

Title: Composition of First-tier Tribunal and Upper Tribunal panels IA No: MoJ021/2016 RPC Reference No: N/A Lead department or agency: Ministry of Justice Other departments or agencies:	Impact Assessment (IA)			
	Date: February 2018			
	Stage: Final			
	Source of intervention: Domestic			
	Type of measure: Secondary Legislation			
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Summary: Intervention and Options **RPC Opinion:** 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) £0m	One-In, Three-Out Out of scope	Business Impact Target Status
				N/A

What is the problem under consideration? Why is government intervention necessary?
 In the First Tier Tribunal, the Senior President of Tribunals (SPT) sets panel composition, but is required to have regard to former panel composition arrangements, limiting the scope to implement changes. Allowing the SPT to set panels without an explicit requirement to consider former arrangements will enable greater flexibility to adopt a more efficient use of specialist expertise while introducing ministerial oversight in panel composition determination will bring it in line with the wider courts and tribunals system. Government intervention via amendments to secondary legislation is required as these changes cannot 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 First-tier Tribunal.

What are the policy objectives and the intended effects?
 The principal policy objective is to ensure that panel composition arrangements are proportionate, appropriate and flexible enough to be adapted as the technology, procedures and methods of resolving disputes are modernised. It is intended that the policy will enable cases to be resolved more efficiently with resource being utilised only where it is needed and where having multiple panel members can add real value.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)
 Two options are assessed in this Impact Assessment:
 - **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. Option 1 is the preferred option as it best meets policy objectives.

Will the policy be reviewed? There is no plan to review the policy. If applicable, set review date:					
Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope?		Micro No	Small No	Medium No	Large No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded: N/A		Non-traded: 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: Lucy Frazer Date: 18 April 2018

Summary: Analysis &

Evidence Policy Option 1

Description: Amend the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008

FULL ECONOMIC ASSESSMENT

Price Base Year 17/18	PV Base Year 17/18	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

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

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

Given Option 1 is expected to lead to a reduction in the number of NLM sitting days, the illustrative scenarios consider sitting day reductions only. These do not present any monetised costs.

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.

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

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

Benefits to HMCTS could be around £23m (NPV: £196m) if there is a 75% reduction in the number of NLM sitting days, where sitting days are a measure of judicial workload. Other scenarios could include savings of around £15m (NPV: £131m) with a 50% reduction and £8m (NPV: £65m) with a 25% reduction.

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

Any reduction in panel size would mean that cases could be listed more quickly as there is need to find availability for fewer panel members. This could improve the end-to-end process time of the appeal, 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.

Key assumptions/sensitivities/risks

Discount rate 3.5%

The scenarios above assume that panels would generally have fewer members but there is a risk that there could be an increase in certain tribunals. Further risks include an increase in the number of appeals to the UT, a change in the number of successful appeals or an adverse impact on the experience of tribunal users. However, previous examples of reductions in panel members from the SEND and Immigration and Asylum Chamber (IAC) suggest that these risks would not be significant.

BUSINESS ASSESSMENT (Option 1)

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

Evidence Base (for summary sheets)

A. Background

The First-tier Tribunal and its panel composition arrangements

1. 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.
2. In order to unify several separate tribunals that were administered at that time by various Government Departments, the First-tier Tribunal (FtT) was created in 2008 following the Tribunals, Courts and Enforcement Act (TCE Act) 2007. The FtT 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.
3. A distinctive feature of tribunals is the use of a combination of skills and backgrounds on a panel. 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. 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.
4. 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.
5. The TCE Act 2007 provides that the Lord Chancellor is responsible for determining panel composition in the FtT and Upper Tribunal (UT). This function was subsequently delegated to the Senior President of Tribunals (SPT), under the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008. In practice, the SPT does this without any ministerial oversight 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 that were in place prior to the creation of the FtT.
6. 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.
7. 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 there is sufficient flexibility for the SPT to take into account future changes to the way that cases are resolved.

B. Policy Rationale and Objectives

8. The conventional economic rationale for government intervention is based on efficiency or equity arguments. Government intervenes if there is a perceived failure in the way a market operates (“market failures”) or to correct existing institutional distortions (“Government failures”). Government also intervenes for equity (“fairness”) reasons.
9. The rationale for government intervention in this instance relates to efficiency. The requirement to have regard to former panel composition arrangements has prevented consideration of how specialist expertise could be used more efficiently. Intervention is necessary to provide the flexibility to implement changes to panel compositions, where appropriate, enabling greater efficiency where the marginal benefit of a certain panel member is outweighed by the costs involved.
10. The principal policy objective is to ensure that panel composition arrangements are proportionate, appropriate and flexible enough to be adapted as the technology, procedures and methods of resolving disputes are modernised. The introduction of a requirement for the SPT to specify through practice direction where one, two or three member panels should be used according to the expertise needed to determine the case and the means by which a case is heard will trigger a review of panel composition in the FtT. This 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 value. It is anticipated that this will enable the realisation of substantial financial savings which, in combination with wider tribunal reforms, will help to improve the efficiency and sustainability of the tribunals service without impairing the experience of users or judicial independence.
11. The Government also intends to introduce ministerial oversight of panel composition, on a consultative basis, to bring the unified tribunals in line with other parts of the justice system, where judicial decisions commit government expenditure. This will be achieved through the requirement of practice direction.
12. Government intervention is necessary as secondary legislation needs to be amended.

C. Affected Stakeholder Groups, Organisations and Sectors

13. These reforms will 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 could potentially hear fewer cases;
 - HM Courts and Tribunal Service (HMCTS) who administer the FtT;
 - Tribunal users.
14. It is not envisaged that tribunal users would be negatively affected by these reforms. It is assumed that decisions taken by the SPT following the reforms will adequately consider the need for special expertise across cases such that any changes are not to the detriment of outcomes. Previous 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 or negligible resulting difference in user outcomes (refer to section F on Risks and Assumptions below).

D. Description of Option Considered

15. 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”).**

Option 0

16. Under the baseline option, no changes will be made in the requirement made of the SPT to have regard to the composition of panels that were in place prior to the creation of the FtT.
17. There are currently around 95,000 NLM sitting days per year across all tribunals in scope of this reform (all FtT excluding the Employment Tribunals), which creates annual costs to HMCTS of around £30m in NLM fees. Sitting days are a measure of judicial workload. This estimate is only based on panel member fees and so does not include travel and subsistence, training, appraisal and general administration. Option 0 will have zero benefit to HMCTS as it is the current baseline scenario.

Option 1

18. Option 1 will require secondary legislation in order to require the SPT to specify where one, two or three member panels should be used according to the expertise needed to determine the case. In addition, the SPT’s requirement to have regard to previous panel compositions will be removed, to allow greater flexibility in his determination of the circumstances in which panel members should be used. Finally, this option will allow ministers greater accountability by introducing a requirement that any future panel composition changes are introduced through practice direction and will therefore require consultation with the Lord Chancellor.
19. Option 1 will 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 ensure that panel members are used to hear cases solely where their expertise is necessary, and this, in turn, could reduce any unnecessary expenditure, and increase administrative efficiency in listing 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.
20. This option will also 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 following consultation with the Lord Chancellor. The Government considers that this option best meets the policy objectives and intended outcomes.

E. Costs and Benefits Analysis

21. This IA follows the procedures and criteria set out in the Impact Assessment Guidance and is consistent with the HM Treasury Green Book.
22. Where possible, this IA identifies both monetised and non-monetised impacts on individuals, groups and businesses in England and Wales with the aim of understanding what the overall impact on society might be from the proposals under consideration. IAs place a strong focus on the monetisation of costs and benefits. There are often, however, important impacts that cannot sensibly be monetised. These might be impacts on certain groups of society, both positive or negative. Impacts in this IA are therefore interpreted broadly, to include both monetisable and non-monetisable costs and benefits, with due weight given to those that are non-monetisable.
23. The costs and benefits of each proposal are compared to option 0, the do nothing or ‘baseline’ case. As the ‘baseline’ option is compared to itself, the costs and benefits are necessarily zero, as its Net Present Value (NPV). As the baseline estimate is only based of fees rather than wider costs of panel members the following benefits may be an underestimate.

Methodology

24. Option 1 is expected to lead to a reduction in the number of NLM sitting days which would reduce the amount of expenditure on NLM fees. 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, in which NLMs are employed to different extents, to indicate the potential benefits of a revised allocation. This is for illustrative purposes only.

25. The following scenarios are assessed in this IA:

- *Scenario A – 75% reduction in NLM sitting days.* If the number of NLM sitting days were reduced by around 75% equally across the FtT, the potential savings in NLM fees would be around £23m per annum.
- *Scenario B – 50% reduction in NLM sitting days.* If the number of NLM sitting days reduced by around 50% equally across the FtT, the potential savings in NLM fees would be around £15m per annum.
- *Scenario C – 25% reduction in NLM sitting days.* If the number of NLM sitting days reduced by around 25% equally across the FtT, the potential savings in NLM fees would be around £8m per annum.

26. Each scenario has been assessed using the following key assumptions:

- In practice and for the vast majority of cases, the chairing member is usually the Judge but in a very small number of cases in some Tribunals, such as Residential Property Tribunals, this can be a specialist NLM. For the illustrative examples, we have assumed that the chair is always the judge. Therefore, any reduction in panel composition would only reduce NLM sitting days.
- The number of NLM 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 very small 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, Special Educational Needs and Disability (SEND), Residential Property Tribunal and War Pensions and Armed Forces Compensation Chamber, NLM sitting days are taken from latest available management information. In the 12 months between October 2016 and September 2017, recorded NLM sitting days for these tribunals were 13; 56,053; 31,619; 571; 642; 1,568; 1,710; 3,380, 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 2016/17 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 2017/18 NLM fees and it is assumed volumes will remain constant. Given the level of sitting days and fees used, total NLM fees are calculated to be around £30m per annum.

Option 1: Amend the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008.

Costs of Option 1

Monetised

27. Given Option 1 is expected to lead to a reduction in the number of NLM sitting days, the illustrative scenarios consider sitting day reductions only. These do not present any monetised costs.

Non-monetised

28. There may be costs associated with supplementary training for judges. However, we assume that this would be minimal.

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

Benefits of Option 1

Monetised

30. There are no monetised costs associated with this option.

Non-monetised

31. 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.

32. Cases could also potentially be listed more quickly as there would be the need to find availability for fewer panel members. This could improve the end-to-end process time of the appeal and improve user experience and estate utilisation.

Overall Impact

33. Any reduction in the use of NLMs would mean fewer sitting days for panel members. While the loss of employment would result in lost wages, it is also the case that panel members would no longer need to provide a service. On the assumption that employment is fully compensated by wages, the overall economic impact on panel members is therefore considered to be zero.

34. The Net Present Value (NPV) is 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.

35. The NPVs associated with the three scenarios are presented in the table below.

Scenario	NPV
75% reduction in NLM sitting days	£196m
50% reduction in NLM sitting days	£131m
25% reduction in NLM sitting days	£65m

36. Given a reduction in the use of NLMs, the reform has a positive NPV due to efficiency savings for HMCTS. HMCTS would also benefit from not having costs for travel and subsistence, training, appraisal and general administration for the panel members, although these are not monetised

Direct Costs and Benefits to Business (for BIT)

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

F. Risks and Assumptions

38. We have assumed that changes to the Order will result in fewer NLM sitting days but this is not necessarily the case. It may be that the SPT decides there is no change needed to the current panel composition arrangements. There is also a risk that there will be an increase of NLM sitting days in certain tribunals. This risk is mitigated as the panel could not consist of more than three members. Additionally, should the SPT decide, for example, to increase the size of a panel in one jurisdiction, this risk of this would be mitigated by the potential for a decrease in panel size in another jurisdiction.

39. There is the potential for an increase in number of appeals to the UT. However as shown below, a SEND tribunal pilot suggests there would be a negligible impact on the UT.

40. 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. FtT Immigration and Asylum Chamber (IAC)

41. In June 2014, following the SPT's response to the consultation on the use of NLMs in the IAC, the President of the FtT 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.

42. 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, 35% in 2015/16, and 38% in 2016/17.

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

Example 2. Special Education Needs and Disability (SEND)

44. 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.

45. 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.

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

47. 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.

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

Example 3. Employment Tribunal

49. 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.
50. 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, 11% in 2014/15 and 7% in 2015/16 and 2016/17. 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

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

Equality Impact Assessment

52. The extent of the impact that this policy will have on the judiciary will not be known until the SPT has reviewed the current arrangements and decided what, if any, panel composition changes should be introduced. Our assessment of the equality impacts is that this proposal will not result in any direct or indirect discrimination but could potentially indirectly impact NLMs who share certain protected characteristics. We are satisfied that the proposal is lawful as it is a necessary and proportionate means of achieving the policy aims.

H. Implementation

53. The proposed amendments to the Composition Order are subject to the affirmative resolution procedure.
54. Following amendment of the Composition Order there will be a review of the existing panel composition arrangements across the FtT to make sure that the 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 following consultation with the Lord Chancellor. It is anticipated that this will begin in 2018.

I. Monitoring and Evaluation

55. A range of quantitative data will be collected following implementation of any panel composition changes under 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 operational data is routinely collected by HMCTS and will be used following introduction of practice directions to monitor any unforeseen impacts, and reported to the senior judiciary.