



Department for
Business, Energy
& Industrial Strategy



Ministry
of Justice

REFORMING THE EMPLOYMENT TRIBUNAL SYSTEM

Government response

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Introduction

1. The consultation paper 'Reforming the Employment Tribunal System'¹ was published on **5 December 2016**.
2. The paper set out our proposals for changes to the Employment Tribunals Act 1996 to provide a more flexible underpinning legislative framework to make sure that any future procedural or operational reforms would be able to be implemented promptly, in a way that reflects the diverse needs of employment tribunal and Employment Appeal Tribunal users.
3. The consultation sought views on four particular areas:
 - Modernising the handling of employment tribunal claims
 - Delegation of judicial functions to caseworkers
 - Tailoring the panel to the needs of the case
 - Proposed approach to implementing reform in the employment tribunal System
4. The consultation period closed on **20 January 2017**. This report summarises the responses received on those proposals and sets out how the Government intends to proceed.

¹ www.gov.uk/government/uploads/system/uploads/attachment_data/file/575001/Reforming_the_Employment_Tribunal_System_-_Consultation_Document_v3.pdf

Wider considerations

Devolution

5. The UK Government is committed to transferring the functions of the employment tribunal system to Scotland as part of the implementation of the Smith Commission Agreement. Following the transfer, the Scottish Government will be responsible for deciding how the Scottish tribunals hearing employment claims are managed in future. The precise timing and approach of that transfer is still under discussion and has not yet been agreed by the UK Government and the Scottish Government.
6. While the UK Government will continue to be responsible for managing the operations of employment tribunals and the Employment Appeal Tribunal until they are transferred to Scotland, we recognise that any reform of those tribunals could have implications for the transfer. The UK Government and the Scottish Government have been working closely on plans to implement the Smith Commission Agreement and will continue to do so in respect of our plans to reform the employment tribunal system set out in this response.

Tribunal fees

7. Although not part of the consultation, several respondents raised the issue of tribunal fees. On 31 January 2017 the Government published its post implementation review of employment tribunal fees.² The review includes a consultation on further proposals to widen support available to people under the Help with Fees scheme. These proposals would help people on low incomes and are expected in particular to benefit women, disabled people and people from Black and Minority Ethnic backgrounds who feature disproportionately among those in low income groups. The consultation will close on 14 March 2017 and can be found on GOV.UK.³
8. While the review concludes that the current system of fees and remissions is generally working effectively, it has identified some areas for improvement. In particular, the fall in employment tribunal claims and the evidence that some people have been discouraged by the fees has persuaded us that some re-balancing action is necessary. For these reasons, the Government has decided that an adjustment to the current scheme is justified to alleviate these impacts. **We believe that the fairest and most effective way to do so is to adjust the Help with Fees scheme.**
9. We propose that the gross monthly income threshold for a full remission is increased from £1,085 to £1,250 broadly the level of the National Living Wage. Therefore more people would qualify for a full remission and others would contribute less than under the current arrangements. We believe that this is the most effective and fairest way of addressing the issues we have identified because they target people on low incomes who we believe are those most likely to be deterred from pursuing a claim because of the fee required.

² See: <https://consult.justice.gov.uk/digital-communications/review-of-fees-in-employment-tribunals>

³ See: <https://consult.justice.gov.uk/digital-communications/review-of-fees-in-employment-tribunals>

10. Although these proposals have been developed to address concerns about the impact of fees in the employment tribunal system specifically, Her Majesty's Courts and Tribunals Service operates a standard scheme across all of its fee charging jurisdictions, with the exception of the First-tier Tribunal (Immigration and Asylum chamber) where a separate fee remissions, exemptions and waivers policy applies. If implemented, our latest proposals would therefore also benefit those bringing proceedings in any court or tribunal where the Help with Fees scheme might apply, for example the civil and family courts.
11. The published review also announces that three sets of proceedings, related to payments from the National Insurance Fund, will be exempt from fees.
12. The Government keeps the fees for courts and tribunals under regular review, and will be considering the appropriate level of fees as we develop our detailed plans for reform of the employment tribunal system.

Summary of responses

13. We received 77 responses to the consultation. A list of the respondents is set out in Annex A. Individual respondents have not been identified. A summary of the types of respondent is in the table below.

Respondent type	Number of responses
Legal representative	23
Individual	12
Judiciary	11
Trade Union	9
Other	7
Charity or social enterprise	6
Business representative organisation / trade Body	3
Large business (over 250 staff)	2
Government	1
HR	1
Local government	1
Small business (10 to 49 staff)	1

Modernising the handling of Employment Tribunal claims

14. Some parts of the employment tribunals system and the Employment Appeal Tribunal are already operating digitally, with around 90% of claims lodged online. However, much of the subsequent processing and case management is done on paper. The aims of the reform programme are to increase the digitisation to make the system more accessible, simple and cost-effective. Increased digitisation provides more opportunities for the parties to transact with the tribunal and engage with each other online via new digital tools, which will save time and money.
15. It may also be possible for more cases to be considered and determined using virtual means. This covers telephone, online and video conference. The Government wants to ensure that the operation of Employment Tribunals and the Employment Appeal Tribunal in future is sufficiently flexible to allow this if it is appropriate.

Question 1: Do you agree that with the right system in place the specific needs of users of Employment Tribunals and the Employment Appeal Tribunal can be accommodated in a more digitally based system?

16. A total of 71 respondents answered this question. The breakdown of types of respondent is set out in the table below.

Respondent type	Number of responses
Legal representative	22
Individual	10
Judiciary	10
Trade Union	9
Charity or social enterprise	6
Other	6
Business representative organisation / Trade body	3
Large business (over 250 staff)	2
Government	1
Local government	1
Small business (10 to 49 staff)	1

Summary of responses

17. 45 respondents gave a definitive answer to the question. Of these, 35 clearly agreed and 10 disagreed. The remaining responses were more nuanced.
18. The majority of respondents broadly agreed that some digitisation of the system would be beneficial but the extent of support for the proposal varied. Some respondents pointed out that there is already significant contact between the parties by email and by telephone. The main theme to emerge was concern that the move to a digital system would not be well managed or properly resourced and that measures should be in place to ensure staff and judiciary have proper access and training to use the new tools so as not to hinder their take-up. A secondary theme was the risk of not having suitable

processes in place for those who do not have access to or are unable to use websites, email, video link or conference call facilities, and this becoming a barrier to these people being able to access justice.

19. Among those who disagreed with the proposal, there was still support for digitisation of some elements of the process, such as internal Her Majesty's Courts and Tribunals Service systems for processing cases and dealing with case management issues – even if the support did not extend to digital contact with the parties or virtual hearings. A small number of respondents expressed concerns about the implications for open justice if hearings do not take place in person, and a few others objected to any possibility that, in future, the outcomes of cases could be determined by automated decision making, which is not under consideration.

Government response

20. The Government welcomes the fact that most respondents believe digitisation can be adopted within Employment Tribunals and the Employment Appeal Tribunal as long as the process is well managed and support is in place for those who need it. The current tribunal system can be complicated and inefficient with a heavy reliance on paper documents. Aged IT systems and complex paperwork increase the burdens on citizens preparing and presenting their own cases.
21. We recognise the concerns about the risks of new IT systems creating unforeseen problems and will provide appropriate new equipment, along with appropriate training for judges and staff. Her Majesty's Courts and Tribunals Service's programme of reforms will take place over a number of years and digital transformation of Employment Tribunals and the Employment Appeal Tribunal is currently scheduled in the latter part of that programme. We will therefore be able to benefit from practical lessons learnt from similar types of reform taking place in other courts and tribunals. The development of digital systems will be undertaken via an iterative approach with user testing at all stages, and with all types of users included. We believe that this approach will mitigate some of the inherent risks in digital transformation.
22. We also agree with the need to ensure that the move to an increased online system does not disadvantage any claimants or respondents who do not have digital access or are not comfortable interacting online. We have set out in our response to the *Transforming our justice system* consultation⁴ the scheme of "assisted digital" support that we will put in place across all courts and tribunals for those who need guidance or help to use online services. This will be available to users of employment tribunals and the Employment Appeal Tribunal at no cost. As noted, currently approximately 90% of claimants choose to present their claim online. We will therefore build on the take-up of our existing digital provision, but maintain the option of a paper-based route in employment tribunals and the Employment Appeal Tribunal for those who need to use it.
23. We aim to digitise the whole claims process so that users can digitally start a claim, track progress, provide evidence and information, and participate in innovative resolution methods if they can and wish to do so. This will speed up the resolution of disputes and allow users to engage with the tribunal at times and locations convenient to them. This will mean that in some cases, the tribunal may not need to hold a physical hearing to determine the outcome of a claim. For those who were concerned about automatic

⁴ www.gov.uk/government/uploads/system/uploads/attachment_data/file/590391/transforming-our-justice-system-government-response.pdf

determination by technology, we would like to reassure you that this is not under consideration.

Question 2: What issues do you think need to be considered when deciding whether a claim would be suitable for online consideration?

24. A total of 71 respondents answered this question. The breakdown of types of respondent is set out in the table below.

Respondent type	Number of responses
Legal representative	22
Individual	10
Judiciary	9
Trade Union	9
Other	7
Charity or social enterprise	5
Business representative organisation / Trade body	3
Large business (over 250 staff)	2
Government	1
Local government	1
Small business (10 to 49 staff)	1
HR	1

Summary of responses

- 25. The most common theme in responses to this question was that the nature and complexity of the case should be the main factor in deciding whether a claim would be suitable for online consideration. Examples given included those where the decision could be taken on the papers, and some wage claims. However, some respondents pointed out that it is possible for cases to seem simple initially but require witnesses to provide testimony on issues of fact and therefore become more complex. Respondents making this point considered there would need to be flexibility to move to a physical hearing if that became necessary. This could mean that the number of cases that are suitable in practice for online consideration turns out to be small.
- 26. A number of respondents felt that considering the needs of the particular parties in a case was important, whatever the nature of that case. Some parties will be less able or comfortable dealing with their claim online due to their personal circumstances. This can apply to claimants as well as respondents in Employment Tribunal proceedings.
- 27. Some respondents questioned the assumption that dealing with cases online would prove more efficient than hearings in person. This could be due to issues with the technology or people’s ability to use it effectively.

Government response

28. The Government's position, as stated in the consultation document, that complex claims will be unsuitable for online determination, remains unchanged. We note that this view was shared by respondents. We recognise the concern that cases such as wage claims can be complex.
29. Online consideration is a broad term that encompasses case management and preliminary hearings as well as online determination. It appears from the responses to this question and the previous question that there is broad support for some case management decisions to be taken online. For example, about 45% of case management hearings are already held by telephone and we believe it makes sense to extend the use of remote technology to include online facilities. It is arguable that employment tribunals are already doing this when issuing standard case management orders by email.
30. Enabling all parties to provide sufficient information to a tribunal at the earliest stage will allow the nub of a case to be identified quickly, weeding out claims or defences with little chance of success at an early stage. This will improve justice for everyone involved, reducing the need for physical hearings where possible and thereby taking some of the stress out of the process.
31. As a safeguard to make sure that users who are not proficient at using online tools are not disadvantaged, online processes will not be mandatory.

Next steps

32. Legislation is not required to increase the use of digital systems in Employment Tribunals and the Employment Appeal Tribunal. Progress in this area is operational and will be led by Her Majesty's Courts and Tribunals Service.
33. Reforms across the justice system are being delivered by a series of projects looking at specific jurisdictions and services. Each service project is responsible for making sure that the right level of support for digitally excluded people or those with low digital capabilities or confidence is in place. As previously noted, reforms to Employment Tribunals and the Employment Appeal Tribunal are scheduled for the latter part of the programme, and a great deal more user and stakeholder activity will take place in advance of the commencement of the reforms.
34. The support under our "Assisted Digital" programme is set out in more detail in the response to the *Transforming our justice system* consultation⁵. This will be put in place alongside the digital transformation.

⁵ <https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/results/transforming-our-justice-system-government-response.pdf>

Delegation of judicial functions to caseworkers

35. The wider reforms across the courts and tribunals are about achieving a system that is just, accessible and proportionate.
36. The consultation set out how the use of tribunal caseworkers to undertake certain functions delegated from the judiciary could be applied to employment tribunals to allow judges to focus their efforts on complex decision making where their expertise is needed most.
37. Under these proposals, the Tribunal Procedure Committee would be able to make rules concerning the delegation of judicial functions. Our intention is that it would adopt the same approach as for the unified system. This would mean that the decisions on what functions would be appropriate to delegate to tribunal caseworkers would be a judicial matter for the Senior President of Tribunals, working in conjunction with the senior employment judiciary. However, our working assumption is that delegation would not include substantive consideration and/or determination of an individual's employment rights.
38. New procedural rules would specifically provide that any parties unhappy with decisions made by a tribunal caseworker would have the safeguard of being able to ask that a judge considers afresh any decision made under a delegated provision.

Question 3: What factors do you think should be taken into consideration when creating the scope to allow increased flexibility to delegate judicial functions to caseworkers in employment tribunals and the Employment Appeal Tribunal?

39. A total of 73 respondents answered this question. The breakdown of types of respondent is set out in the table below.

Respondent type	Number of responses
Legal representatives	22
Individual	12
Trade Union	9
Judiciary	8
Other	7
Charity or social enterprise	6
Business representative organisation / Trade body	3
Large business (over 250 staff)	2
Government	1
Local government	1
Small business (10 to 49 staff)	1
HR	1

Summary of responses

40. Of the 73 respondents who answered this question, the overwhelming majority gave qualified support for the principle of delegating tasks to tribunal caseworkers.
41. Some respondents commented that there was a need for adequate safeguards while others mentioned the need for appropriate levels of training and experience in not only employment law and tribunal procedures but also communication skills and specific training around diversity issues and handling litigants in person.
42. There was a strong sense from the responses that, in theory, case management tasks could be delegated to appropriately experienced and qualified tribunal caseworkers, but in practice the nature of employment law and litigation meant that few functions were likely to be suitable for delegation. Therefore, while there was recognition of the potential time savings to parties through effective delegation, the overall view was that the number of instances in which such delegation could be applied successfully was likely to be low.
43. A number of responses both for and against the principle of delegated tasks mentioned the potential for caseworkers' decisions to lead to lengthy challenges, counter to the objective of faster resolution of disputes and more efficient use of judicial time.
44. Some responses (mainly from trade unions and legal representatives) were clear in their opposition to the principle of delegation, citing the potential complexity of what may at first appear to be a relatively simple pay claim and the unintended consequence of review requests adding further delay to the process and increasing the cost to both parties and the tribunal. One argument was that it was better to have the experience and knowledge of a judge involved early in case management decisions to effectively progress the case and identify issues at hand, rather than to get stuck in a cycle of delegation and requests for decisions to be considered again by a judge.
45. A number of responses expressed concern that the consultation paper gave the impression that tribunal caseworkers would not be qualified and therefore unsuited to the potential tasks outlined.
46. Stakeholders in their consultation responses and during engagement sessions were clear that while judicially approved delegation to caseworkers takes place in other tribunals (including the Employment Appeal Tribunal), this cannot be applied directly to Employment Tribunals. In particular, respondents felt that there was likely to be a higher number of requests for a reconsideration of a tribunal caseworker decision in Employment Tribunals because of the party-to-party nature of cases.

Government response

47. The Government considers that it is important that we provide the procedural flexibility to adapt the tribunal system to meet future challenges. We welcome the generally supportive response to the proposal but we note concerns around ensuring that the right people are looking at case management decisions at the right time with the appropriate level of qualification and training.
48. We recognise concerns that the unique position of Employment Tribunals makes it more difficult to apply our experience of delegation in other courts and tribunals. However, we believe that some of the learning in other areas of the justice system around delegation will help the judiciary in determining the functions suitable for delegation.
49. The Government intends to bring Employment Tribunals into line with the unified tribunals and wider justice system by providing an underpinning framework to allow delegation to take place where appropriate. This would mean that Employment Tribunal rules could delegate specified functions to Her Majesty's Courts and Tribunals Service staff, or the rules could delegate that authority to a specified person. Such functions would only be delegated to suitably legally qualified or trained staff.
50. In the unified tribunal system, this power has been used to authorise the Senior President of Tribunals to decide which functions should be delegated to particular members of staff. He does so after consultation with the relevant senior Chamber judiciary and stakeholders. We consider that this approach would work equally well in the Employment Tribunal system.
51. We note the concerns raised around the suitability for delegation in Employment Tribunals. The Senior President of Tribunals has a statutory duty to consider the need for tribunals to be accessible, for proceedings to be fair and handled quickly and efficiently, the need for members of tribunals to be experts in the relevant subject-matter or law and the need to develop innovative methods of resolving disputes. We expect, therefore, that any delegation would only be implemented following further engagement between the Senior President of Tribunals, employment tribunal judiciary and tribunal users.
52. The issue of appropriate levels of qualification and training for tribunal caseworkers will be explored in more detail in the next section but we reiterate the intention is that any training would be commissioned and delivered jointly by the judiciary and Her Majesty's Courts and Tribunals Service.
53. Our experience of delegation in other tribunals, and also in the county court, is that the safeguard of being able to ask for a judge to consider any matter afresh is rarely used, but stakeholders have made it clear that the challenges of an emotive area of litigation such as employment with its proportion of unrepresented parties may prove otherwise.

Question 4: Are there any specialist skills that a caseworker dealing with employment tribunals and the Employment Appeal Tribunal would need, distinct and different from those required for carrying out casework in other tribunals?

- 54. Following on from the previous question the consultation asked for stakeholder feedback on what skills would be necessary for a tribunal caseworker to consider delegated judicial functions in employment tribunals.
- 55. This was in recognition that the approach taken in the tribunals where disputes primarily consist of a party challenging a state decision would not necessarily be appropriate in employment tribunals.
- 56. A total of 65 respondents answered this question. The breakdown of types of respondent is set out in the table below.

Respondent type	Number of responses
Legal representative	21
Judiciary	9
Trade Union	9
Individual	7
Other	6
Charity or social enterprise	5
Business representative organisation / Trade body	3
Large business (over 250 staff)	2
Government	1
Local government	1
Small business (10 to 49 staff)	1

Summary of responses

- 57. The strong view of respondents, including some of those opposed to the principle of delegated functions, was that if tribunal caseworkers were to carry out delegated functions then they should have appropriate knowledge of employment law along with experience of working in an employment tribunal or the Employment Appeal Tribunal).
- 58. Where respondents differed was the level of experience required. Some respondents took the view that the complexity of employment law and the potential impact on the outcome of what may appear to be a simple administrative decision seemed to suggest that the tribunal caseworker should be legally qualified.
- 59. Some respondents opposed the use of tribunal caseworkers on this basis, querying what value a caseworker would add if they effectively had to have the same level of qualifications and experience as an employment judge. For this reason one respondent suggested that the role of tribunal caseworker may be better suited to a fee paid judge 'learning the ropes' of becoming an employment judge.
- 60. For a number of respondents a high level of experience in employment law and tribunal procedure was not only necessary to perform the role but essential to present a credible

and authoritative decision maker. This would serve the dual purpose of not only minimising the potential cost and delay of challenged decisions, but also reassuring parties that they were not receiving a lower class of service than that provided by an employment judge.

61. Respondents made comparisons with the role of Registrar in the Employment Appeal Tribunal and noted that her level of specialist employment law knowledge and experience of practice and procedure enables uniform and consistent delegated decision making.
62. As well as citing the importance of qualification and procedural experience a number of responses made reference to the importance of communication skills and empathy particularly in relation to handling unrepresented and vulnerable parties.
63. Some respondents felt unable to answer as they considered that there was not sufficient information about what tasks would be carried out by tribunal caseworkers to be able to answer what skills would be required.

Government response

64. As stated in paragraph 26 of the consultation document⁶, the intention is that tribunal caseworkers would be either legally trained or qualified. All decisions made under delegated authority would be taken under judicial supervision and scrutiny to ensure that the quality of decision making is not degraded. It would be a matter for the Senior President of Tribunals as to the appropriate level of caseworker (in terms of qualifications, knowledge and experience) for the delegated functions.
65. An example of this use in practice is in Mental Health Tribunals where the practice statement on delegation outlines different duties for different tiers of caseworker.⁷
66. It is clear that if tribunal caseworkers are to make decisions on complex matters then the expectation from stakeholders is that they should, as a minimum, have a good understanding of the law and the rules to minimise the potential for delays resulting from reconsiderations. The Senior President of Tribunals typically seeks advice from, and would ordinarily expect to act on, the recommendations of the senior tribunal judiciary, in this case the Employment Tribunal Presidents, in determining the appropriate level of skills and qualifications to undertake any delegated judicial duties. Aside from contributing their own expert knowledge, the Employment Tribunal Presidents would continue to engage with the wider employment judiciary and tribunal user community (including user groups), ensuring that any decisions as to the delegation framework were fully informed.

Next steps

67. The Government intends to proceed with its proposal to amend the Employment Tribunals Act 1996 to provide for the Tribunal Procedure Committee to be able to make rules concerning the delegation of judicial functions to Her Majesty's Courts and Tribunals Service staff. This power will specifically provide for the rules to delegate to the Senior President of Tribunals the authority to designate both the functions to be delegated and the categories of staff who may exercise those delegated functions.
68. These changes will be brought forward as soon as Parliamentary time allows.

⁶ www.gov.uk/government/uploads/system/uploads/attachment_data/file/575001/Reforming_the_Employment_Tribunal_System_-_Consultation_Document_v3.pdf

⁷ www.judiciary.gov.uk/wp-content/uploads/2015/04/delgation-of-functions-2015-after-27-april-2015.pdf

Tailoring the panel to the needs of the case

69. The consultation paper set out a proposal to provide for decisions on panel composition to be delegated by the Lord Chancellor to the Senior President of Tribunals. This would bring the practice in the employment tribunal system in line with the unified tribunal system and allow for the incorporation of any reforms following the *Transforming our justice system* consultation.⁸ Our intention was that the Senior President of Tribunals should have flexibility to determine the best way to provide necessary expertise in the employment tribunal system following consultation with the senior employment tribunal judiciary, in the same way that he can do for the unified system.
70. We recognise that non-legal members in the employment tribunal system have a different history and perform a slightly different role than they do in other tribunals, and that means that the approach to determining panel membership in employment tribunals and the Employment Appeal Tribunal may need to consider different aspects from those in the unified system. We therefore sought views on whether there are any specific issues relating to Employment Tribunals and the Employment Appeal Tribunal that need to be taken into consideration in relation to making changes to the law regarding panel composition to bring it in line with the unified system.

Question 5: Are there specific issues relating to Employment Tribunals and the Employment Appeal Tribunal that need to be taken into consideration in relation to making changes to the law regarding panel composition?

71. A total of 72 respondents answered this question. The breakdown of types of respondent is set out in the table below.

Respondent type	Number of responses
Legal representative	23
Judiciary	10
Individual	9
Trade Union	9
Other	7
Charity or social enterprise	5
Business representative organisation / Trade body	3
Large business (over 250 staff)	2
Government	1
Local government	1
Small business (10 to 49 staff)	1
HR	1

⁸ https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/supporting_documents/consultationpaper.pdf

Summary of responses

72. A number of responses expressed support for the increased flexibility that would be provided by the Government's proposals. Some of these respondents considered that these proposals could provide greater opportunity to bring in more specialism, making use of wider non-legal expertise that is used in other parts of the tribunals system to ensure that the provision of specialist expertise is tailored to the factors involved in the case.
73. Overall, many respondents described the important function and added value of non-legal members, and in particular the benefit to the Employment Tribunals system. It was generally felt that non-legal members are able to provide knowledge and experience of the workplace that is not necessarily available to the judge and that, as a result, users may consider the decisions reached more credible. Some also considered there to be a need for a balanced panel, with one employer and one employee panel member.
74. Some respondents expressed concern that there would be a reduction in the use of non-legal members and that this would result in specific expertise not being sought in cases where it is needed. Others were of the view that all determinative hearings in employment tribunals should require a three member panel. Conversely, the majority of respondents thought that it was appropriate for panel composition to be determined either on a case-by-case basis or according to case type, as it is currently. Many respondents held the view that the current panel arrangements are already appropriate, with non-legal members automatically providing their expertise in cases that require it. Some respondents reported that they would like to see judges using their discretion to involve non-legal members more frequently.
75. Respondents pointed out that the panel arrangements in the Employment Appeal Tribunal are somewhat different from those in the Employment Tribunals, as there is a default position of a single judge with judicial discretion to ensure that additional expertise, where it is needed, can be included on the panel. These respondents felt that these arrangements are already proportionate and flexible and that they would like to see a continuation of this system in the Employment Appeal Tribunal.

Government response

76. The Government agrees that non-legal members are a vital part of the Employment Tribunal judiciary, bringing unique skills and expertise to the Employment Tribunal system. Non-legal members provide a valuable contribution to the decision-making process in tribunals, helping to ensure that the panel is well informed, as well as providing an alternative, non-legal based viewpoint. Whilst the panel composition arrangements in the Employment Appeal Tribunal are different from those in employment tribunals, both sets of arrangements are currently, in essence, parliamentary decisions given effect through primary and secondary legislation. This contrasts with the unified tribunal system, where the Lord Chancellor has delegated responsibility for determining panel composition to the Senior President of Tribunals so that it is carried out as a judicial function. Decisions on judicial allocation and deployment are already judicial functions in the courts system.
77. It is not our intention to remove the use of non-legal members from cases where their workplace experience is needed to help determine the case. They will continue to be involved in proceedings where they are needed. However, we consider that responsibility for making sure that this is done in the most effective and proportionate way in

employment tribunals and the Employment Appeal Tribunal should rest with the senior judiciary, not Ministers.

78. The Senior President of Tribunals determines the composition arrangements for tribunals in the unified system on the basis of discussions with the senior tribunal judiciary and consultation with stakeholders. We consider that this, in conjunction with the Senior President of Tribunal's existing statutory obligations when exercising his functions,⁹ are an effective safeguard to ensure that non-legal members will continue to be provided in employment tribunals and the Employment Appeal Tribunal where they are needed. We therefore intend to proceed with providing for the Senior President of Tribunals to be able to have responsibility for determining panel composition in Employment Tribunals and the Employment Appeal Tribunal in the same way as he does for the unified system.

Next steps

79. The Government intends to proceed with its proposal to amend the Employment Tribunals Act 1996 to:
- confer the power to determine panel composition in the Employment Tribunal and in the Employment Appeal Tribunal on the Lord Chancellor; and
 - provide for this power to be able to be delegated to the Senior President of Tribunals.
80. Following the commencement of the necessary amendments to the Employment Tribunals Act 1996, the Government will delegate responsibility for determining panel composition to the Senior President of Tribunals. These changes will be brought forward as soon as parliamentary time allows.

⁹ See section 2(3) of the Tribunals, Courts and Enforcement Act 2007
www.legislation.gov.uk/ukpga/2007/15/section/2

Proposed approach to implementing reform in the Employment Tribunal system

81. In the consultation paper we proposed to confer responsibility for making procedural rules for the Employment Tribunal system on the existing judicial led Tribunal Procedure Committee and expand the membership of the Committee to reflect its expanded role by appointing an employment judge and employment practitioner. This would make sure that appropriate expertise was involved in the making of any new procedural rules.

Question 6: What criteria should be used to determine the appointment of the new employment practitioner member of the Tribunals Procedure Committee?

82. A total of 63 respondents answered this question. The breakdown of types of respondent is set out in the table below.

Respondent type	Number of responses
Legal representative	19
Individual	10
Judiciary	10
Trade Union	6
Other	6
Charity or social enterprise	4
Business representative organisation / Trade body	3
Large business (over 250 staff)	1
Government	1
Local government	1
Small business (10 to 49 staff)	1
HR	1

Summary of responses

83. Most of those answering this question considered that the proposed new practitioner member on the Tribunal Procedure Committee should have a detailed knowledge of employment law and extensive experience of practising across the Employment Tribunal system (including in the Employment Appeal Tribunal), with some respondents suggesting that this should be for at least 10 years. Some respondents also suggested that the new practitioner member should be a senior solicitor, as opposed to a barrister, but the majority did not express a particular view. A small number suggested that the role might also be suitable for a non-lawyer, to make sure that the interests of unrepresented claimants and respondents were appropriately represented on the Committee.
84. A majority of those giving views on the skills needed by the new practitioner member took the view that it was essential that the new practitioner member had experience of representing both claimants and respondents to make sure that their different perspectives were reflected. Whilst a small number of these respondents considered that this could best be achieved by appointing two practitioner members, the majority agreed

that a suitably experienced single member would be able to represent both perspectives effectively.

85. Although not an area that was consulted upon, some respondents, including those from the trades union sector and the Confederation of British Industry, disagreed that the Tribunal Procedure Committee should carry out the proposed function. They wanted to maintain a close link between the Employment Tribunals system and the management of employment law policy and were concerned that the Tribunal Procedure Committee would not have the necessary expertise to perform the proposed role effectively. Instead they proposed that the Department for Business, Energy and Industrial Strategy should continue to be responsible for procedural matters with any consideration of new rules being undertaken by a judiciary-led review involving all stakeholders, such as the one undertaken by Sir Nicholas Underhill¹⁰ which led to the introduction of the current Employment Tribunal rules in 2013¹¹.

Government response

86. The Government recognises the important role that an effective and proportionate dispute resolution process plays in supporting the protection of employment rights and the importance of working with representatives of both sides of industry to make sure the system works for businesses and workers alike. The employment tribunal stands alone as a separate pillar within the tribunal system which allows its rules and procedures to reflect the unique nature of a party-to-party tribunal that deals with what can be very personal and complex disputes. However, the employment tribunal system does not operate in isolation and we consider that it is important that it should, where appropriate, reflect the improvements in the wider justice system whilst retaining the valuable aspects unique to the employment tribunal. We consider that can be best achieved by placing responsibility for the management of the system with those who are best placed to understand that system, the judiciary and frequent users.
87. Whilst the review undertaken by Sir Nicholas Underhill was effective in undertaking the major revision of employment tribunal rules needed in 2013, we do not consider that this would be an effective way of undertaking the regular, iterative review of procedural matters required to support and maintain an effective justice system, or iterative digital transformation. Instead, we believe that transferring the responsibility for Employment Tribunal and Employment Appeal Tribunal rules to the Tribunal Procedure Committee will allow those rules and procedures to be more responsive to the challenges of resolving complex workplace disputes and the wider reforms being introduced generally across the justice system than the current legislative framework allows.
88. The Tribunal Procedure Committee has an existing statutory obligation to consult such persons as it considers appropriate before making procedural rules. This would usually include tribunal users and other stakeholders. This will apply to any new rules for the employment tribunal system. However, as set out in the consultation paper, we recognise that the Tribunal Procedure Committee would not be able to undertake this role for the employment tribunal system without the insight of additional specialists. It is clear from the responses to this question that the strong view is that the new practitioner member should have extensive experience of practising in the employment tribunal system and be able to effectively represent the interests of both claimants and respondents and we will

¹⁰ www.gov.uk/government/consultations/employment-tribunal-rules-review-by-mr-justice-underhill

¹¹ www.gov.uk/government/uploads/system/uploads/attachment_data/file/429633/employment-tribunal-procedure-rules.pdf

consider how to reflect this in the requirements for the proposed new appointments to the Tribunal Procedure Committee.

Question 7: Do you agree that the proposed legislative changes will provide sufficient flexibility to make sure that the specific features of employment tribunals and the Employment Appeal Tribunal can be appropriately recognised in the reformed justice system?

89. A total of 56 respondents answered this question. The breakdown of types of respondent is set out in the table below.

Respondent type	Number of responses
Legal representative	17
Judiciary	9
Individual	8
Trade Union	8
Charity or social enterprise	5
Other	4
Business representative organisation / Trade body	2
Large business (over 250 staff)	1
Government	1

Summary of responses

90. 37 respondents gave a definitive answer to the question. Of these, 20 agreed and 17 disagreed. The remaining responses were more nuanced.
91. A majority agreed that the proposed legislative changes were likely to be sufficiently flexible to appropriately recognise the specific features of the employment tribunal system. Some expressed concern about the potential risk that the new members of the Tribunal Procedure Committee might not carry sufficient weight when making any new procedural rules but agreed that this should be tested.
92. Those respondents who disagreed were largely concerned that the Tribunal Procedure Committee would not be able to carry out the new function effectively. Some respondents proposed instead that procedural rules should continue to be made by the Secretary of State for Business, Energy and Industrial Strategy following a single judiciary led review involving all interested stakeholders.
93. A small number of respondents considered that they would only be able to provide a definitive view on the sufficiency of the legislative changes in preserving the specific features of the employment tribunal system when specific procedural reforms were brought forward for consideration and it was possible to see how the Tribunal Procedure Committee would approach these.

Government response

94. As set out in our response to Question 6, the Government recognises that the Tribunal Procedure Committee would not be able to take on responsibility for making procedural

rules for the employment tribunal system without the insight of additional specialists and we intend to appoint appropriate additional members in the form of an employment judge and a suitably experienced employment practitioner to the Committee to reflect its wider role.

95. Whilst the Tribunal Procedure Committee is responsible for how it undertakes its statutory responsibilities, it typically assigns responsibility for consideration of new rules for specific jurisdictions to dedicated sub-groups. These groups are responsible for researching the issue, which includes engaging with any external groups that they consider would be helpful. We do not anticipate any need for a major revision of the current rules. Instead it is likely that any change would be incremental, iterative and in specific areas. Whilst it would be a matter for the Tribunal Procedure Committee to consider, we would expect that it would set up an employment sub-group led by those members with employment expertise to ensure appropriate consideration of any new procedural requirements.
96. When making new rules, the Tribunal Procedure Committee is under a statutory obligation to consult such persons as it considers appropriate, which would likely include relevant stakeholders. This statutory obligation would also apply to the Committee's expanded role in making rules for the employment tribunal system, meaning that we would expect that the Committee would engage with the Department for Business, Energy and Industrial Strategy, the legal professions and representatives from both the employer and employee sectors.
97. An important part of the justice transformation programme is making sure that user needs are robustly identified, tested and appropriately addressed and this involves engaging with both individual users and wider stakeholders. As we move forward with the development and implementation of the reform programme the Government recognises that we will need to review and refresh our existing stakeholder engagement arrangements in order to make sure that they appropriately reflect, for example, the changing focus of our work as a result of the transfer of ministerial responsibility for procedural matters in the employment tribunal system. We intend to work with stakeholders to assess how this might best be done.
98. The Government considers that the expanded membership of the Committee, the statutory obligation for the Committee to consult and the plans to develop new engagement arrangements will mean that the specific features of the employment tribunal system can continue to be appropriately reflected.

Next steps

99. The Government intends to proceed with its proposal to amend the Employment Tribunals Act 1996 to:
 - confer the power to make procedural rules on the Tribunal Procedure Committee; and
 - appoint two additional members to the Tribunal Procedure Committee in the form of an employment judge and a legal practitioner with specific experience of the employment tribunal system.
100. These changes will be brought forward as soon as Parliamentary time allows. Alongside these legislative changes, the Government will continue to engage with stakeholders to develop appropriate and effective engagement processes to reflect the new arrangements.

Impact and Equalities Impact Assessment

To accompany the consultation document, we had published Impact and Equalities Impact Assessments.

101. In the consultation, impacts of the reforms on employers were largely considered to be beneficial. Greater use of virtual hearings would save costs and time travelling to and from hearings while digital technology would create smoother and more efficient hearings. Total employer benefits would be £1.7m per annum once the reforms are fully in place. The only notable costs would be one-off familiarisation costs to legal professionals of £0.5m.
102. Particular impacts on small and micro businesses were considered modest, given widespread access to the internet among businesses. It was reasoned that access to technology is likely to be more dependent on the nature of a business's work than its size. Where technology access is limited, processes would adapt accordingly. More efficient hearings and reduction in time spent travelling to and from hearings would benefit all businesses but perhaps smaller businesses in particular if the business owner would otherwise attend hearings in person. In the consultation, the Employment Tribunal reforms were considered not to result in any direct discrimination against Employment Tribunal users, the judiciary or Her Majesty's Courts and Tribunals Service staff.
103. The Equalities Impact Assessment revealed there may be disparate impacts on employment tribunal judges who share certain protected characteristics relating to age, ethnicity and gender, but these were considered justified. The document also indicated that the employment tribunal reforms did not have an adverse impact in relation to harassment and victimisation, nor in relation to the need to foster good relations. Finally, the assessment suggested that equality of opportunities amongst Employment Tribunal users may be promoted as the employment tribunals will be more accessible to people who may have issues with the system presently.

Question 8: Do you anticipate the impacts of the proposed reform to be disproportionately large for small or micro sized businesses? Please explain your answer supported by evidence.

104. A total of 55 respondents answered this question. The breakdown of types of respondent is set out in the table below.

Respondent type	Number of responses
Legal representative	17
Individual	9
Judiciary	8
Trade Union	6
Charity or social enterprise	5
Other	4
Business representative organisation / Trade body	2
Large business (over 250 staff)	2
Local government	1
Small business (10 to 49 staff)	1

Summary of responses

105. A number of respondents anticipated the impacts to be disproportionately large on small or micro sized businesses. There were concerns that small businesses generally have less resource and organisational knowledge to adapt to the changes. They may not have adequate technological facilities to access online systems or the ability to use new technology effectively, particularly if not legally represented. Also the repeated challenges to caseworker decisions could impact small or micro businesses which do not have the resources to engage in further disputes.
106. Whilst the majority of respondents did not anticipate the impacts to be disproportionately large on small or micro sized businesses, most did not give any explanation for their answer. A small number of respondents suggested that the changes would benefit small or micro businesses. Other respondents suggested that the size of the business was irrelevant and if litigants in person were expected to use the digital process, then small and micro businesses should also be capable of doing this.
107. Some respondents had further concerns relating to the provision of clear support and guidance and appropriate safeguards. Others were concerned about access to justice issues for small and micro businesses due to the disadvantages they may face as a result of the changes.

Government response

108. The purpose of the Impact Assessment has been to lay out assumptions and test views from interested parties. The Government, therefore, welcomes views on potential impacts of a reformed service on business. We acknowledge the issues related to access to technology, challenges to caseworker decisions and availability of appropriate support and guidance.
109. The precise details of the reform package are not set by the primary legislation, which simply enables the proposed reforms to take place. There is now scope to refine the general assumptions applied in the impact assessment, according to feedback obtained in the consultation and further development work going forward. The final form of the service will be underpinned by specific user research, focused on ensuring that the needs of businesses are met, regardless of size.
110. The question asked in the consultation was specifically about impacts on business in fulfilment of the Government's commitment to deregulation. However, many of the issues raised by respondents apply equally to claimants. The Government is keen that the new process should offer more convenient and efficient service without compromising access to justice. Further research will consider all employment tribunal users, both business and individuals.

Question 9: Do you agree that we have correctly identified the range of equalities impacts, as set out in the accompanying Equalities Impact Assessment, resulting from these proposals?

111. A total of 49 respondents answered this question. The breakdown of types of respondent is set out in the table below.

Respondent type	Number of responses
Legal representative	13
Individual	9
Trade Union	7
Judiciary	6
Charity or social enterprise	6
Other	4
Business representative organisation / Trade body	2
Large business (over 250 staff)	1
Government	1

Summary of responses

112. 22 respondents gave a definitive answer to the question. Of these, fourteen agreed and eight disagreed. The remaining responses were more nuanced.
113. Out of the respondents who gave views on the equalities impacts, many considered that the Government had correctly identified the range of equalities impacts resulting from its proposal. Some respondents had reservations about the risk of the resources provided being insufficient to ensure the system works efficiently, or risks related to age and the

potential lack of familiarity with technology. Some respondents suggested an incremental approach should be taken to implementing the reforms in order to reduce and mitigate the risk of unforeseen impacts.

114. Some respondents felt that further clarity was needed as to what the new system would involve and some felt that more information was needed to answer the question.
115. A minority disagreed with the impacts that the Government identified, stating that an increased risk of discrimination particularly for claimants with disabilities or for non-English speakers had not been correctly identified. Some felt that the new system underestimates the difficulties that some users may have in expressing themselves in writing. Some respondents also had concerns that the reduction in panel members would impact negatively on diversity. Finally, some respondents felt that insufficient analysis had been provided and that user impacts had not been identified correctly. However, no additional sources of equalities evidence were identified by these respondents.
116. Overall, a major source of concern for many respondents remained the availability of technological facilities to claimants and to employers, and their ability or otherwise to use the internet effectively, which could ultimately hinder their access to the employment tribunals and the Employment Appeal Tribunal.

Government response

117. The Government has noted the respondents' concerns, especially regarding the potential risk of discrimination and the possible impact on people with disabilities or non-English speaking users. We appreciate that some people with certain protected characteristics are likely to have greater difficulty in using digital systems.
118. As set out in the response to the *Transforming our justice system* consultation¹², Her Majesty's Courts and Tribunals Service will implement an appropriate assisted digital programme to provide support for individuals who are not self-sufficient in digital technologies across the justice system. Her Majesty's Courts and Tribunals Service will also provide appropriate training and support for the employment tribunal and Employment Appeal Tribunal judiciary and Her Majesty's Courts and Tribunals Service. With this support in place, we consider it unlikely that there will be any indirect discrimination resulting from digital capability or access to digital systems. The removal of paper-based processes and introduction of greater digitisation will reduce processing times and operating costs, streamline Her Majesty's Courts and Tribunals Service administration and significantly speed up processing of claims.
119. Maintaining access to justice for all will involve detailed user research to explore the specific needs of users of employment tribunals and the Employment Appeal Tribunal. Combined with evidence emerging as the reforms are implemented, this research will ensure the needs of users with protected characteristics (including people with disabilities) are understood and properly catered for.

¹² www.gov.uk/government/consultations/transforming-our-courts-and-tribunals

Next steps

120. The Government has used the consultation responses to update the Impact Assessment and Equality Analysis. The Impact Assessment has been submitted to the Regulatory Policy Committee for validation. We will publish it once that validation has taken place.
121. The Equality Analysis is published alongside this response. We will keep this under review. Further research will focus on the needs of users with protected characteristics (including people with disabilities) to ensure that all users have appropriate access to the new service and fair outcomes.

Annex A: List of individuals/organisations consulted

- Acas
- Association of Recruitment Consultancies
- Association of School and College Leaders
- Association of Teachers and Lecturers
- Birmingham Law Society
- CBI
- CIPD
- Citizens Advice
- Citizens Advice Scotland
- Council of Employment Judges
- Council of Tribunal Members Association
- Croner Group Limited
- Discrimination Law Association
- Equalities and Human Rights Commission
- Employment Appeal Tribunal
- Employment Appeal Tribunal Lay Members Committee
- Employment Appeal Tribunal User Committee
- Employment Judges Scotland
- Employment Law Bar Association
- Employment Lawyers Association
- Employment Tribunals (England & Wales)
- Equality and Diversity Forum
- Free Representation Unit
- GMB
- Individual responses
- Kuits
- Law Society (England & Wales)
- Law Society of Scotland
- Lewis Silkin LLP
- Liverpool Law Society
- Manchester City Council

- Midlands (West) Tribunal Members' Association - TMAWM
- Mind
- Morrish Solicitors LLP
- National Union of Teachers
- Newman HR Ltd
- Number 18 Chambers
- Peninsula Business Services
- Phillips Solicitors
- Prospect
- PSM HR Outsourcing Limited
- Public & Commercial Services Union
- Quantrills Employment Law and HR Solicitors
- RBP Ltd
- Regional Employment Judges (England & Wales)
- Resolutions
- Taylor & Emmet LLP
- The Forum of Private Business
- Thompsons Solicitors
- TUC
- Unison
- Unite
- Valuation Tribunal
- Ward Hadaway
- Watford Employment Tribunals Association
- Weightmans
- The Welsh Government



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