

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:
 - General Regulatory Chamber;
 - Social Entitlement Chamber;
 - Property Chamber;
 - Health, Education and Social Care Chamber;
 - War Pensions and Armed Forces Compensation Chamber.

2. The SPT is responsible for determining panel composition in the First-tier Tribunal (FtT) under the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008. In respect of every matter to be decided by the FtT, the SPT must determine whether the tribunal is to consist of one, two, or three members. Most of the current determinations on panel composition are set out in practice statements. The 2008 Order was amended in 2018 so that any new determinations must be made in practice directions which are issued after consulting the Lord Chancellor.

3. On 1 November 2019 the previous SPT issued a practice direction making composition arrangements for new case types in the General Regulatory Chamber¹ for a pilot period of 6 months. The SPT issued a consultation which ran from 18 February to 14 April 2020, seeking views on whether those arrangements should be adopted permanently, as well as other proposals to amend the composition statements for the Chambers listed at paragraph 1 above (apart from the War Pensions and Armed Forces Compensation Chamber). Many of the proposed amendments were to permit more decisions to be made by judges sitting alone or with fewer panel members.

4. On 18 March 2020 the previous SPT issued a practice direction implementing temporary arrangements on panel composition in the First-tier Tribunal and the Upper Tribunal in response to the pandemic. It permitted a salaried judge (or a salaried surveyor member in the Upper Tribunal Lands Chamber) to decide that a case shall be heard by a judge alone, or by a panel consisting of fewer or different members than usual, if the case could not otherwise proceed or would be unacceptably delayed. That practice direction expired on 18 September 2021.

5. The temporary arrangements during the pandemic may have served as a real-world test of proposals set out in the consultation. The current SPT has decided to issue a further consultation to canvass views based on experiences of the temporary arrangements, and to provide a further opportunity to hear views from those who were unable to respond to the original consultation due to the pandemic. We are not consulting again on a number of proposals from the original consultation where a new Chamber President does not support a proposal that was made by their predecessor. This consultation also includes (starting at paragraph 17 below) new proposals that were not set out in the 2020 consultation.

6. In deciding whether to implement the proposals, the SPT will take into account:
 - The responses to this consultation;
 - The responses to the 2020 consultation, where relevant;
 - The needs:

¹ Specifically those under sections 162(1)(d) (appeals against penalty notices), 166(2) (orders to progress complaints); and 202(2) (certifying an offence to the Upper Tribunal) of the Data Protection Act 2018.

- i. for tribunals to be accessible,
 - ii. for proceedings before tribunals to be fair and to be handled quickly and efficiently,
 - iii. for members of tribunals to be experts in the subject-matter of, or the law to be applied in, cases in which they decide matters, and
 - iv. to develop innovative methods of resolving disputes that are of a type that may be brought before tribunals.
- The nature of each type of case and the means by which it is to be decided
 - Equality and diversity issues (see paragraph 36 below)

Proposals from the 2020 consultation

General Regulatory Chamber

7. The following changes were initially proposed by the then Chamber President (who has since retired) and are supported by the current Chamber President:

- a) That the pilot arrangements set out in the practice direction issued on 1 November 2019 should be adopted permanently, to allow more flexibility and provide consistency, on the basis that the cases do not engage the specialisms of non-legal members.
- b) That the following decisions be taken by a judge sitting alone:
 - i. 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;
 - ii. determining a preliminary issue under rule 5(3)(e) of the GRC Rules;

This is based on the consideration that some decisions could be taken swiftly and proportionately by a judge sitting alone, but in some circumstances currently require a panel because the composition statement sets out requirements based on whether a decision ‘disposes of proceedings or determines a preliminary issue’.

- c) 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. It is considered that 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 without compromising access to justice.
- d) That the following categories of cases be added to paragraph 11(3) of the composition statement, to enable them to be heard by a judge alone where the Chamber President considers it appropriate:
 - i. Cases where the issue is whether the public authority is entitled to rely on an absolute exemption. This is on the basis that the engagement of an absolute exemption is a pure matter of law, and so relying on the specialist experience of non-legal members is not necessary or 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.

- ii. 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') by the Information Commissioner, or served under other legislation by any other authority. It is considered that 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 enforcement. It is considered that this proposal would allow more flexibility and provide consistency.

Social Entitlement Chamber

Criminal Injuries Compensation Cases

8. The Chamber President considers that there should be 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.

These cases generally involve questions of fact, and the Chamber President's view is that they could generally be determined justly and efficiently without the requirement for a medical/lay member's expertise. Amending the composition statement in this way would make it possible to work more efficiently, and to list and resolve appeals more quickly.

9. The Chamber President considers that current arrangements should remain in force for all cases involving assessment/quantum.

Property Chamber

10. In Land Registration cases, 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 is amended to state that Land Registration cases will be heard by a Judge sitting alone.
11. 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 it is disproportionate to use a panel on purely legal matters.
12. 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 allow flexibility 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, to ensure that parties receive the best possible service. It is anticipated that this will occur rarely.
13. 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

14. 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 judicial office holders and select members for panels based on skill rather than because they have completed a certain number of sittings. This process would be informed by reports from judicial mentoring, supervising judges and appraisal outcomes.
15. 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. This would provide an opportunity to offer supported sitting for newly appointed judges and those in need of further training to help ensure good practice.
16. 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 the composition of the panel more effectively to the complexity and subject matter of the case and to use judicial resources more efficiently, and would provide a more efficient service to users.

New proposals

Health, Education and Social Care Chamber

Mental health

17. Automatic references to the Tribunal under sections 67, 68 and 71 of the Mental Health Act 1983 (“the Act”) are an important safeguard, ensuring that all detentions are reviewed independently from the detaining authority on a regular basis, rather than relying on the patient or their representative to request one. The Tribunal’s experience, however, is that there is a significant cohort of patients who do not welcome the intrusion into their lives that an automatic reference represents. They find the procedure distressing and will frequently refuse to appoint a representative (or meet one appointed for them) and/or refuse to attend the hearing. All such references are currently listed for hearing before a full panel, regardless of the views of the patient.
18. The temporary arrangements mentioned in paragraph 5 above were relied on to allow decisions to be made by a judge alone in many automatic reference cases where the patient’s legal representative applied for that reference to be disposed of without a hearing.
19. The ability for judges to sit alone made a significant contribution to the efficient working of the Chamber and the delivery of justice at the height of the pandemic.
20. In light of this experience, it is proposed to amend the current composition statement to allow a judge alone to make a decision that disposes of proceedings which are referred to the Tribunal either by the Hospital Managers (pursuant to section 68 of the Act) or by the Secretary of State (pursuant to sections 67 and 71 of the Act) and where the patient is aged 18 or over and where either:

- a) the patient has stated in writing that the patient does not wish to attend or be represented at a hearing of the reference and the Tribunal is satisfied that the patient has the capacity to make that decision; or
 - b) the patient's representative has stated in writing that the patient does not wish to attend or be represented at the hearing of the reference.
21. Under this proposal, cases could be listed before a judge alone, witnesses could be excused from giving oral evidence, and the decision would be based on the written evidence before the judge. The proceedings would in effect be uncontested and heard by a judge alone, so the hearing would be shorter and less formal than a fully contested hearing listed before a full panel.
22. It is envisaged that the patient would be notified of the hearing, but it would be made clear that they are not required to attend if they did not wish to. In the event that the patient did decide to attend, the judge would be able to consider case management or an outcome decision. This is consistent with current practice, and would offer options for both the patient and the judge.
23. There is no injustice to a patient to have their case decided by a single judge in circumstances where they had not themselves requested a hearing, did not want to attend a hearing and were not asking the Tribunal to discharge them from detention. The patient (or representative) is entitled of course to change their mind at any point leading up to the decision, and in those circumstances the judge deciding the matter would have a discretion to adjourn the case to be listed before a full panel. The judge could also decide of their own volition that the case needs to be listed before a full panel if it is in the interests of justice to do so.
24. The ability to list such cases before a single judge will become increasingly important if the proposals in the 'Reforming the Mental Health Act' White Paper to increase the frequency of automatic references are implemented. Listing such references before a single judge in the circumstances would be one way of helping to ensure the continued efficient working of the Chamber and the delivery of justice.

Primary Health List cases

25. The current Practice Statement permits pharmacologist members to be listed to hear Primary Health List cases. The Chamber President proposes to substitute "pharmacist" for "pharmacologist", on the basis that the jurisdiction covers appeals by providers of pharmaceutical services, and the Chamber aims (where possible) to include on the panel a professional member with relevant professional experience in the field, which for pharmaceutical services, would be better represented by a pharmacist.

Social Entitlement Chamber

Social Security and Child Support

26. In cases where there has been no Personal Independence Payment (PIP) consultation (e.g. appeals involving the failure to attend a consultation or provide information without good reason), the Chamber President proposes that the appeals should be heard by a judge sitting

alone. In her view, as these cases do not involve the assessment of daily living or mobility activities, they do not require the expertise of the non-legal members. Similarly, other PIP appeals which do not involve the assessment of daily living or mobility activities (e.g. appeals under sections 83-87 of the Welfare Reform Act 2012) do not need to be heard by a panel and could be determined by a judge sitting alone. Requiring these appeals to be heard by a judge alone would make better use of the Chamber's resources and allow speedier disposals. It would bring the composition arrangements for PIP appeals into line with those for Employment and Support Allowance and the limited capability for work or work related activity (LCW and LCWRA) elements of Universal Credit where there is no issue regarding the assessment of LCW or LCWRA.

Criminal Injuries Compensation

27. Presently the Composition Practice Statement permits any matter to be decided by a panel of two or three members. There is no requirement for one of the members to be a judge and the presiding member of a panel need not be a judge. Additionally the Practice Statement permits matters to be decided otherwise than at a hearing by a member who is not a judge. These provisions are rarely used in practice. The Chamber President considers that it is essential that the legal expertise of a judge is applied in all decisions and proposes that the Practice Statement is amended to require decisions to be made by a judge and either one or two other members or (in accordance with the proposed amendment at paragraph 10) by a judge alone. In addition, it is proposed that the Practice Statement is amended so that the presiding member of a panel must be a judge.

War Pensions and Armed Forces Compensation Chamber

28. The current practice statement on composition in the War Pensions and Armed Forces Compensation Chamber has the effect that any decision that disposes of proceedings or determines a preliminary issue made at, or following, a hearing must be made by a panel comprised of a judge, a Service Member and either one or, exceptionally, two Medical Members, with the judge presiding. Any other decision must be made by a single judge.
29. The power to list a panel of four members to hear a case is never used. It is anomalous to have the possibility of a four-person panel in the First-tier Tribunal, and using four judicial office holders to decide one first instance case – no matter how complex – would be a disproportionate use of resources. The Chamber President supports removing that power.
30. The temporary arrangements referred to at paragraph 4 above enabled a case that would otherwise be determined by a panel to be determined by a single judge or a panel with fewer or different members. This gave the Chamber President greater flexibility to make the best use of judicial resource.
31. Under the current arrangements, the composition of the panel making a decision that disposes of proceedings – which includes a decision whether or not to strike a case out – is determined by whether or not there is a hearing rather than by the nature of the case. The Chamber President's view is that it would be preferable for her to have a discretion to decide:
- whether a hearing at which preliminary issues are to be determined should be before a panel or a judge sitting alone; and
 - whether a decision on the papers disposing of the proceedings should be made by a panel or a judge sitting alone.

32. This would allow more appropriate deployment of judicial resources. For example:
- a judge sitting alone at a hearing could determine preliminary legal issues such as jurisdictional issues on late claims and validity of the appeal, instead of having to sit with a full panel;
 - decisions disposing of the proceedings which engage the expertise of service and medical members, could be made by a panel on paper where appropriate, instead of needing a hearing to be listed for that purpose.
33. The rule that a decision disposing of the proceedings at (or following) a hearing must be made by a panel would remain unchanged, except that the possibility of the panel comprising 4 (rather than 3) members would be removed.

General Regulatory Chamber

34. The Chamber President considers that in order to support judges, it would be desirable in the interests of efficiency to list some cases to be heard by developmental panels comprising two judges (and possibly also a specialist other member). This would enable judges to sit with, and learn from, more experienced judges. To allow this, it is proposed that in any case, the Chamber President should have the power – for development purposes – to vary the standard composition arrangements by either adding an additional judge or substituting a judge in place of an other member. A judge could not be added if it would result in a panel of four members.
35. The Chamber President considers that applications made under section 61(4) of the Freedom of Information Act 2000 (certifying an offence to the Upper Tribunal) should be added to paragraph 11(3) of the composition statement, to enable them to be heard by a judge alone where the Chamber President considers it appropriate. The change proposed in paragraph 7(a) above would permit a judge alone to hear an application to certify a contempt in relation to proceedings under the DPA. Without this additional change, the determination of such applications in proceedings under FOIA would still require determination by a panel. This proposal would provide a consistency of approach as between applications under FOIA and applications under the DPA.

Equality and diversity

36. In making his final decision, the SPT will consider the potential equality and diversity impacts of the proposals. He would therefore welcome any views and evidence consultees may wish to provide on this issue.

Consultation questions

37. Views are invited on the following questions:

Q1. Do you agree with the proposals outlined above? 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

38. Please send your consultation responses by 5pm on **Friday 5th August** to:

SeniorPresidentTribunalsOffice@judiciary.uk

or by post to:

Shane O'Reilly
Senior President of Tribunals Office
Room C120
Royal Courts of Justice
The Strand
London
WC2A 2LL

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

Confidentiality

39. 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).
40. If you would like 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.
41. 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.