course to review the current arrangements, in consultation with their judges, members and users. The general objective should be to ensure that the best use is made of judges and members, following the principles originally derived from the Leggatt review, and developed in the Consultation Paper Transforming Tribunals.”

11. The Presidents of the General Regulatory Chamber, Social Entitlement Chamber, Property Chamber and Health, Education and Social Care Chambers have reviewed the composition statements for their Chambers and made various proposals that they consider would improve their Chambers’ arrangements. The President of the General Regulatory Chamber has also reviewed the pilot Practice Direction mentioned above. The SPT now wishes to consult more widely before making any decisions on possible changes to composition.

12. The SPT adopts the approach set out at paragraph 10 above and is conscious that practices may need to change to reflect changing need over time.

The present composition statements and GRC pilot Practice Direction

13. The present composition statements, and the Practice Direction dated 1 November 2019 in relation to composition requirements for new appeal and application rights in the First-tier Tribunal, General Regulatory Chamber, are attached at Appendix A to this Consultation.

Proposals

General Regulatory Chamber

14. The Chamber President proposes that the pilot arrangements set out in the Practice Direction issued on 1 November 2019 continue, and that they are incorporated (without being time-limited) into the composition statement for all cases within the Chamber.
15. The Chamber President considers that there are some decisions that can be taken swiftly and proportionately by a Judge sitting alone, but which currently require a panel because the composition statement sets out requirements based on whether a decision ‘disposes of proceedings or determines a preliminary issue’. She proposes that the arrangements are altered so that the following decisions in all General Regulatory Chamber jurisdictions are taken by a Judge sitting alone:

   a. a decision under rule 17 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the ‘GRC Rules’) where there is consent to a withdrawal;

   b. a decision under rule 8 (striking out a party's case) of the GRC Rules;

   c. a decision under rule 37 (consent order) of the GRC Rules;

   d. a costs application determination under rule 10 of the GRC Rules;

   e. the giving of directions (including the determination of a preliminary issue) under rule 5 of the GRC Rules;

   f. the fresh consideration of a matter under rule 4(3) (decisions made by authorised members of staff) of the GRC Rules;

   g. the determination of an application under rule 14 (disclosure/publication of documents) of the GRC Rules;

16. The Chamber President considers that either two or three-person panels should be permitted under paragraph 8 (Estate Agents Appeal cases), paragraph 11(1) (Information Rights cases) and paragraph 12 (Immigration Services cases) of the composition statement. The flexibility to allow two-person panels is already available for other jurisdictions within the Chamber, so its extension would provide consistency. She considers it would also make it easier for panels to proceed when a non-legal member is taken ill or is otherwise unavailable, thus avoiding delay and inconvenience for the parties.

17. The Chamber President would like the following categories of cases to be added to paragraph 11(3) of the composition statement, to enable such matters to be heard by a Judge alone where she considers it appropriate:

   a. **Cases where the issue is whether the public authority is entitled to rely on an absolute exemption** - The engagement of an absolute exemption is a pure matter of law, so she considers that the specialist experience of non-legal members is not needed and using a panel is therefore not proportionate. This is to be distinguished from ‘qualified exemption’ cases, where non-legal members would continue to be involved, as their experience and input is relevant to the application of the public interest balancing test.

   b. **Enforcement appeals** – This encompasses cases where the appeal is against an information notice, an assessment notice, an enforcement notice, a Penalty, a Penalty Variation, or a "special purposes" determination served under the Freedom of Information Act 2000 (‘FOIA’) or the Data Protection Act 2018 (‘DPA 2018’) by the Information Commissioner, or served under other legislation by any other authority. The Chamber President believes these matters are suitable for determination by a Judge alone, as they do not engage the specialisms of non-legal members. The current composition statement permits a Judge alone to hear FOIA enforcement cases, but requires a full panel for DPA 2018 enforcement. The
Chamber President considers that this proposal would allow more flexibility and provide consistency.

Social Entitlement Chamber

Social Security and Child Support Cases

18. The Chamber President’s view is that in some cases (for example, where additional persuasive evidence has been submitted since a decision was first considered), it is very clear what the outcome of the case will be. In such cases, the skills and experience of medical and disability tribunal members may be unnecessary. The Chamber President therefore proposes that the composition statement should be varied to give him the flexibility to allow the following types of cases to be decided by a Judge alone:

   a. Where all the parties have agreed to a decision;

   b. Where it is clear that an appellant is going to be successful, or partly successful;

   c. Where an appellant has no reasonable prospects of success.

19. In cases where there has been no Personal Independence Payment consultation (e.g. appeals involving the failure to attend a consultation or provide information without good reason), the Chamber President proposes that the composition requirements be made more flexible, to allow him to decide whether it is appropriate to use a three-person panel (as per the current arrangements); a Judge and one Tribunal Member; or a Judge sitting alone. In his view, cases which do not involve the assessment of daily living and mobility activities do not always require the expertise of non-legal members and it would make better use of the Chamber’s resources if there was more flexibility and would provide a speedier disposal and thus an enhanced service to users. A similar process is in effect for Employment Support appeals and runs efficiently and without adverse comment, the need for a full panel in Personal Independence cases is anomalous.

20. The Chamber President considers that paragraph 12 of the composition statement should remain in its current form. Under paragraph 12, where a panel consists of a Judge and one other member, the Judge is the presiding member. Under article 8 of The First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008, where a decision of a panel is not unanimous, the presiding member has the casting vote. The Chamber President considers this to be a sensible way for the outcome to be decided in this situation.

Criminal Injuries Compensation Cases

21. The Chamber President considers that he should have the flexibility to list cases for hearing before a Judge sitting alone where:

   a. only the Appellant’s eligibility under the Criminal Injuries Compensation Scheme is at issue, or;

   b. the Criminal Injuries Compensation Authority alleges that there are grounds for withholding or reducing an award.

22. These cases generally involve questions of fact, and the Chamber President’s view is that they could generally be determined justly and proficiently without the requirement for a medical/lay member’s expertise. Amending the Composition Statement in this way would save resources and make it possible to list and resolve appeals more quickly.
23. The Chamber President considers that current arrangements should remain in force for all cases involving assessment/quantum.

Property Chamber

24. The Chamber President would like the composition arrangements for Land Registration cases to be clarified. The composition statement currently defaults to the arrangements at paragraph 3, with the Chamber President deciding whether a matter ought to be dealt with by one, two or three members. The Chamber President proposes that this ought to be amended to state that such cases will be heard by a Judge sitting alone.

25. In Agriculture and Land Drainage cases, the Chamber President proposes the amendment of the composition statement to allow a Judge alone to decide issues of law, even if such a decision disposes of proceedings without consent. Her rationale is that non-legal members are not qualified to add insight into questions of law, so it is disproportionate to use a panel on purely legal matters.

26. The Chamber President proposes the amendment of paragraphs 11 and 12 of the composition statement to allow her, or her nominee, to direct that a matter must be dealt with by a salaried Judge. The reason for this proposal is to make it possible for a more experienced Judge to take over conduct of a particularly challenging issue, even if the original Judge who was involved in the case is still available. It is anticipated that this will occur rarely, but the Chamber President wishes to have the flexibility to ensure that parties receive the best possible service.

27. The Chamber President proposes the amendment of paragraph 13 of the composition statement so that a Regional Surveyor can also select the presiding member on a panel.

Health, Education and Social Care Chamber

28. In Special Educational Needs and Disability cases, the Chamber President proposes the removal of the requirement in paragraph 6 for the Judge and specialist member on a two-person panel to have sat on at least 25 hearings within the jurisdiction. This would allow the Chamber President to assess the capability of the panel members and select members for panels based on skill rather than because they have completed an arbitrary number of sittings. This process would be informed by reports from judicial mentoring, supervising judges and appraisal outcomes.

29. The Chamber President also proposes the amendment of paragraph 6 of the composition statement to allow a two-Judge panel sitting with a specialist member to hear particularly complex cases and in order to offer training and support to judicial office holders. The opportunity to offer supported sitting for newly appointed judges and those in need of further training is regarded as positive action to ensure good practice.

30. In Primary Health Lists cases and Care Standards cases, the Chamber President proposes that two-person panels should be permitted in appropriate cases. This would allow the Chamber President to tailor more effectively the composition of the panel to the complexity and subject matter of the case and use judicial resources more efficiently and provide a speedier and more efficient service to users.

Equality and diversity

31. In making his final decision, the SPT will consider the likely equality and diversity impact of the proposals. He would therefore welcome any views and evidence consultees may wish to provide on this issue.
Consultation questions

32. Views are invited on the following questions:

Q1. Do you agree with the Chamber Presidents’ proposals outlined above? If not, please give reasons.
Q2. Do you consider that these proposals will have an impact on equality and diversity issues? If so, please explain.
Q3. Do you have any other comments regarding the proposals?

How to respond

33. Please send your consultation responses by 5pm on 31 March 2020 to:

SeniorPresidentTribunalsOffice@judiciary.uk

or by post to:

Catherine Yallop
Senior President of Tribunals Office
Room C120
Royal Courts of Justice
The Strand
London
WC2A 2LL

34. Please state whether you are responding as an individual or on behalf of an organisation.

Confidentiality

35. Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily FOIA, The General Data Protection Regulation (GDPR) and the DPA 2018).

36. If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding.

37. Your personal data will be processed in accordance with the GDPR and DPA 2018. In the majority of circumstances this will mean that your personal data will not be disclosed to third parties.
APPENDIX A


