

<b>Title:</b> Composition of First-tier Tribunal panels <b>IA No:</b> MoJ021/2016 <b>RPC Reference No:</b> <b>Lead department or agency:</b> Ministry of Justice <b>Other departments or agencies:</b>	<b>Impact Assessment (IA)</b>			
	<b>Date:</b> 15/09/2016			
	<b>Stage:</b> Development/Options			
	<b>Source of intervention:</b> Domestic			
	<b>Type of measure:</b> Secondary legislation			
<b>Contact for enquiries:</b>				
<b>Summary: Intervention and Options</b>				<b>RPC Opinion:</b> Not Applicable

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANDCB in 2014 prices)	One-In, Three-Out	Business Impact Target Status
£0m	£m	£0m	Not in scope	Qualifying provision

**What is the problem under consideration? Why is government intervention necessary?**

First-tier Tribunal (FtT) hearings usually use set multi-membered panels consisting of a legally trained judge and one or two non-legal members (NLMs). Whilst the Senior President of Tribunals (SPT) determines panel composition, he is bound by a requirement to have regard to the constitution of former tribunal panels, limiting the scope of measures to adopt a more proportionate and flexible approach to the provision of specialist expertise. The Government recommends that the deployment of panel members be based specifically on the expertise needed for the individual case. Government intervention is necessary as legislation is needed to remove the requirement to have regard to the constitution of former tribunal panels.

**What are the policy objectives and the intended effects?**

The principle objectives of this policy are to reduce any unnecessary deployment of panel members and to remove the restrictive requirement to have regard to previous panel compositions. This would give the SPT greater flexibility to deploy members to hear cases solely where their expertise is necessary which would, in turn, reduce unnecessary expenditure, and increase administrative efficiency in listing and hearing cases. This flexibility would also fit better with future wider reforms to the tribunal service, in which there will be a stronger focus on digitising services and a move away from more traditional methods of delivering justice.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

Initial assessments looking into whether the policy objectives could be delivered within existing powers demonstrated that the objectives could not be met without legislation due to the requirement of the SPT to have regard to the panel compositions of tribunals before they were transferred into the unified system.

- Option 0 'baseline': No amendment to the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008, therefore maintaining current panel member composition.
- Option 1: Amend the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008.

In assessing methods to deliver the key objectives stated above, Option 1 best meets policy objectives.

<b>Will the policy be reviewed?</b> It will be reviewed. <b>If applicable, set review date:</b> Month/Year					
Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope?		<b>Micro</b> No	<b>Small</b> No	<b>Medium</b> No	<b>Large</b> No
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			<b>Traded:</b> N/A		<b>Non-traded:</b> N/A

***I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.***

Signed by the responsible Minister: \_\_\_\_\_ Date: \_\_\_\_\_

# Summary: Analysis & Evidence

# Policy Option 1

## Description:

### FULL ECONOMIC ASSESSMENT

<b>Price Base Year</b> 1516	<b>PV Base Year</b> 1617	<b>Time Period Years</b> 10	<b>Net Benefit (Present Value (PV)) (£m)</b>		
			<b>Low:</b> Optional	<b>High:</b> Optional	<b>Best Estimate:</b> 0

<b>COSTS (£m)</b>	<b>Total Transition (Constant Price) Years</b>	<b>Average Annual (excl. Transition) (Constant Price)</b>	<b>Total Cost (Present Value)</b>
<b>Low</b>	Optional	Optional	<b>Optional</b>
<b>High</b>	Optional	Optional	<b>Optional</b>
<b>Best Estimate</b>			

#### Description and scale of key monetised costs by 'main affected groups'

Reduced costs paid to non-legal panel members would financially benefit HM Courts and Tribunals Service (HMCTS). Such costs are currently £21m. Scenarios suggest that a 75% reduction in the non-legal member (NLM) sitting days would result in costs of around £16m, £11m with a 50% reduction and £5m with a 25% reduction in NLM sitting days.

#### Other key non-monetised costs by 'main affected groups'

There may be costs to HMCTS associated with supplementary training for judges in order to mitigate the risk that judges take longer in making a decision due to a lack of expertise on the panel. However this risk would be mitigated by the intended flexibility in requesting additional panel members where it is required.

<b>BENEFITS (£m)</b>	<b>Total Transition (Constant Price) Years</b>	<b>Average Annual (excl. Transition) (Constant Price)</b>	<b>Total Benefit (Present Value)</b>
<b>Low</b>	Optional	Optional	<b>Optional</b>
<b>High</b>	Optional	Optional	<b>Optional</b>
<b>Best Estimate</b>			

#### Description and scale of key monetised benefits by 'main affected groups'

Benefits to HMCTS could be around £16m if there was a 75% reduction in the number of NLM sitting days. Other scenarios could include savings of around £11m with a 50% reduction and £5m with a 25% reduction.

#### Other key non-monetised benefits by 'main affected groups'

A reduction in the use of multi-member panels may mean appeals could be dealt with more quickly due to less discussion. Cases could also be listed more quickly as there is only the need to find availability for a single rather than multiple panel members. This could improve the end-to-end process time of the appeal so benefitting users. There could also be a reduction in costs to HMCTS associated with lower expenditure on travel and subsistence, training, appraisal and general administration.

<b>Key assumptions/sensitivities/risks</b>	<b>Discount rate</b>	3.5%
<p>The scenarios above assume that panels would generally have fewer members but there is a risk that there could be an increase. It has also been assumed that fewer members would speed up decision making. Further risks include an increase in the number of appeals to the Upper Tribunal, a change in the number of successful appeals or an adverse impact on the experience of panel users. However, examples from the SEND and Immigration and Asylum Chamber (IAC) suggest these should not be significant.</p>		

### BUSINESS ASSESSMENT (Option 1)

<b>Direct impact on business (Equivalent Annual) £m:</b>			<b>Score for Business Impact Target (qualifying provisions only) £m:</b>
<b>Costs:</b>	<b>Benefits:</b>	<b>Net:</b>	

# Evidence Base (for summary sheets)

## A. Background

### *The First-tier Tribunal and its panel composition arrangements*

1. The First-tier Tribunal (FtT) was created in 2008 following the Tribunals, Courts and Enforcement Act 2007 in order to unify several separate tribunals that were administered at that time by various Government Departments. It incorporates a number of chambers which deal with a wide range of disputes, including matters such as entitlement to disability benefits, immigration and asylum status, and tax decisions. The complexity of these issues can range from individuals bringing straightforward cases, such as a dispute over a benefit sanction, to very high-value tax claims.
2. Cases will typically be heard by a tribunal panel of a Judge sitting with non-legal members (NLMs) with expertise appropriate to the matters generally heard by the tribunal. A distinctive feature of tribunals is the use of a combination of skills and backgrounds on a panel. This is achieved through appointing NLMs such as doctors, accountants or surveyors, or people with practical experience of, for instance, disability or service in the armed forces. This is intended to ensure that the tribunal has the expertise, knowledge and experience to make informed and just decisions.
3. In order to facilitate a smooth transition to the unified system, tribunals generally retained the panel composition that was in place at the time that they were transferred into the FtT structure. Whilst this was justifiable in the short term, while the new system was being established, and despite limited reforms in particular tribunals, the panel composition in many tribunals continues largely to reflect the arrangements that were put in place when these bodies were originally enacted.
4. The Senior President of Tribunals (SPT) has the authority, under the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008, to determine the panel composition in cases heard within the FtT. In practice, this is done by way of chamber or jurisdiction specific practice statements, following consultation. However the SPT is bound by a requirement in the same Order to have regard to panel composition arrangements prior to the creation of the FtT. While this has not prevented changes to panel composition in certain jurisdictions on an *ad hoc* basis, this does restrict the SPT's ability to introduce wholesale panel composition reforms across the FtT.
5. Currently, the composition of an individual tribunal panel is usually determined according to broad case types rather than on a case by case basis with the specified panel being convened to hear each case of a particular jurisdiction regardless of whether the expertise and involvement of each of the members is specifically needed in the individual case.
6. The cost of panel members is significant, covering fees, travel and subsistence, training, appraisal and general administration. As such, it is the Government's view that consideration should be given to the use of NLMs to ensure that their specialist expertise is provided in the most efficient way possible, and that a system that uses a default of a single member panel, generally a legal member, with the use of additional members only where specifically required, would be more proportionate.

## B. Policy Rationale and Objectives

7. The Lord Chancellor, Lord Chief Justice, and Senior President of Tribunals set out in their joint statement of intent the aims of the Courts and Tribunals reform programme which will introduce swifter resolution and improved access to justice for tribunal users, making the system more responsive and sustainable, dealing with cases proportionately and making appropriate use of opportunities offered by new technology. These proposals, in line with the wider policy objectives, would introduce more flexibility in the determination of tribunal panel composition, which should lead to cost and efficiency savings and allow cases to be dealt with more proportionately and sustainably.
8. The introduction of single member panels as the default position, along with the removal of the SPT's requirement to have regard to the composition of former tribunal panels, should encourage a more

proportionate use of specialist expertise in tribunals, ensuring that this resource is only utilised where it is needed and where having multiple panel members can add real value. This should enable the realisation of significant financial savings which, in combination with wider tribunal reforms, would help to improve the efficiency and sustainability of the tribunals service without impairing the experience of users or judicial independence.

9. Government intervention is necessary as legislation is needed to remove the requirement to have regard to the composition of former tribunal panels.

## C. Affected Stakeholder Groups, Organisations and Sectors

10. These reforms would primarily affect the tribunal panel members. A list of all the main groups that could be affected is shown below:

- Tribunal panel members, particularly NLMs, who are likely to hear fewer cases;
- HM Courts and Tribunal Service (HMCTS) who administer the First-tier Tribunals; and
- Tax payers who subsidise HMCTS, as overall HMCTS income falls below its overall costs.

11. It is not envisaged that tribunal users would be negatively affected by these reforms. Similar reductions in the number of panel members in various chambers (FtT Immigration and Asylum Chamber (IAC), Special Education Needs and Disability (SEND), Employment Tribunal (ET)) suggest there to be no/negligible resulting difference in user outcomes (refer to section F on Risks and Assumptions below).

## D. Description of Option Considered

12. In assessing methods to deliver the key objectives stated above, the following options have been considered:

- **Option 0 ‘baseline’: No amendment to the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008.**
- **Option 1: Amend the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008, (the “Composition Order”).** This would require secondary legislation in order to reset panel composition to a single member unless otherwise determined by the SPT. In addition, the SPT’s requirement to have regard to previous panel compositions would be removed, to allow greater flexibility in his determination of when additional panel members should be used. Finally, this option would allow ministers greater fiscal accountability by introducing a requirement that any future panel composition changes are introduced through Practice Direction.

13. This option would reduce any unnecessary deployment of panel members, and remove the restrictive requirement to have regard to previous panel compositions. This should enable the SPT greater flexibility to deploy members to hear cases solely where their expertise is necessary, and this, in turn, should reduce any unnecessary expenditure, and increase administrative efficiency in listing and hearing cases. In addition, this flexibility is intended to better fit with future wider reforms to the tribunal service, in which there will be a stronger focus on digitising services and a move away from more traditional methods of delivering justice. This option would afford the opportunity to introduce the appropriate ministerial oversight of expenditure in this area by providing that future panel composition changes are made by way of Practice Direction. The Government considers that this option best meets the policy objectives and intended outcomes.

## E. Costs and Benefits Analysis

14. This Impact Assessment identifies both monetised and non-monetised impacts on Government, HMCTS, tribunal panel members, and panel users with the aim of understanding what the overall impact on society might be from implementing the preferred option.

15. **Option 0 ‘baseline’: No amendment to the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008, therefore maintaining current panel member composition.** There are currently around 65,000 NLM sitting days per year across all tribunals in scope of this reform (all FtT excluding the ET), which creates annual costs to HMCTS of around £21m in Non Legal Member (NLM) fees. This estimate is only based on panel member fees and so does not include travel and subsistence, training, appraisal and general administration. This would be a zero benefit to HMCTS as it is the current baseline scenario.
16. **Option 1: Amend the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008.** The costs and benefits of this option are analysed below and are compared with the Option 0 ‘baseline’ case, where no changes are made to the current panel compositions. As the baseline estimate is only based of fees rather than wider costs of panel members the following benefits may be an underestimate.

### ***Benefits of Option 1***

#### *Monetised*

#### *HMCTS*

17. Option 1 is expected to lead to a reduction in the number of NLM sitting days which would reduce the amount of fees payable to NLMs. However, as the allocation of NLMs is a decision made by the SPT, we are unsure as to the overall magnitude of this impact. For this reason, a range of scenarios is provided to indicate the potential benefits.
18. Each scenario has been calculated using the following key assumptions:
- The chairing member would remain as the default sit-alone panel member. In practice, and for the vast majority of cases this is usually the Judge but in some circumstances, such as Residential Property Tribunals, this can be a specialist NLM. These specialist NLMs have not been removed from the 100% reduction scenario as it occurs in a negligible number of cases.
  - The number of non-legal member sitting days is assumed to represent all sitting days of panel members who are not the chairing member. Legal panel members only appear in a negligible number of cases where they are not the chair.
  - For the FtT IAC, Social Security and Child Support (SSCS), Mental Health, First Tier Tax Tribunal, Criminal Injuries Compensation, Residential Property Tribunal and War Pensions and Armed Forces Compensation Chamber, NLM sitting days are taken from management information. In 2014/15, recorded NLM sitting days for these tribunals were 783; 21,402; 32,974; 1,010; 1,804; 2,943; 1,094, respectively.
  - For the Residential Property Tribunal the above figure includes non-chair lawyers. Additionally, the Southern region did not distinguish between Valuer member chair days and Valuer member other days and therefore the total for both was halved in order to provide an indicative figure which was added to the other types of member sitting days.
  - Where the number of NLM sitting days was not available the NLM sitting days have been estimated by pro-rating published sitting days according to the proportions suggested by the relevant Practice Statements. Where there is more than one panel composition possible it has been assumed to be an equal split between types.
  - The calculations are based on 2014/15 volumes, which are assumed to remain constant, and 2015/16 fees.

#### *Scenario A – 100% reduction in NLM sitting days*

19. If there were no longer NLMs in any FtT, the savings in NLM fees alone could be around £21m per annum. This is equal to the current costs to HMCTS and therefore is based on the assumption that the

volume of NLM sitting days would not otherwise change. However, it should be noted that, in practice, this upper figure is unlikely to be realised as it would risk cutting across the SPT's duty to ensure appropriate expertise is available.

*Scenario B – 75% reduction in NLM sitting days*

20. If the number of NLMs were reduced by around 75% equally across the FtT, the potential savings could be around £16m per annum.

*Scenario C – 50% reduction in NLM sitting days*

21. If the number of NLMs reduced by around 50% equally across the FtT, the potential savings could be around £11m per annum.

*Scenario D – 25% reduction in NLM sitting days*

22. If the number of NLMs reduced by around 25% equally across the FtT, the potential savings could be around £5m per annum.

*Non-monetised*

23. Although not monetised, HMCTS would also benefit from any reduction in the number of NLM sitting days as it would no longer need to pay costs associated with travel and subsistence, training, appraisal and general administration.

24. Appeals could be dealt with more quickly in regard to in-court time if heard by a judge alone due to less negotiation. This would allow more cases to be heard per day and therefore improve user experience and estate utilisation. There is, however, a risk that decisions could take longer, as detailed in Section F below.

25. Cases could also be listed more quickly as there would only be the need to find availability for a judge rather than a judge and panel members. This could improve the end-to-end process time of the appeal and be a benefit to users.

**Costs of Option 1**

*Monetised*

26. In each scenario, the costs to panel members of this reform directly match that of the respective benefits to HMCTS as detailed in 'Monetised Benefits, HMCTS'. For example, in Scenario 1 where benefits to HMCTS are around £21m, the costs to panel members would also be around £21m.

*Non-monetised*

27. There may be costs associated with supplementary training for judges in order to mitigate the risks as detailed in section F.

28. There will be minimal transitional and staff costs associated with the issuing of new practice directions.

**Overall Impact**

29. The Net Present Value (NPV) has been calculated using the monetised costs and benefits to all stakeholders over 10 years, discounted at a rate of 3.5% to the present year which takes account of the value of receiving benefits or sustaining costs in the future rather than now. It provides an indication of whether the reform has a net benefit (if NPV is positive) or a net cost (if NPV is negative), and the scale of the impact attributable to the reform.

30. For this reform the monetised Net Benefit/Cost is equal to zero as the benefits to HMCTS are outweighed exactly by the costs to the current panel members. Therefore, the NPV is equal to zero.

31. However, HMCTS would also benefit from not having costs for travel and subsistence, training, appraisal and general administration for the panel members. These are not costs to panel members and, therefore, whilst not monetised, indicate that the policy would represent a Net Benefit to stakeholders as a whole. This conclusion is reinforced by the other non-monetised benefits provided above.

#### Direct Costs and Benefits to Business (for BIT)

32. There are no direct costs or benefits to business.

### **F. Risks and Assumptions**

33. It has been assumed that fewer panel members would improve the speed and efficiency of listing and hearing cases. However there is a risk that it may cause the judge to take longer to reach a decision as they may have less expertise immediately available to draw upon. This could impact on the numbers of hearings per day and HMCTS resources.

34. Furthermore, there is also the potential for an increase in number of appeals to the Upper Tribunal. However as shown below in the Wider Impacts section, a SEND tribunal pilot suggests there would be a negligible impact on the Upper Tribunal.

35. There is a risk that the number of successful appeals and user experience could be negatively affected by the change in panel composition. However, the following examples suggest this is unlikely to be significant.

#### *Example 1. First Tier Tribunal Immigration and Asylum Chamber (IAC)*

36. In June 2014, following the SPT's response to the consultation on the use of NLMs in the IAC, the President of the First Tier Tribunal agreed with the Resident judges that NLMs would no longer be routinely booked on all deportation first tier appeals. It is now a matter for the Resident Judge to decide when, in the interests of justice, a non-legal member is required for the hearing of any appeals.

37. Following this reform, the proportion of appeals allowed/granted in deportation cases has not been notably affected with the proportions so determined standing at around 32% in 2012/13, 37% in 2013/14, 33% in 2014/15 and an average of 35% in the first two quarters of 2015/16.

38. This would imply that, in terms of the proportion of appeals allowed/granted, panel users have not been significantly affected by a reduction in the number of panel members.

#### *Example 2. Special Education Needs and Disability (SEND)*

39. Between 31st October 2014 and 20th April 2015, a pilot was conducted throughout the whole SEND tribunal. This pilot reduced the default number of panel members from three to two in all SEND cases.

40. A third panel member was requested by the parent/representative in two of the 322 appeals. The request was refused on one occasion. A further 32 requests for a third panel member were received from the nominated judges, which were all approved.

41. Of the 167 appeal hearings adjourned during this period, none was related to panel composition. One of 8 applications to appeal to the Upper Tribunal was linked to panel composition, but permission to appeal was not granted.

42. This pilot demonstrated that the number of panel members did not prove controversial or affect user experience and where deemed necessary the tribunal was flexible enough to adapt to the complexity of the case.

43. There were savings in fees alone of around £76,000 during the pilot (October 2014 to April 2015).

### *Example 3. Employment Tribunal*

44. A further example is in the ET which, although not within the scope of the FtT, provides a comparator of another large tribunal. In 2012, the practice statement of the ET was amended to allow unfair dismissal cases to be heard by a single judge.
45. The proportion of unfair dismissal cases successful at hearing has not been notably affected at around 10% between 2007/08 and 2009/10, 8% in 2010/11, 9% in 2011/12, 8% in 2013/13 and 2013/14, and 11% 2014/15. This would imply that the reduction in panel members in these cases has not significantly affected the outcome for users.

## **G. Wider Impacts**

### *SME impact*

46. No direct costs or benefits to business are expected.

## **H. Implementation**

47. It is currently anticipated that the proposed amendments to the Composition Order would be implemented through a new Order. This Order would be subject to the affirmative resolution procedure.
48. The SPT would subsequently be invited to review the existing panel composition arrangements across the FtT to make sure that the panel composition arrangements are appropriate under the terms of the amended Order. Any changes to the arrangements for panel composition would subsequently be introduced through new Practice Direction issued by the SPT and approved by Ministers during and, if necessary, beyond 2017.

## **I. Monitoring and Evaluation**

49. A range of quantitative data will be collected following implementation of the Order, to include success rates, appeal rates, and overturn rates of first-instance appeals, to assess any impact on decision-making in affected jurisdictions. This data will be collected after 6 and 12 months following implementation, and will be reported to the senior judiciary.