

Response of the Administrative Justice & Tribunals Council to:

Transforming tribunals: Implementing part 1 of the Tribunals, Courts and Enforcement Act 2007

List of questions for response

Chapter 7: Overview of Tribunal Structure

Assignment

Question 1. **Do these proposals strike the correct balance between maintaining judicial expertise and encouraging judicial career development?**

Comments: Though it is difficult to comment at this early stage, the proposed arrangements would seem to strike an appropriate balance between maintaining judicial expertise and encouraging judicial career development. In particular, they will create more opportunities for tribunal judges to widen their expertise and experience at their own initiative.

Once the proposed reforms are in place and have been operating for a sufficient time, the Council will be in a better position to determine whether an appropriate balance has been struck. For example, the assignment and ticketing processes are determined by Chamber Presidents according to the needs of the Chamber, which would not necessarily have the development of the individual as a primary concern, as opposed to the needs of the system. The practical issues will be the extent to which Presidents are willing to consider existing tribunal members in their own or another chamber ahead of external candidates and the extent to which resources will be available to ensure that the training and appraisal needs of those tribunal judges and members who wish to apply for cross-ticketing or assignment can be met. The Council has seen in draft a letter from the Chairman of the JSB Tribunals Committee constituting the JSB's response to the present consultation, and strongly supports what is said there about the need for compulsory 'induction/gatekeeper' training courses as well as refresher courses for tribunal judges (and, the Council would add, for non-legal members too).

The Council welcomes the commitment in paragraph 105 of the paper to maintain the requirements for employment tribunal and EAT members to have either relevant judicial expertise or workplace experience on either side of industry.

In considering the matter of balance, account must also be taken of the separate legal system operating in Scotland, and in cases heard in Scotland there has to be awareness of the appeal structure to the Court of Session. There needs to be a sufficient number of Scottish judges appointed and, where appropriate, arrangements made for them to sit on a Scottish case.

After a fixed period of time, it will be necessary for the Tribunals Service to conduct a structured review of the ticketing and assignment processes, to determine whether they are meeting the needs of users, the tribunal system and tribunal members.

Proposed Chambers Structure

Question 2. Do you agree with this general approach for Chambers?

Comments: The Council agrees with this general approach for Chambers.

However, the proposed chamber structure will mean the grouping of jurisdictions of differing size, with different legislative frameworks and varying workloads. Appropriate safeguards will be needed to ensure that the necessary individual characteristics, particularly of smaller and more specialised Tribunals, are maintained, including the provision of advice and assistance to appellants at hearing centres. This will require suitably trained staff. Also, training and appraisal for judges and members will still need to be specific to the jurisdiction in which they are operating, and any existing research support to individual Tribunals will need to be preserved.

For example, the Asylum Support Tribunal has been placed in the Social Entitlement Chamber. It works to extremely tight timeframes, has a fluctuating workload, and a distinctive legislative framework. Given the large number of Social Security and Pensions appeals that this chamber is likely to hear relative to asylum support appeals, it is important that the individual requirements of the AST are accommodated in the chamber structure and operations.

There will be a continuing need for users to be able to access information (including

information on procedures, reports, precedents etc.) which is specific to the jurisdiction they are applying to. Generalised information on how to make an application etc. will not help users in finding out what evidence they need to produce, how to present their case, and what may be relevant or specific to their particular application. Even within Chambers, each jurisdiction will have different requirements. It is essential that the present user-focused information and procedures of, for example, the Special Educational Needs and Disability Tribunal should not suffer in the reform process. Valuable information about specific jurisdictions that previously appeared in the annual reports of individual tribunals should continue to be available to the public in some form. The Council would be glad if it were able to assist in the publication and circulation of such information.

There is also a need for improved information and communication to provide appropriate reassurance, and to demonstrate to users, that the role and expertise of specific jurisdictions will be preserved despite the change of name. For example, great care must be taken to ensure that the incorporation of the Mental Health Review Tribunals in England into the Health, Education and Social Care Chamber and the consequent change of name will not be seen by patients as an erosion of their rights to an expert tribunal to make decisions about their liberty. It would assist users generally if the names of individual jurisdictions could be preserved by way of 'signposting'.

Question 3. Is the allocation of jurisdictions to Chambers the right one?

Comments: Yes, so long as it can be demonstrated that the role and expertise of specific jurisdictions allocated to Chambers will be preserved.

Chapter 8: The Upper Tribunal

Structure of the Upper Tribunal

Question 4. Do you agree with the proposed three-chamber structure for the Upper Tribunal?

Comments: This seems to be a sensible starting point, which could be modified in the light of experience, user surveys and research.

Location

Question 5. **Do you agree with this approach to where the Upper Tribunal is located?**

Comments: The Upper Tier should be accessible to users and flexible in its approach to sitting in regional centres if needed.

The Council is aware that some tribunals are concerned about the reduction in the number of hearing centres generally, which will impact on access in more rural areas, in particular in Scotland and Wales. It is important that those concerns are met.

Jurisdictions of the Upper Tribunal

Question 6. **Do you agree with the proposals for transferring existing appeal rights?**

Comments: Yes.

Question 7. **Are there other appeal rights not listed?**

Comments: The Council is not aware of other appeal rights not listed.

Proposed Changes to and Exclusions from Appeals

Question 8. **MHRT. Do you agree?**

Comments: It is appropriate that an appeal from the MHRT should be an appeal on a point of law with permission to the Upper Tribunal without exclusions or restrictions.

The introduction of the Upper Tribunal should provide greater consistency in appeal rights across Tribunals, and in the case of the MHRT provide greater access to justice for vulnerable people affected by a decision of the MHRT. Appeals to the Upper Tribunal should be less complex, cheaper and quicker than the current option of judicial review.

Given the recurring nature of mental health cases, the Council considers that special attention will be needed to ensure that no member of the Upper Tribunal should hear a case in which they had been involved at the lower tier.

Question 9. **SENDIST. Do you agree?**

Comments: Yes.

As above, the Council considers that appeals to the Upper Tribunal should be less complex, cheaper and quicker than the current position of an appeal to the High Court.

Question 10. **PAT. Do you agree?**

Comments: Yes. For reasons stated above.

Question 11. **CST. Do you agree?**

Comments: The Council agrees that appeals from the Independent Safeguarding Authority should go to the Upper Tribunal since the right of appeal is on a point of law only.

While the Consultation Paper does not make it clear, it is assumed that, as for the MHRT, SENDIST and PATs, the default position under the 2007 Act will also apply to appeals in respect of the CST's other jurisdictions – i.e. an appeal on a point of law with permission to the Upper Tribunal without exclusions or restrictions.

Question 12. **Transport. Do you agree?**

Comments: The Council agrees that the default position should apply to appeals from Traffic Commissioners.

However, the Council notes that the default provision does not simply add a permission requirement to the present position. The Transport Act 1985 explicitly provides that the Transport Tribunal has full jurisdiction to hear and determine all matters of law and fact, so the proposed changes to the appeals system would appear to extinguish a statutory right to appeal from the decision of a Traffic Commissioner on an issue of fact.

Question 13. **Lands. Do you agree?**

Comments: Yes. The broader right of appeal to the Lands Tribunals from Valuation

Tribunals and Leasehold Valuation Tribunals should be retained.

First Instance Jurisdiction of the Upper Tribunal

Question 14. Which would be the appropriate option for the Information Tribunal's work?

Comments: There may be disadvantages to all three options presented in the consultation paper. However, on the information available, the Council considers that the most appropriate option is to put all Information Tribunal cases into the Upper Tribunal. The appellate nature and the type of cases generally heard by the Information Tribunal (including national security cases), along with the seniority and status of its membership and the standing of the Information Commissioner from where appeals lie, suggest that this is the most appropriate option.

Chapter 9: Review of the Role of Non-Legal Members

Appointments and Tribunal Composition

Question 15. Do you agree that this is the right approach to tribunal composition?

Comments: The consultation paper states that now is the time for a major re-assessment of the use of non-legal members, and that the government intends to map existing non legal members in to the new roles in a way which maximises the opportunity for their flexible use in appeals. The Council would be glad to assist the government with this task considering its previous work in this area, and observations of Tribunal hearings over many years.

Non-legal members, where properly selected and trained, can and do play an important role in Tribunals. Generally, the size and composition of a Tribunal should be proportionate to the issues being considered. For example, certain types of cases concerning purely legal matters could be allocated to a Chair sitting alone, but more complex cases may well require a three-person tribunal.

The Council supports the wide definition of expert provided in the consultation paper – that “expertise comes in many forms: it is not confined to those with professional qualifications” [para 231] and the broad range of examples given under ‘Other experts’ [para 238]. The

Council agrees that non-legal members should be “deployed selectively on the basis of the needs of the case” which will include the “likely skills and understanding of the parties” [para 231].

Provided that ‘non-legal expertise’ and ‘non-professional expertise’ are broadly interpreted, the Council agrees with the overriding principle expressed in the consultation paper that ‘the use of non-legal members at a particular hearing should bring to the table skills, experience or knowledge that tribunal judges cannot provide’. This assists tribunals in assessing the evidence and in making confident findings of fact, to the benefit of users of the system.

Non-legal members can be of particular benefit to a case where the Tribunal includes representatives with in-depth practical experience of ‘both sides’ of an issue. For example, the employment tribunals and the EAT include non-legal members with experience in employment relations from union and employer perspectives. Where tenancy issues arise, the agricultural land tribunals will include one lay member nominated from the “Farmers Panel” and the other from the “Landowners Panel”. Where Tribunals are constituted in this way they can create a forum where all parties have confidence in the outcome of a decision.

Tribunals also benefit from non-legal members with practical or specialised experience or expertise in a certain area. For example, in disability cases the SSCSA gains from having members who have experience in delivering services for people with disability problems or who are themselves disabled. In the Financial Services and Markets Tribunal non-legal members have a wealth of ‘real world’ private sector experience in the financial services industry, which is invaluable in understanding the complex financial issues that the Tribunal considers. Other tribunals where non-legal members have made a substantial contribution both to users’ perceptions of the fairness of the appeal process and to the tribunal’s deliberations include the RPTS and CICAP.

An example of a purely ‘non-legal’ tribunal is provided by Children’s Hearings in Scotland, where members come from a diverse range of occupations, income groups and backgrounds. Such members may not qualify as ‘other experts’ as defined in the consultation paper [para 238], but the observations of the Scottish Committee of the AJTC suggest that this system operates to a high standard.

However, the Council supports the notion of a more professionalised and expert non-legal membership of tribunals (for instance in the field of tax), with proper arrangements for appraisal and due regard to the need to refresh the talent pool regularly. In this connection, the Council would point out that expertise can be acquired or built upon after appointment. It

can also be quickly lost. Generic skills and wide-ranging experience, rather than a narrow knowledge base, may be what should be sought.

The emphasis should be on ensuring that tribunals have the expertise they need so that users get a fair hearing. In certain jurisdictional areas such as employment and education the Council believes that there should be a presumption in favour of including non-legal members on the tribunal and that any departure from this in particular cases would need justification. The deployment of non-legal members should not be driven by considerations of workload, resources or administrative convenience.

The Council notes the proposal in paragraph 231 of the paper that non-legal members may be able to chair hearings or conduct cases alone. While not opposed to this in principle, the Council does not believe that it would work satisfactorily in tribunals such as employment tribunals and the EAT which have a balanced composition with representatives from either side of industry. In that situation, the ability for a non-legal member to chair a hearing or conduct a case alone could undermine users' confidence in the impartiality of the system.

Question 16. Should there be different principles for certain Chambers or appeal rights, and if so, why?

Comments: The broad nature of the principles should provide sufficient flexibility to be applied across Chambers and appeal rights, though differences can arise in jurisdictions where the tribunal has a 'balanced' constitution (e.g. employment tribunals, EAT, agricultural land tribunals). An instance of this is given at the end of the answer to Question 15 above.

Categories of Non-Legal Member

Question 17. Do you agree that these are the appropriate categories for members?

Comments: The Council is not convinced that the approach outlined in the paper is the correct one. In particular the distinction between Healthcare and other Qualified Professionals seems questionable and the purposes to which the categorisation would be put are unclear. The Council also wonders how the appointment of 'professional' or 'expert' members will be managed, for example whether their particular experience and/or expertise will be specified in their title.

The Council welcomes the widening of the Healthcare Qualified Professional category to

include clinical groups other than doctors, but is unsure how far this is intended to go. The reference to “allied professionals” in the first sentence of paragraph 234 appears to link only to psychologists, but may be intended to encompass all the “Professions Allied to Medicine” (PAMs as they are known in the NHS). This needs clarification. There is also an apparent imbalance between the paragraphs on Healthcare Qualified Professionals and the much shorter paragraph on Other Qualified Professionals.

The Council looks forward to dialogue with government throughout the mapping and reassessment process to ensure that users’ interests are respected. There will also be a need to ensure that non-legal members have either relatively recent experience or some means of refreshing the knowledge base which led to their appointment. The lack of new appointments in some areas may mean that the pool of non-legal members in some jurisdictions is in danger of becoming stale. This could and should be addressed through appraisal.

Titles

Question 18. **What should the description be?**

Comments: See below.

Question 19. **Would the term ‘member’ suffice?**

Comments: The term ‘lay member’ is misleading, given that most members are appointed to tribunals for their expertise or experience. The Council believes that the term ‘member’ is appropriate.

Chapter 10: Tribunal Procedure

Improving the Service to Tribunal Users

Question 20. **Do you agree that where a function of a tribunal is carried out by staff there should always be right of access to a judge?**

Comments: Yes.

Question 21. **Are there any functions of a tribunal which should never be performed**

by staff, whatever the safeguards?

Comments: The Council gave careful consideration to this question when formulating its 'Guide to Drafting Tribunal Rules' (2003). These model rules are not prescriptive but may provide useful guidance to the Procedure Committee in determining which functions may be delegated to staff and which should not.

The model rules provide guidance on which functions may be performed by the Tribunal, the Chair (in that capacity or when acting on behalf of the Tribunal), the Registrar and other Tribunal staff.

The model rules envisage a hierarchy of functions on the following lines:

1) Functions that only the Tribunal itself can perform, which include:

- deciding any question on a preliminary hearing, other than giving a direction for such a hearing to be held [Rule 29]
- deciding an opposed appeal/initiating application [Rule 76]
- making an order disposing of the appeal/application following a review [Rule 78]

2) Functions of the Tribunal that may be performed by the President/Chair, which include any function of the Tribunal except those above [see Rule 96]. However, the Tribunal must confirm the decision of the Chair where the Chair gives a direction for a preliminary hearing or a direction suspending the whole or part of the proceedings or decision.

3) Functions of the Tribunal or Chair that may be performed by the Registrar or Assistant Registrar under the direction of the Tribunal or Chair, which include a variety of interlocutory functions such as:

- pre-hearing review, including the giving of directions which appear necessary to the conduct of the appeal/application [Rule 28]
- requiring the parties to provide a statement of agreed facts [facts in dispute] [issue or issues to be decided by the Tribunal] [a list of agreed documents] [Rule 32(3)(d), (11)]
- giving directions (e.g. to provide further particulars or statements, and directions as to evidence needed, the exclusion of evidence not needed and limiting cross-examination) necessary or desirable to furthering the overriding objective in the conduct of an

appeal/application [Rule 37]

In relation to all the functions listed any direction given by the Registrar may be set aside or varied by the Chair on the application of a party or on the Chair's own initiative.

Functions of the Registrar also include a variety of administrative functions such as receiving documents and making arrangements for hearings.

The extent of the functions of the Tribunal or the Chair undertaken by the Registrar will depend on their qualifications and experience. For example, under the Competition Appeal Tribunal (CAT) Rules 2003 the Registrar must be a qualified solicitor or barrister with at least seven years experience. The CAT Registrar can, among other things, consider and determine interlocutory matters.

4) Functions of the Registrar that may be performed by staff authorised by the Chair or President include any of the Registrar's functions apart from those that the Registrar may perform on behalf of the Tribunal or the Chair.

The Procedure Committee will include a representative of the Council, who will be able to represent the views of the Council on these issues.

Costs

Question 22. Are these the right criteria against which a costs regime should be judged? Is there good reason for inclusion of other principles?

Comments: As outlined in Rule 82 of the Council on Tribunals 'Guide to Drafting Tribunal Rules', the Council considers that costs should normally only be awarded where a person has acted vexatiously or unreasonably, or in favour of an appellant where there is a successful appeal against an administrative decision affecting the appellant's livelihood. Other considerations may apply where a tribunal is provided solely as an alternative to a court, for example, the Lands Tribunal.

In ordering costs, a Tribunal should take account of the resources of the party against whom the order is to be made.

The risk of a substantial award of costs, or indeed users' perceptions of that risk, can act as a bar to access to justice. Care should therefore be taken in framing any generic rules

governing costs.

Chapter 11: Tax Appeals Modernisation

Tax Appeals Modernisation

Question 23. What features of the present system should be retained in the new one?

Comments: Procedurally simple, inexpensive, accessible and user-friendly (though professional) determination of less complex cases at local venues. High quality legal determination of the more complex cases.

Question 24. What are your views on the type of cases that could be heard by non-legal members?

Comments: As stated above (Question 15), non-legal members may be particularly helpful in assessing evidence and making confident findings of fact, as in many cases involving penalties. Nor would the Council preclude the use of non-legal members in cases raising points of law. For example, many existing General Commissioners have considerable expertise in tax matters. General Commissioners already deal with a not dissimilar range and complexity of cases to those dealt with by full time Special Commissioners. (The description of all General Commissioners as “Non-expert” in the table on page 76 of the consultation paper is to that extent misleading.)

Question 25. What types of case should go straight to the Upper Tribunal?

Comments: The Council agrees with the general approach set out in paragraph 292 of the consultation paper. Where a case will almost certainly go to the Court of Appeal or further, there is a strong argument for it to be heard in the Upper Tribunal. Any further thoughts that the Council may have on this and the following three questions will be communicated through its representation on the Tax Appeal Modernisation Stakeholder Group and Project Board.

Question 26. What types of case will require early case management?

Comments: The Council suggests the following:

Cases involving numerous documents and raising difficult issues of fact and law.

Multiple cases dealing with similar issues which may be heard together, as well as cases which have been stayed pending a decision by the higher courts (or in due course, the Upper Tribunal).

Cases raising points of wider significance.

Cases where encouragement to use PDR such as mediation might be beneficial either in agreeing statements of fact or reaching settlement without recourse to the tribunal.

Cases where the appellant is not represented and might therefore benefit from additional guidance and support.

Question 27. What are the types or features of cases that you think should be subject to an award of costs?

Comments: The Council is opposed to the award of costs except where a party has behaved unreasonably. This could include cases where parties have unreasonably failed to comply with directions or sought unreasonably to introduce late evidence or submissions. In the ordinary run of cases each side should be expected to bear its own costs. The Council agrees that this should be the default position. The Council recognises that different considerations may arise in substantial and complex cases or where an important principle of tax law is in issue that may have significance as a precedent.

Question 28. How do you think the award of costs should operate in practice?

Comments: As above.

Chapter 12: Land, Property and Housing

Land, Property and Housing

Question 29. Do you agree that this is the right long-term vision for tribunals dealing with land, property and housing? If not, do you have an alternative?

Comments: The consultation paper's long-term vision for land, property and housing

tribunals accords with that of the Council.

Question 30. Do you agree that the jurisdictions of the RPTS and the ALR should be transferred to the First-tier Tribunal and their administration to the Tribunals Service?

Comments: In principle it would make sense to transfer the various jurisdictions of the RPTS to the First-tier Tribunal and its administration to the Tribunals Service. This would be in line with the Leggatt principle that tribunals should be independent of their sponsoring departments and would be an important step towards creating the kind of integrated structure envisaged by the Law Commission in its 2003 report on land, valuation and housing tribunals. This would be the case whatever decisions are taken in the light of the Law Commission's final report on housing disputes next year.

In recent years the RPTS has established itself as a well run organisation that has shown a capacity to absorb additional jurisdictions and to pioneer innovative ways of resolving disputes. In that sense it provides something of a model to the Tribunals Service itself. Care would need to be taken to ensure that none of this was lost in the transfer of the RPTS to the Tribunals Service. This may affect the proposed timetable.

Comparable considerations arise with agricultural land tribunals.

The transfer of the ALR jurisdiction to the First-Tier Tribunal would also be conducive to a more integrated structure for land, property and housing tribunals. As the consultation paper points out, the Tribunals Service already provides the administrative support for the ALR.