

EXPLANATORY MEMORANDUM TO
THE FIRST-TIER TRIBUNAL AND UPPER TRIBUNAL (COMPOSITION OF
TRIBUNAL) (AMENDMENT) ORDER 2018

2018 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument amends the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008, (the “Composition Order”), which makes provision for determining the number of members of the tribunal who are to decide matters which fall to the First-tier Tribunal (FtT) or the Upper Tribunal (UT).
- 2.2 The instrument amends article 2 of the Composition Order, which determines the number of members of the FtT. The amendment removes the existing requirement on the Senior President of Tribunals (SPT) to have regard to how tribunal panels were formerly composed prior to their transfer into the First-tier Tribunal, which started on a rolling basis in 2008. Instead it introduces a requirement that the SPT must specify whether a tribunal panel is to consist of one, two, or three members having regard to the nature of the dispute and the means by which it is to be determined, and the need for members of tribunals to have particular expertise, skills or knowledge. Amendments to articles 2 and 3 also introduce a requirement for the SPT to set panel composition in the FtT and UT by practice direction, which would require consultation with the Lord Chancellor.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 This instrument is made under the Lord Chancellor’s power in section 145(1) of, and paragraph 15 of Schedule 4 to, the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”). Section 49(5) of the 2007 Act provides that this instrument is subject to the draft-affirmative procedure. Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland and is not a financial instrument that relates exclusively to England, Wales and Northern Ireland.

4. Legislative Context

- 4.1 The FtT and UT were established by the Tribunals Courts and Enforcement Act 2007 (the “TCEA 2007”) and the functions of former tribunals were transferred to the new entities. Paragraph 15 of Schedule 4 to the TCEA 2007 provides that the Lord Chancellor must, by order, make provision for determining the number of members of the tribunal who are to decide matters that fall to the FtT and UT.

- 4.2 The Composition Order was made by the Lord Chancellor under this power and delegates the responsibility for setting tribunal panel composition to the SPT without currently specifying the need to consult the Lord Chancellor. In practice, the SPT currently sets panel composition by way of practice statement, two examples of which have been included in Annex A.
- 4.3 In making panel composition determinations for the FtT, the SPT must currently consider any provisions that were in place prior to the transfer of the tribunals' functions to the FtT. He or she must also have regard to the need for members of tribunals to have particular expertise, skills or knowledge.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is all of the United Kingdom.
- 5.2 The territorial application of this instrument is to all of the United Kingdom.

6. European Convention on Human Rights

- 6.1 The Lord Chancellor has made the following statement regarding Human Rights:
- 6.2 In my view the provisions of the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) (Amendment) Order 2018 are compatible with the Convention rights.

7. Policy background

What is being done and why

- 7.1 Tribunals were initially designed as proportionate, user-friendly processes, but over time they have become complicated and slow to deal with. The Government has committed to reforming the tribunals as part of its wider reform of the justice system, generally, to create a more proportionate and efficient system that delivers better value for money. As part of this, greater use will be made of technology, and new online processes will enable tribunals to be more accessible and easier for users to navigate.
- 7.2 As the tribunals are streamlined and new innovative and digital processes are introduced, panel members will need to be able to be used in a more tailored and flexible way. The Government's aspiration is to provide the SPT with more flexibility in when and how panel members are used, moving away from an approach of providing panel members without consideration of whether their specialist expertise and knowledge is specifically required or the way the case is resolved. While there will continue to be a need for specific experts, for example qualified medical practitioners, to be involved in certain tribunal proceedings, the greater use of technology will be an important new factor to consider when determining future panel composition needs. Greater reliance on digital processes and online engagement will require specialist panel resources to be able to be engaged and utilised in different ways. While such approaches may not be applicable to all case types, it will be necessary to develop new means of providing specialist expertise (including identification of issues and developing questions for appellants) where there is not a traditional face-to-face hearing between the parties and the tribunal.
- 7.3 The SPT currently sets the panel composition in the FtT, but is bound by a statutory obligation to consider the composition of tribunal panels that existed before the creation of the FtT in 2008. We consider this requirement to be an obstacle to the

introduction of greater flexibility in determining panel composition and incompatible with the need to ensure that panel composition arrangements remain relevant and appropriate to the needs of tribunal users as processes and technology continue to evolve.

- 7.4 The TCEA 2007 provides the Lord Chancellor with responsibility for setting panel composition. The Composition Order was introduced under the terms of this Act to delegate the responsibility to the SPT. However, unusually, this does not specify the mechanism for making such determinations nor, in contrast with the approach taken elsewhere, does this involve any form of ministerial oversight. As such, the Composition Order contrasts with other areas of the justice system where judicial decisions commit government expenditure. For example, while decisions on judicial allocation and assignment in the civil courts are similarly matters for the judiciary, under the provisions of the Civil Procedure Act 1997, these are made by way of practice direction subject to consultation with the Lord Chancellor.
- 7.5 We therefore intend to amend the Composition Order to:
- Remove the requirement on the SPT to have regard to how panels were composed prior to the creation of the FtT;
 - Provide that the SPT must specify whether a tribunal panel is to consist of one, two or three members, having regard to the nature of the dispute and the means by which it is to be determined, and the need for members of tribunals to have particular expertise, skills or knowledge; and
 - Provide that the SPT must set panel composition of the FtT and UT by practice direction, as defined under section 23 of the TCEA 2007. Under this definition, a practice direction would require consultation with the Lord Chancellor.
- 7.6 The Statutory Instrument also includes a savings provision to ensure that current practices will continue until such time that they are superseded by a practice direction.

8. Consultation outcome

- 8.1 The Ministry of Justice launched a public consultation, *Transforming Our Justice System*, on 15 September 2016.¹ The panel composition component of the consultation ran for ten weeks, closing on 24 November 2016.
- 8.2 The panel composition section of the consultation received 586 responses. Of these, approximately 250 were members of the judiciary, 29 were legal groups or legal professionals, 106 represented charities, local authorities, or other third party organisations, 28 were HMCTS employees or other civil servants, and 173 were private individuals with no stated affiliation to the above categories.
- 8.3 The initial proposal in the consultation document was to amend the Composition Order to give the SPT greater freedom to adopt a more proportionate and flexible approach to panel composition, by:
- providing that a FtT panel is to consist of a single member unless otherwise determined by the SPT; and
 - removing the requirement to consider the arrangements that were in place before the tribunals' functions were transferred into the FtT.

¹ <https://consult.justice.gov.uk/digital-communications/panel-composition-in-tribunals/>

- 8.4 Whilst there was a recognition amongst some respondents as the need to provide the SPT with greater flexibility in determining panel composition, the consultation responses highlighted concerns over the proposal to introduce single member tribunal panels as the default position. This largely reflected concerns that single member panels would be routinely used without due consideration of whether specialist expertise is needed, particularly in tribunals that generally deal with vulnerable or disadvantaged people. The majority of respondents raised particular types of cases – mainly those dealing with disability, mental health, or past members of the armed forces – where the use of panel members with particular expertise, skills, or knowledge relevant to the matters being determined, in their view, would be required in all or most circumstances.
- 8.5 The Government has decided to proceed with removing the requirement to have regard to historic panel arrangements in order to provide the necessary flexibility to the SPT in his or her determination of panel composition arrangements in the reformed tribunal system. However, the Government recognises that additional panel members with particular expertise, skills, or knowledge relevant to the matters being determined will continue be required in many tribunals. To provide reassurance to stakeholders that expert members will continue to be provided where needed, the Government has decided not to introduce the proposed single member default position. Instead the SPT will be required to specify whether a tribunal should consist of one, two or three members, having regard to the nature of the dispute and the means by which it is to be determined, and the need for members of tribunals to have particular expertise, skills or knowledge. As now, the SPT, in his or her determination of panel composition arrangements, will continue to have a statutory duty to consider the need for panel members to be experts of the law or subject matter being heard, and to ensure that the hearing is fair and efficient.
- 8.6 The Ministry of Justice did not consult on the proposal to introduce a requirement for the SPT to make panel composition determinations by practice direction as this is considered to be an internal, procedural matter.

9. Guidance

- 9.1 Guidance is not being prepared on this instrument. It will be a matter for the SPT to decide how any new criteria as set out in this instrument is implemented whilst having regard to his or her existing statutory obligations.

10. Impact

- 10.1 A full impact assessment on the effect on the costs on users, business and the voluntary sector of the policy implemented by this instrument has been published alongside the Statutory Instrument.
- 10.2 There is no impact on business, charities or voluntary bodies.
- 10.3 The SPT will continue to be responsible for determining panel composition under the terms of the Composition Order, as amended by this instrument. The SPT will continue to be subject to the existing statutory requirements under section 2 of the TCEA 2007 when discharging his or her duties to maintain access to justice, to ensure that proceedings are fair and efficient, and for panel members to be experts of the law or subject matter being heard. As such, we consider that there will be no negative impact on tribunal users as necessary expertise will continue to be provided where it is needed.

10.4 It is expected that there will be a positive impact on the public sector due to efficiency savings, although this is dependent on panel composition determinations made by the SPT. In 2016/17, non-legal member fees cost around HMCTS £30m p.a. Any reduction in the number of sitting days will reduce this cost. A range of scenarios has been set out in the Impact Assessment. However, there is also a risk that non-legal member sitting days will increase and result in a higher cost.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 A range of quantitative data will be collected following implementation of the Composition 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 will be reported to the senior judiciary.

13. Contact

13.1 Andrew Jonathan at the Ministry of Justice (andrew.jonathan@justice.gov.uk) can answer any queries regarding the instrument.

Annex A – Examples of Practice Statements relating to panel composition currently used in First-tier Tribunals

PRACTICE STATEMENT

COMPOSITION OF TRIBUNALS IN SOCIAL SECURITY AND CHILD SUPPORT CASES IN THE SOCIAL ENTITLEMENT CHAMBER ON OR AFTER 01 AUGUST 2013

1. In this Practice Statement;
 - a. “the 2008 Order” means the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008;
 - b. “the Qualifications Order” means the Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal Order 2008;
 - c. “the 2008 Rules” means the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008;
 - d. “social security and child support case” has the meaning given in rule 1(3) of the 2008 Rules.
2. In exercise of the powers conferred by the 2008 Order the Senior President of Tribunals makes the following determinations and supplementary provision:
3. The number of members of the Tribunal must not exceed three.
4. Where the appeal relates to an attendance allowance or a disability living allowance under Part III of the Social Security Contributions and Benefits Act 1992, or to personal independence payment under Part 4 of the Welfare Reform Act 2012, the Tribunal must, subject to paragraphs 8 to 13, consist of a Tribunal Judge, a Tribunal Member who is a registered medical practitioner, and a Tribunal Member who has a disability qualification as set out in article 2(3) of the Qualifications Order.
5. Where –
 - a. the appeal involves the personal capability assessment, as defined in regulation 2(1) of the Social Security (Incapacity for Work)(General) Regulations 1995;
 - b. the appeal involves the limited capability for work assessment under Part 5 of the Employment and Support Allowance Regulations 2008, under Part 5 of the Universal Credit Regulations 2013 or under Part 4 of the Employment and Support Allowance Regulations 2013;
 - c. the appeal involves the limited capability for work-related activity assessment under Part 6 of the Employment and Support Allowance Regulations 2008, under Part 5 of the Universal Credit Regulations 2013 or under Part 5 of the Employment and Support Allowance Regulations 2013;
 - d. the appeal is made under section 11(1)(b) of the Social Security (Recovery of Benefits) Act 1997;
 - e. the appeal raises issues relating to severe disablement allowance under section 68 of the Social Security Contributions and Benefits Act 1992 or industrial injuries benefit under Part V of that Act (except for an appeal where the only issue is whether there

should be a declaration of an industrial accident under section 29(2) of the Social Security Act 1998);

f. the appeal is made under section 4 of the Vaccine Damage Payments Act 1979;

g. the appeal is against a certificate of NHS charges under section 157(1) of the Health and Social Care (Community Health and Standards) Act 2003;

h. the appeal arises under Part IV of the Child Maintenance and Other Payments Act 2008;

the Tribunal must, subject to paragraphs 7 to 14, consist of a Tribunal Judge and a Tribunal Member who is a registered medical practitioner.

6. In any other case the Tribunal must consist of a Tribunal Judge.
7. The Chamber President may determine that the Tribunal constituted under paragraph 5 or 6 must also include –
 - a. a Tribunal Member who is an accountant within the meaning of Article 2(i) of the Qualifications Order, where the appeal may require the examination of financial accounts;
 - b. an additional Member who is a registered medical practitioner, where the complexity of the medical issues in the appeal so demands;
 - c. such an additional Tribunal Judge or Member as he considers appropriate for the purposes of providing further experience for that additional Judge or Member or for assisting the Chamber President in the monitoring of standards of decision-making.
8. Where the Chamber President considers, in a particular case, that a matter that would otherwise be decided in accordance with paragraphs 4 or 5 only raises questions of law and the expertise of any of the other members is not necessary to decide the matter, the Chamber President may direct that the Tribunal must consist of a Tribunal Judge, or a Tribunal Judge and any Tribunal Member whose experience and qualifications are necessary to decide the matter.
9. The powers of the Chamber President referred to in paragraphs 7, 8, 10 and 12 may be delegated to a Regional Tribunal Judge and those referred to in paragraphs 7, 8 and 12 may be delegated to a District Tribunal Judge.
10. A decision, including a decision to give a direction or make an order, made under, or in accordance with, rules 5 to 9, 11, 14 to 19, 25(3), 30, 32, 36, 37 or 41 of the 2008 Rules may be made by a Tribunal Judge, except that a decision made under, or in accordance with, rule 7(3) or rule 5(3)(b) to treat a case as a lead case (whether in accordance with rule 18 (lead cases) or otherwise) of the 2008 Rules must be made by the Chamber President.
11. The determination of an application for permission to appeal under rule 38 of the 2008 Rules and the exercise of the power of review under section 9 of the Tribunals, Courts and Enforcement Act 2007 must be carried out –
 - a. where the Judge who constituted or was a member of the Tribunal that made the decision was a fee-paid Judge, by a Judge who holds or has held salaried judicial office; or
 - b. where the Judge who constituted or was a member of the Tribunal that made the decision was a salaried Judge, by that Judge or, if it would be impracticable or cause undue delay, by another salaried Tribunal Judge, save that, where the decision is set

aside under section 9(4)(c) of the Act, the matter may only be re-decided under section 9(5)(a) by a Tribunal composed in accordance with paragraph 4, 5 or 6 above.

12. Where the Tribunal consists of a Tribunal Judge and one or two Tribunal Members, the Tribunal Judge shall be the presiding member. Where the Tribunal comprises more than one Tribunal Judge, the Chamber President must select the presiding member. The presiding member may regulate the procedure of the Tribunal.
13. Under rule 34(2) of the 2008 Rules it will be for the presiding member to give any written statement of reasons.
14. In rule 25(2) (Medical and physical examination in appeals under section 12 of the Social Security Act 1998) of the 2008 Rules “an appropriate member” of the Tribunal is a Tribunal Member who is a registered medical practitioner.

SIR JEREMY SULLIVAN

SENIOR PRESIDENT OF TRIBUNALS

31 July 2013

PRACTICE STATEMENT

COMPOSITION OF TRIBUNALS IN RELATION TO MATTERS THAT FALL TO BE DECIDED BY THE WAR PENSIONS AND ARMED FORCES COMPENSATION CHAMBER ON OR AFTER 3 NOVEMBER 2008

1. In this Practice Statement “the 2008 Rules” means the Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008.
2. In exercise of the powers conferred by the First-tier Tribunal and Upper Tribunal Composition of Tribunal) Order (“the 2008 Order”) the Senior President of Tribunals makes the following determinations and supplementary provision:-
3. A decision that disposes of proceedings or determines a preliminary issue (except a decision under Part 4 of the 2008 Rules) made at, or following, a hearing must be made by:-
 - a. One judge; and
 - b. One other member who has substantial experience of service in Her Majesty’s naval, military or air forces or who is a transferred-in other member from the Pensions Appeal Tribunal and is not a registered medical practitioner; and
 - c. One other member who is a registered medical practitioner or, in a particular case, or class of case, where the Chamber President considers it appropriate in order for the Tribunal to decide the matter, two other members each of whom is a registered medical practitioner.
4. Where the Tribunal is constituted under paragraph 3 the “presiding member” for the purposes of article 7 of the 2008 Order will be the judge.
5. Where the Tribunal has given a decision that disposes of proceedings (“the substantive decision”), any matter decided under, or in accordance with rule 5(3)(1) or Part 4 of the 2008 Rules, or section 9 of the Tribunals, Courts and Enforcement Act 2007 must be decided by one judge unless the Chamber President considers it appropriate that it is decided by the same members of the Tribunal as gave the substantive decision.
6. Any other decision, including striking out a case under rule 8 (except at, or following, a hearing) or giving directions under rule 5 of the 2008 Rules (whether or not at a hearing), must be made by one judge.
7. In rule 24(1) (Medical examinations and commissioning of medical evidence) of the 2008 Rules “an appropriate member” of the Tribunal is a other member who is a registered medical practitioner.

LORD JUSTICE CARNWATH

SENIOR PRESIDENT OF TRIBUNALS

30 October 2008