Senior President of Tribunals

Panel composition in the First-tier Tribunal – Senior President of Tribunals' Consultation Response

Introduction

1. The Senior President of Tribunals ("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.

2. On 1 November 2019 the SPT (then Sir Ernest Ryder) issued a practice direction making composition arrangements for new case types in the General Regulatory Chamber for a pilot period of six months. He 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 Social Entitlement Chamber, the Property Chamber and the Health, Education and Social Care Chamber. Many of the proposed amendments were to permit more decisions to be made by judges sitting alone or with fewer panel members.

3. On 18 March 2020 the SPT issued a practice direction implementing temporary arrangements on panel composition in the FtT and the Upper Tribunal in response to the Covid-19 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.

4. On 9 June 2022 the SPT (now Sir Keith Lindblom) issued 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 because of the pandemic. Some proposals from the original consultation, which were no

longer being pursued, were not included. The consultation also included new proposals that were not set out in the 2020 consultation.

5. This document explains the decisions that have been made in the light of the responses received to the 2022 consultation. Responses to the 2020 consultation were also taken into account where they were relevant to proposals which are still under consideration.

6. In making these decisions, the SPT has had regard, in accordance with section 2 of the Tribunals, Courts and Enforcement Act 2007, to the needs:
   - for tribunals to be accessible;
   - for proceedings before tribunals to be fair and to be handled quickly and efficiently;
   - 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
   - to develop innovative methods of resolving disputes that are of a type that may be brought before tribunals.

7. In accordance with article 2 of the 2008 Order the SPT has also had regard to the nature of each type of case and the means by which it is to be decided.

8. Throughout the whole of this exercise, and now in this response to consultation, the SPT has had in mind the interests of justice and access to justice in those tribunals for which he is responsible, and the need for all proceedings in the tribunals to be conducted fairly, efficiently and effectively, according to the particular circumstances of the case in hand.

9. The SPT has specifically taken into account equality, diversity and inclusion. Most of the proposals being considered involve cases being heard by panels with fewer non-legal members (i.e. members of the tribunal who are not judges) than before. The proportion of people from ethnic minorities is higher among non-legal members of the tribunals (18%) than it is among judges in the tribunals (12%) or courts (9%).[1] There is also a higher proportion of women (56%, compared with 52% and 35%).

10. Recent appointments of non-legal members have included a significantly higher proportion of people with disabilities (11%) than have appointments of judges (6%). It seems likely that a substantial proportion of those members will be "disability-qualified" members who could be affected by the proposals in the Social Entitlement Chamber.

11. Reduced sittings for non-legal members could affect the representation of these groups among the judiciary in several ways. If non-legal members are sitting less often, the proportion of judicial sittings that are carried out by

[1] *Diversity of the judiciary: Legal professions, new appointments and current post-holders - 2022 Statistics*.

judicial office holders from those groups will be reduced. Reduced sittings available could lead to a reduced need for recruitment in the future.

12. Promoting diversity in the tribunals judiciary is one of the SPT's main strategic objectives. However, having carefully considered the potential equality impacts, the SPT considers that the proposals are proportionate. The SPT's objective in pursuing these proposals is to achieve greater flexibility and consistency in the deployment of the tribunals judiciary where the proceedings do not require the specialist input of non-legal members, in order to ensure the efficient and effective delivery of justice and access to it.

13. The SPT acknowledges and would like to emphasise the value of the contribution that non-legal members make to the delivery of justice in the tribunals throughout the country, every day. It is with this in mind that the SPT has considered, in accordance with his own obligations under statute, how best to deploy the expertise of non-legal members to secure both the delivery of justice and access to justice in the tribunals.

The War Pensions and Armed Forces Compensation Chamber

14. In the War Pensions and Armed Forces Compensation Chamber, there were two proposals. The first was this:

> "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.
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> 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."

15. An experienced judge of the chamber was wary of removing this power, and could recall historical instances where it had been used to include two medical members with different specialisms on the same panel in a complex case. The SPT is naturally hesitant to abolish a practice that an experienced judge considers useful, but is of the view that he cannot properly support the concept that a panel should in the future be composed of four judicial office holders in such cases. He has in mind that the 2008 Order (as amended in 2018) requires him to determine in a practice direction whether the FtT will

consist of one, two or three people. He also takes into account the view of the chamber President that the possibility of a four-person panel ever being needed again are slim, and the fact that she is confident of being able select a panel not exceeding three judicial office holders of the right specialisms or experience for any particularly demanding cases.

16. The second proposal was this:

> "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:
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> - 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.
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> This would allow more appropriate deployment of judicial resources. For example:
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> - 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.
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> 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."

17. There was a response from a tribunal member who considered that the panel making a final decision should always include a service member, in order to give its decision credibility with the parties and the public. The SPT's view is that justice has to be done, and be seen to be done in every case. But these basic principles of the rule of law do not extend to the concept of shaping a panel according merely to public perception.

18. Having regard to those considerations, and in the light of all the representations made, the SPT has decided to implement the proposals as they were set out in the consultation.

The Property Chamber

19. The proposals for the Property Chamber were these:

"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 such cases will be heard by a Judge sitting alone.

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.

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.

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.

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

20. No specific criticism of these proposals was made by respondents. However, one respondent – a surveyor member – observed that the proposals represented a move away from a specialised expert tribunal, towards one more dominated by lawyers. The SPT sees no force in that assertion. As has been explained above, the contribution of expert non-legal members to the work of the tribunals is an important feature of the delivery of justice and access to justice, and will remain so. The issue to be faced is how best to deploy that contribution where it is truly needed.

21. Having regard to those considerations, and in the light of all the representations made, the SPT has decided to implement the proposals as they were set out in the consultation.

The Social Entitlement Chamber

22. The consultation included one proposal in the Social Security and Child Support ("SSCS") jurisdiction, and two in the Criminal Injuries Compensation ("CIC") jurisdiction. The SSCS proposal was this:

> "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."

23. There was some support for the proposed change among respondents to the consultation, including some non-legal members. There were also objections from a number of respondents to the concept that a "failure to attend" case does not engage the specialist knowledge of medical members and members with expertise in disability. The gist of those objections was that the reason for a failure to attend could be related to the appellant's disability or medical condition, and that the knowledge of non-legal members could therefore be needed to assist in deciding whether there was a good reason for the failure to attend.

24. The purpose of the proposal was to bring PIP cases into line with ESA and Universal Credit, where failure to attend cases are always decided by a judge alone. The SPT's view is that there is no reason to treat PIP cases differently. A judge has the skills and expertise to decide these cases alone. In other jurisdictions in the courts and tribunals similar decisions are made by judges alone.

25. The reason for specialist expertise where questions of functional limitation are being decided for the purpose of determining whether the individual qualifies for ESA, PIP and DLA/AA is that in those cases the tribunal is often considering several health and disability issues against complex statutory criteria. This often involves balanced conclusions about a person's health and disability, for which the assistance of non-legal members is particularly valuable. The same is not generally so in decisions about failures to attend or

to provide information, which do not call for the same complexity or detail of findings, nor detailed medical evidence.

26. Some respondents expressed a concern about the impact the change could have on disabled litigants and their ability to participate in a hearing. The SPT does not consider that those concerns are well founded. Facilitating the participation of vulnerable litigants in person is a core part of the work of judges in this jurisdiction.

27. The two proposals for the CIC jurisdiction were these:

> "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 [to provide a discretion for some cases to be listed before a judge alone]) 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.
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> The Chamber President considers that there should be the flexibility to list cases for hearing before a Judge sitting alone where:
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> 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.
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> 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 make it possible to work more efficiently, and to list and resolve appeals more quickly."

28. There were no concerns among respondents about imposing a requirement for at least one judge on panels in CIC cases.

29. On the proposal for smaller panels, many respondents expressed the view that some or all eligibility cases benefit from the involvement of non-legal members no less than assessment cases do.

30. The SPT's view is that those responses do not present persuasive objections to the proposal. Generally, the decisions in these cases are those which a judge can take. Judges are well equipped to make findings of fact, including findings in the light of medical evidence or financial evidence. Specific issues discussed in the responses – such as CCTV evidence, evidence on mental health, clinical conditions and witness credibility – feature in many cases before criminal and family courts and in many tribunals, and are dealt with by a judge sitting alone.

31. The difference between these cases and those involving issues of assessment or quantum is that the latter generally involve detailed evaluation of the appellant's evidence about their condition and of the relevant medical evidence. This is akin to a personal injury case which, in the civil courts, would likely involve expert evidence. In many CIC cases there is no expert evidence.

32. However, there will of course be CIC cases within the proposal which do require non-legal members. The proposal was to allow discretion in appropriate cases to direct a panel of two or three people where there is a need for specialist input. The aim is always to have the appropriately constituted tribunal for the case. At present there are cases which do not require a panel, and could instead be determined speedily and fairly by a judge alone if the composition arrangements permitted it.

33. Having regard to those considerations, and in the light of all the representations made, the SPT has decided to implement the proposals as they were set out in the consultation.

The General Regulatory Chamber

34. The main proposals for the General Regulatory Chamber were these:

> "a) That the pilot arrangements set out in the practice direction issued on 1 November 2019 [that there should be a discretion for cases 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 to be heard by a judge alone] 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.
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> b) That the following decisions be taken by a judge sitting alone:
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> 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;
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> ii. determining a preliminary issue under rule 5(3)(e) of the GRC Rules;

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.

   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 […] (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."

35. Some respondents objected in principle to any reduction in the use of non-legal members. A group of members pointed out that it is not always obvious in information rights cases what specialism or background may provide valuable insights. A judge commented that the contribution of two non-legal members always had a significant and positive effect, that three-person panels provide the backbone of public confidence in decisions, and that additional non-legal members contribute much to the quality of the proceedings and investigative scrutiny of the facts on complex issues.

36. These arguments do not persuade the SPT that the proposals are unsound. Keeping full panels on the basis that it is difficult to predict what will come up in a case is too speculative. These responses did not demonstrate specific issues that a judge alone would be unable to decide. Using a full panel merely for the purposes of adding credibility to the tribunal's decisions has been discussed above in the context of the War Pensions and Armed Forces Compensation Chamber.

37. One practitioner commented that two-person panels would likely become the norm if they were permitted. He thought this would be regrettable, because FOIA and DPA cases arise in a very wide range of factual scenarios, and having two non-legal members increases the chance that they will have, between them, a sufficiently diverse experience of information rights in practice to enable the tribunal to appreciate the issues that may arise in any given case. A small group of respondents suggested that any provision for a two-person panel should be limited to covering medical or other emergencies, while others suggested that any difficulties with judicial availability should be addressed through additional recruitment rather than by changes to panel composition. The SPT does not agree. A careful choice of the particular non-legal member would provide a better guarantee of the right experience. And since a two-person panel is acceptable in principle there is no good reason to impose limitations on when it can be used. The Chamber President does not intend that two-person panels would become the norm, but believes – for the reasons identified in the consultation – that having the option will provide the chamber with a valuable degree of flexibility.

38. Some concerns were expressed about absolute exemption cases being heard by a judge alone. A number of respondents cited sections 40(2) (personal data) and 41 (information provided in confidence) of the FOIA, as being exemptions which – though categorised as "absolute" – have a built-in public interest balancing exercise akin to that applicable in the case of qualified exemptions.

39. A smaller group of those respondents went further and argued that almost all absolute exemptions do not involve a straightforward and purely legal analysis and should therefore continue to be heard by a full panel. An example they cited was cases under section 23 of FOIA involving consideration of arguments about whether information had been supplied by or related to bodies dealing with security matters. Those respondents said there is often much argument about the meaning of "the security service", and whether information generated when a security service is working with a public authority not covered by the section 23 exemption can nonetheless be subject to that exemption.

40. The SPT believes there is force in the concerns raised about sections 40(2) and 41. In particular, section 40(2) only provides for an absolute exemption in limited circumstances –when the reason for non-disclosure is that disclosure would contravene data protection principles – and otherwise only provides qualified exemptions. It would be more pragmatic, and consistent, to treat the subsection as a whole for composition purposes and retain the use of a panel.

41. The SPT does not find the points made about other absolute exemptions convincing. On section 23 specifically, the question of whether information was supplied by or relates to a security body is, as suggested, a question of objective fact, but one which does not require judgments concerning matters of national security. Although this is not a question of pure law, it is well within the grasp of a judge sitting alone and not a question to which non-legal members bring any special expertise.

42. There was also a proposal to add judges to some panels:

> "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."

43. Respondents expressed some scepticism about this proposal. One practitioner said the appropriate way to bring a "learner" judge up to speed is through observation, sitting-in and mentoring. A group of members suggested an alternative approach, which they say was used by the tribunal in the past; a prospective or newly appointed judge has with the permission of the parties sat with a panel of three members but has not taken part in actual

determination of appeals. This allowed them to experience first-hand how the appeals are run and to ask questions of non-legal members, as well as the judges. The SPT does not believe these arrangements would be an adequate substitute for what is proposed. Participation in making the tribunal's decision is a considerable benefit of a developmental panel. The proposal does not involve the panel including a judge who is not fully qualified to hear the case, but rather it is a tool to assist with developing the skills of judges. For example, sitting in a panel with a more experienced judge could assist by increasing judges' familiarity with particular types of case, such as those involving national security.

44. For these reasons, the SPT has decided to implement the GRC proposals as set out in the consultation, with the exception of that for absolute exemption cases under sections 40(2) and 41 of FOIA, which will be unchanged from the current position.

The Health, Education and Social Care Chamber

45. The proposal for the Mental Health jurisdiction was set out at some length in the consultation. The essence of it is this:

> "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 [Mental Health] 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:
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> 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.
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> 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."

46. There was some support for the proposal among respondents, mostly from judges, but there was also a significant amount of opposition and concern.

47. Respondents have rightly pointed out that patients who are detained in hospital are among the most vulnerable in society, and automatic referrals are an important safeguard to determine whether continued detention is justified. The importance of that safeguard has recently been recognised by the Mental Health Act Review's call for more frequent referrals. The argument made by respondents to the consultation is that any reduction in the tribunal's scrutiny of automatic referrals risks weakening the safeguards against unjustified detention, with the consequence that referral cases become a 'rubber stamp' exercise. Some respondents suggested that private hospitals receiving NHS funding have no incentive to discharge patients and potentially have perverse incentives to maintain detention.

48. The possible impact on patients has to be seen in the light of the fact that many of them will have a mental illness which amounts to a disability, and that people from ethnic minorities, and particularly black people, are disproportionately likely to be detained.

49. Respondents have suggested that if clinicians know that they are unlikely to be questioned, they may put less effort into preparing their reports. From such reports, it would be difficult for a judge to identify failings in care or planning that may be keeping patients in hospital unnecessarily. The only evidence presented to the judge will be from a clinician who believes that the detention criteria are met. A medical member would be better placed to test that evidence. One respondent said that, despite having worked in the field as a legal representative and judge for a long time, they still relied on the expertise of non-legal members and were unsure that they would recognise deficiencies in care planning in every case themselves.

50. Respondents have pointed out that patients who may lack capacity are particularly vulnerable, and there are difficulties with assessing capacity to opt out of the full panel hearing. They say clinical teams are not always assiduous in assessing capacity, and it is in any event unreliable to assess a patient's capacity on just one occasion weeks away from the likely date of a hearing.

51. Another criticism of the proposal is that it conflates disengaging from the tribunal process with being content to be detained. Patients who may wish to be discharged but are not engaging with the process because they are disillusioned with the tribunal system or otherwise demotivated, or anxious, should not be grouped with patients who are content to remain detained for treatment.

52. The SPT's view is that there are good arguments on both sides, and the issue is finely balanced, but caution is appropriate in these cases which concern personal liberty. The resource implications of deploying a full panel are proportionate in order to ensure that the expertise of medical members can be applied in every referral case, even if in practice the majority of cases could be justly determined by a judge sitting alone. On that basis he has

decided not to implement the proposed change in the mental health jurisdiction.

53. There were also some proposals for HESC outside the sphere of Mental Health. The first is this:

> "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."

54. There was some support from respondents for removing the requirement to have sat in 25 hearings before being allowed to sit on a two-person panel. Some of that support was qualified. For example, one respondent thought that at least one person on a two-person panel should have met the 25-hearing requirement or have other substantial judicial experience. There were many more respondents who saw the initial period of 25 hearings as an important learning experience which allowed for sharing of knowledge among judges and non-legal members. One respondent thought that the threshold should be increased beyond 25. Respondents favoured the clarity of a numerical threshold, rather than the uncertainty of assessments made by the chamber President. Some respondents said that current arrangements for mentors, support and supervision and appraisal are too limited to allow the chamber President to make a fully informed decision. One respondent suggested that the lack of openness in such a selection may adversely affect the interests of equality and diversity.

55. The SPT's view is that the proposal in the consultation is fairer than a purely numerical threshold, which seems capable of producing unintended and unfortunate results in individual cases. For example, a person who has considerable experience as a practitioner in the jurisdiction and as a judicial office holder in other jurisdictions, is still treated as needing this period of development. Leadership judges in the chamber intend to produce guidance on the making of these decisions, which should assuage concerns about how those decisions will be made and help ensure the process is transparent..

56. The next proposal was this:

> "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."

57. A response on behalf of a group of judicial office holders said the proposal would marginalise the role of non-legal members in decision-making, dilute their role and run the risk that decisions would not make educational sense, bearing in mind the possibility of two judges outvoting a non-legal member on education issues.

58. One respondent argued that if judges are not capable of dealing with complex cases they ought not to have been appointed, and that case management should ensure that complex cases are allocated to judges experienced enough to deal with them. In contrast, a group response argued that it is difficult to identify complex cases in advance. Respondents suggested that other ways be found to enable judges to observe and learn from more experienced colleagues and panels.

59. The SPT does not think that the possible alternatives to development panels provide all the benefits discussed in the context of the General Regulatory Chamber above. He is confident that leadership judges will be able to identify complex cases, and that the efficient delivery of justice will sometimes be best served by deploying two judges to hear such cases. Both proposals have precedents in other parts of the tribunal system.

60. There would be nothing wrong, in principle, with two judges outvoting a single non-legal member on an education issue. Judges and non-legal members of tribunals are not limited to their respective areas; each is responsible for deciding all the issues in a case.

61. The next proposal was this:

> "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."

62. There was opposition from respondents based on the assumption that it would be the lay member who is excluded from such panels, and that this would deprive the tribunal of a lay perspective on the evidence and on the proportionality of a decision. The SPT's view is that it cannot be said that such a perspective is essential to do justice in all such cases, and there would remain a discretion for cases to be listed before a panel that includes a lay member where appropriate.

63. The last proposal was this:

> "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."

64. Since it only corrects an apparent error, this proposal was predictably uncontroversial.

65. On this basis, and in the light of all the representations made, the SPT has decided to implement the other (i.e. non-mental health) HESC proposals as they were set out in the consultation.