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## **Consultation: Reforming the Employment Tribunal System**

### **Response from the Employment Lawyers Association**

**20 January 2017**

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**Introduction**

The Employment Lawyers Association (“ELA”) is a non-political group of specialists in the field of employment law. We include those who represent both claimants and respondents/defendants in the courts and employment tribunals. It is not our role to comment on the political merits or otherwise of proposed legislation; rather we make observations from a legal and practical standpoint. Our Legislative & Policy Committee is made up of both barristers and solicitors who meet regularly to consider and respond to proposed new legislation.

The members of the working party that prepared this paper are listed at the end of this paper, at Appendix 1.

ELA members are very receptive to change. Indeed employment law, by its very nature is hugely dynamic – rightly – given the need constantly to adapt to and accommodate changes in society as they are reflected in today’s workplace. We are also mindful of the changes that are happening in the wider context of litigation across the board in the Courts and the Tribunals. At the same time we must not lose sight of the fact that the Employment Tribunals occupy a unique position within the judicial system, and this needs to be protected as the Government’s “radical” and “transformational” changes, proposed over the next 5 years, come into force. It is for that reason that we have been responding comprehensively to the various papers issued recently by Lord Justice Briggs and BEIS/the MoJ and HMCTS, as is evidenced by the five submissions referred to below, and attached as separate documents as Appendix 2.

This latest Consultation Paper seeks to import significant change into the Employment Tribunal system. This is in part designed to further “unify” the Courts

and Tribunals. In many instances such changes are going to be helpful, and may enhance access to justice, whilst keeping costs contained. But in making such changes, it is crucial that the unique nature of the Employment Tribunals is fully appreciated and properly accommodated.<sup>1</sup> So, for example, fundamental to the system, is the fact that the parties have confidence that their position, and the nature of their workplace is fully understood by whoever is to determine their case. That is exactly why the industrial tribunals were set up in the way that they were, with a panel consisting of a lawyer and two wing members, one from the side of the employer, and one from the side of the employee. We believe that is every bit as relevant today, as it was back in the 1960's and 1970's; arguably the more so, given the radical changes in the nature and variety of the workplace, that have happened since then. Another distinguishing feature is the availability of a Government sponsored advisory service (ACAS) both before and after the issue of proceedings, with a role to seek to conciliate between the parties. Indeed most proceedings cannot even be instituted unless and until ACAS has been notified of the potential dispute (so as to give them the opportunity of seeking to conciliate between the parties). We also have specialist judges who deal almost exclusively in the employment law field. Our litigants feel especially passionate about their litigation, particularly the employee claimants, as to them, their "job" can matter far more than a claim over "money". Indeed, the loss of a job can have a monetary impact which can be very long term, substantial and not easy to quantify. It can have a significant impact on reputation and livelihood. This is one of the reasons why this area of law can be very emotive. That is also why we trust in a fair and transparent judicial process at ET level, not least to prevent an increased number of appeals going to the EAT. The level of injustice felt by some claimants (particularly in discrimination or whistleblowing cases) means that workplace disputes are not like civil court money claims. They need to be treated differently in the courts and tribunal structure. In the employment jurisdiction as well, what may seem to be a "low value" case, can sometimes prove to be extremely complicated from a legal perspective. In all these respects, perception by

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<sup>1</sup> In some respects the Government refers to the Employment Tribunals together with the Employment Appeal Tribunal. Just for clarity we will make the point that they are (very) different. For the most part factual issues will be determined only by the Tribunals. An appeal to the EAT will involve the determination of questions of law unless, say, the decision of the Tribunal is said to have been perverse. Some (but not all) of our members take the view that the case for a full panel in the Tribunal is far stronger than in the EAT, partly for this reason.

the parties (not just employees but employers as well, particularly if they are unrepresented) is really important and creates confidence in the system. For these reasons, we would urge the Government to be very mindful of the need to preserve the distinct nature of the Employment Jurisdiction within the reformed regime to come.

We have therefore responded at length to the proposals that are discussed in this latest Consultation Paper. Issues such as digital access, and particularly Panel Composition, upon which we have already made comprehensive submissions in response to two recent consultation papers specifically dealing with these issues, need to be handled extremely carefully in our view, when it comes to the Employment Tribunals.

There is an aspect of the Paper which thusfar seems to have generated relatively little comment. This is the proposal to take away the power of the Secretary of State at BEIS and the Lord Chancellor, jointly, to decide which cases may be heard by a single judge. This is now to become a judicial function which will be exercised by the Senior President of (all the) Tribunals. It is said that is because such a decision can then be made by *“those who are best placed to understand the needs of the users and the operation of the system”*. Similarly the power to make Rules of Procedure for the Employment Tribunals and the Employment Appeal Tribunal is to be transferred to the independent Tribunal Procedure Committee, and away from a Minister in the Department of Business, Energy and Industrial Strategy or the Lord Chancellor. BEIS will still be *consulted* before making any changes to the Employment Tribunal Rules. Nonetheless, this does seem to us, to mark a significant shift in terms of responsibility, away from BEIS. If that is going to take place, it is all the more important to ensure those who will be charged with exercising those powers, and exercising the relevant discretions, really do understand the unique characteristics of the Employment Tribunals. We would also point to the high regard in which the current rules are held, and request that if changes are necessary as a result of these reforms, a similar approach is taken this time to their review and drafting. The approach taken by Underhill LJ, with the involvement of the Presidents of the ET’s of England, Wales and Scotland along with a wider group (including ELA) worked

extremely well in our view, and we hope that a similar approach is taken next time the Rules fall to be reviewed.

That leads straight onto the issue of employment tribunal fees. It cannot be forgotten that their introduction in July 2013 led to a transformational fall in the number of cases being issued before the tribunal. What seems to us to be quite extraordinary is the fact that in this latest paper, the Government appears to be so phlegmatic about their internal review into this crucial topic. The Paper says (at paragraph 39) *"we will publish the conclusions of the review in due course and any adjustments to the current fee structure will be brought for consultation"*. In the intervening months since completion of the Report, not to say the years that have passed since introduction of this controversial change, many litigants will have been unable to make use of our tribunal process because they have either been prevented, or put off from doing so, by the sheer amount of the fee they will incur, if they chose to initiate the process. It seems extraordinary that the Government, having had this paper completed and on their desks for so many months, still steadfastly refuses to publish. We know we are not alone in urging them to do so as soon as possible.

That is important for another reason. This Paper presumably assumes the quantum and type of litigation coming before the Employment Tribunals will be in the future, as it is now. But on one view that is artificial, since the current position is as it is, specifically because of the introduction of fees. If that were to change in some way, perhaps as a result of the findings of the Government's Internal Review, or because of a decision of the Supreme Court following the hearing that is now taking place in March, that could mean some of what is being proposed now, will need to be viewed in a different way. For example, the current balance of the more straightforward unfair dismissal and discrimination cases, compared to more complex discrimination cases, may change in the future. Once we see the results of the Government's review (and the decision of the Supreme Court later this year) we can expect to have a clearer idea of what may be in store.<sup>2</sup>

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<sup>2</sup> In this respect we note that in the Impact Assessment (page 4) the Government has made its financial estimates based on the presumption that there will be "no significant changes" in claim numbers or in the fee structure. This may or may not be a wise presumption depending upon what is in the Internal Review, to which we are not privy.

Whilst the Paper considers the reforms to be introduced into the Employment Tribunals across England, Wales and Scotland, it also anticipates the devolution of the tribunal function to Scotland. What is not clear, however, is which will come first. In other words will these reforms be introduced prior to devolution or vice versa? We understand the view of the Scottish Government is that devolution should take precedence, so that any future reform to the tribunals system in Scotland will be overseen by Scottish ministers. What is certainly becoming clear, is that if these reforms are scheduled for introduction post-devolution, we will see an even greater disparity between the process for asserting and defending such claims north and south of the border, despite the reserved nature of employment law. Further, this potential lack of consistency is going to have a particular impact on large employers who operate across England, Wales and Scotland, as well as unions with members across both jurisdictions. We do not believe this to be in the best interests of employment tribunal users as a whole.

Finally, we should say a word about timing. This important Paper was issued on 5 December. The deadline for responses was January 20<sup>th</sup>. Given the intervening Festive Period, in practice that gave ELA and doubtless other organisations an extremely short timeframe within which to respond. We do not believe that was appropriate. The proposals under discussion may well have an extremely significant effect on employment litigation the UK. We would very much urge the Government Departments to provide realistic time frames for these Consultations, so that the changes when they are introduced, will be as appropriate, realistic, sensible and practical as they can be.

## **ELA Response**

(We refer below to the question numbers set out in the Consultation Paper: *Reforming the Employment Tribunal System: Taking forward principles of wider court and tribunal reform in Employment Tribunals and the Employment Appeal Tribunal*)

**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?**

### *Introduction*

As we have made clear in our previous responses on the question of an enhanced digital Employment Tribunals Process and the increased use of online technologies to improve access to justice and efficiencies (including in both of our responses to the Briggs LJ reviews: (see Appendix 2), ELA very much supports the use of technology. However, we also caution that care needs to be taken if the implementation of an online system could result in a lack of adequate investment in, and support for, those who cannot take full advantage of such options.

### *Online System and Access to Justice*

It might seem that an online system would increase access to justice, particularly for those claimants with low value money claims, that might otherwise be put off by Tribunal fees. It is assumed that the online system would have a lower fee structure, and be a simpler process, more easily managed by a litigant in person, to whom this process appears to be aimed.

The assumption that an online system would be a simpler process, presupposes that potential claimants (and indeed respondents) would not only have internet access, but familiarity with conducting their affairs online, and an ability to do so. The Civil Justice Council Online Dispute Advisory Group Report recommending an Online Court, estimates that 5% of the adult population

neither has access to the internet, nor someone who could assist them. The assistance outlined in paragraph 24 of the Consultation Paper would be a necessary minimum to enable such individuals to bring claims.

Statistics on internet usage vary. It is important to look at not only access to the internet, but also an ability to use it. In a report prepared for the Legal Education Foundation, Roger Smith explored "digital divides", with inequality persisting by age, education and income. The report identifies that the issue is not physical access, but barriers relating to cognitive abilities, skills and culture. It was said that 14% of internet users are "discontented". Added to the 20% of the population it claims are non-users, that produces a third of the population either not using the internet or not happy doing so. It is acknowledged that this population may decline, because of those now young and familiar with the internet age, but it is considered that the poor, old, less well educated and those with a disability, are likely to continue to be disproportionately excluded. It is claimed that the overall excluded population rises to around a half of those on low incomes. The Interim Briggs Report accepts that around half of litigants in person may fall within this group.

Disability claims under the Equality Act 2010 is an important jurisdiction for our members. We believe disabled litigants require special consideration. Online and other technology communication facilities may present real difficulties for some individuals with disabilities. In accordance with the Equality Act 2010, the impact on the introduction of such facilities for this group should be very carefully considered. Many of our members believe maintaining and improving access for disabled litigants should be a key driver in any plans for reform, rather than merely being a question of making minimal or even adequate "reasonable adjustments".

More often than not in employment cases, litigants in person out of necessity need the assistance from the tribunal to pursue their case effectively. An online system would remove that all important leveller of the playing field and, in so doing, may compromise the fairness of an online system.



ELA considers, with reference to the figures in the Impact Assessment, many victims of discrimination are less likely to fall in the 'digital self-servers' category, and more likely to be Digitally Excluded Persons (DEPs). ELA believes that unrepresented Tribunal claimants therefore will be more likely to utilise and feel supported by the use of the telephone or face-to-face assistance, rather than webchat services. It is assumed that this category would mostly comprise older people and those on low incomes or state benefits. It will also include some people with disability. In this regard, whilst some people with disability rely on digital access with specially adapted computers, those with manual dexterity issues, and who need more time, can experience difficulties with government websites which 'time out' forms, or do not allow them to be saved. Sufficient resources need to be applied to address these issues.

Those for whom English is not their first language, may be able to understand and make themselves understood in person, but have difficulties in doing so online. Further, if reliance is to be placed on written submissions/evidence, litigants in person may be at a particular disadvantage in an online system when up against a better resourced employer or lawyers on the other side.

However much work goes into making an online system user-friendly. It cannot be as simple a process as internet shopping or banking. Conducting dispute resolution online is likely to require at the very least, provision of detailed information as well as the ability to upload documents, often in volume. Employment Tribunal cases can be very document heavy with large disclosure bundles even in "simple" cases. Dealing effectively with the process of document access and handling is paramount to the success of any digitised process in this context.

Access to the internet has increased amongst low income groups largely because of the prevalence of smartphones and tablets. Unless the online system is designed for use with mobile devices, this would require access to physical hardware, such as a scanner, as well as a desktop or laptop computer.

Claimants will often need to have access to facilities to print off relevant documents. This will generally come at a cost. With those comments in mind, it may well be that potential claimants with low value money claims, form a significant proportion of the group potentially excluded by the very system which seeks to increase access to justice.

ELA urges the Government to consider DEPs and other vulnerable groups, and to ensure that they are afforded adequate protection as part of the reforms.

Given the above, we strongly believe that an online system must not be compulsory for all Employment Tribunal claims. Online ET1 and ET3 forms are already available, but are not compulsory. They simplify the process for those familiar with the online process. However, it is still possible for a physical ET1 form to be posted to a central processing centre. Local Tribunal Centres also take hand delivery of forms. ET3 forms can be downloaded and posted to the Tribunal office handling the claim.

Increasingly, government services are available online. However, rarely has online service completely replaced that provided offline. For example, passport applications can be made online, but it is still possible to obtain a physical form and complete it by hand. The same fee is payable irrespective of the way the application is made. Presumably it is thought that savings will be made from those individuals who prefer to use the online system, whilst ensuring that those unable or unwilling to apply online can still obtain a passport.

This response highlights ELA's concern regarding various groups, for whom access to workplace justice is particularly crucial. For them special consideration and support is required. As a result, the extent of the intended range of support systems to be implemented to assist users of online services, how such support systems will operate in practice and how they will be publicised to users, is very much integral to the development of proposals in this area.

Making an online system available but not compulsory, can still achieve savings without excluding potential users of the Tribunal system. So, in summary, we very much believe better use of technology can significantly alleviate inefficiencies in the existing Employment Tribunal Service, and can improve access to justice for many. The introduction of appropriate new IT solutions to achieve these goals can be beneficial. But this is on the basis that they are properly implemented and adequately resourced if the aim of making the Employment Tribunal Service and the litigation of employment related disputes "*just, proportionate and accessible*" is to be achieved.

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

## **SUITABILITY OF EMPLOYMENT CLAIMS FOR ONLINE CONSIDERATION**

### *Introduction*

We should say at the outset that it is unclear what exactly “online consideration” means. Clarification of this terminology and further consultation on the options under consideration, would therefore be helpful. It seems to us that it could mean one of three options:

1. Case management online with status updates as to the progress of a case and easy view of documents in the case;
2. Decisions made only on the basis of the papers filed online without any oral submissions or hearings at all; and/or
3. Online decisions made following an “e-hearing”, i.e. via an application such as Skype.

We comment on these options below. In doing so we draw upon our previous detailed submissions as part of the Briggs LJ review process (see Appendix 2). These remain relevant in light of the proposals in this Consultation Paper. We note the reference to, and agreement with, our initial response to the Briggs LJ review in the Consultation Paper.

Employment law disputes may be of high value, but for the majority of cases relatively modest sums are likely to be involved - certainly when compared to the size of many commercial claims. On this basis, at first glance, employment claims may appear suitable candidates for online case management, or even online determination. Yet such claims can also be characterised by their complexity. The manner in which they are handled

needs to take into account the special nature of the relationship between employers and employees (and increasingly those who claim similar status, such as "worker" claims as was the case with the Uber litigation in 2016. Indeed this is an area in which we anticipate significant further litigation). It is the combination of these factors which, in our view distinguishes these claims from those set out in the Civil Justice Council Paper of February 2015 as being examples of cases suitable for on-line resolution, and demonstrates some of the factors unique to ET's and the EAT, and the litigation of employment based disputes.

ELA is very much behind initiatives that can improve access to justice, particularly where they can provide cost-effective remedies for employees with very low value claims. There are therefore potential advantages in allowing for online determination of Employment claims. They can save costs for both the litigants and the Tribunal system.

Option 1 (online case management) is a sensible approach, provided that parties are able to contribute to matters such as the directions to be given at an early stage, and there are clear guidelines in place for the treatment of on-line correspondence (such as confirmations of receipt, the ET's timescale for dealing with on-line correspondence and requests etc). Without this degree of interaction and responsiveness, the ET will risk much on-line correspondence, as well as frequent calls to check on progress.

We consider that option 2 (decisions made only on the basis of the papers filed) would be very problematic. In our view, these should be limited to those cases identified below (i.e. simple debt claims). We believe that they would be suitable for those cases relying on legal submissions only, or where the facts are agreed.

We consider that any case that requires witness evidence is not going to be suitable for online determination without an e-hearing (option 3). In this respect we understand from the Consultation Paper, that BEIS and the MoJ are

sympathetic to the views we have already expressed as part of the Briggs LJ reviews and as to the unsuitability of the on-line determination for a number of claims.

If it is intended to determine employment claims entirely online, ELA urges an extensive consultation as to the types of claim (if any) that such a court could practically and efficiently, whilst ensuring that the special focus and safeguards of the existing Employment Tribunal system are mirrored in any new online system.

#### *Potential benefits of online resolution*

We have already made mention of the potential extension of access to justice, particularly in low value and simple money-based claims, with the ability to resolve matters online.

This in turn should lead to a lower instance of "ransom" claims, whereby claims are brought with the belief that the other side will consider it more effective to offer commercial settlement rather than litigate, whatever may be the prospects of success.

Assuming there would be a lower fee for online resolution, this could further extend access to justice, and arguably could address some of the difficulties caused by the introduction of fees into the Employment Tribunal.

If "online consideration" includes virtual hearings (as we understand from the Impact Assessment, and from the considerable estate savings quoted, that it does) removing the need for attendance at a physical Tribunal building will, doubtless, reduce cost to the Employment Tribunal system. It will also potentially improve access for those with mobility issues. That being said, the loss of a physical hearing may affect the parties degree of trust in the system, and the perceived seriousness with which workplace disputes are taken, particularly when taken together with the delegation of certain matters to case

workers, rather than judges.

### *The nature of employment claims and the industrial context*

The law recognises and governs the employment relationship by extending special common law duties to both employers and employees (including duties of loyalty, good faith, trust and co-operation), and imposing a varied and wide ranging set of statutory restrictions and obligations. Accordingly, there are often a range of legal issues to be considered as part of any employment claim. For example, the correct type of claim must be identified, and whether there is jurisdiction to consider it. Secondly, the matters which must be taken into account in order to determine the claim may be extensive and might well involve detailed consideration of a range of evidence.

In ELA members' experience, the Employment Tribunal plays an essential role at both stages, particularly for litigants in person, who generally need guidance and direction from the Tribunal when pursuing or defending any claim. This is provided through discussion at case management hearings, and at hearings when the Tribunal may prompt the parties and explore issues of its own initiative, in order to bring justice to a case. Whilst it is recognised that any new online system would be designed to prompt parties to provide the correct information and documents. It is difficult to envisage any online system being able to do this in the same way electronically in any but the simplest of cases.

The recent move towards issuing the parties with directions at the outset of the case has proved problematic in more complex cases. The time frames tend to be short. They can lead to parties focussing on preparation for a hearing instead of an opportunity to discuss alternative dispute resolution. Case management is best implemented through having all parties contribute to ensure that the timetable sufficiently builds in all individual aspects of a case.

The combination of the high numbers of litigants in person in Employment Tribunals, together with the large number of document-heavy cases, means that

Employment claims are very different from either criminal or civil cases (where Claimants are more likely to have representation to enable them to manage large bundles, electronically). If we move to an online system (even if the hearing takes place in person) this will require a claimant to have a laptop or other electronic device to access the papers. It follows that the Tribunal may have to provide devices for claimants who attend the Tribunal without one.

Furthermore, access to justice will require investment in technology to enable the public to view documents as part of any hearing. If papers are available online, thought will need to be given to how observers will be allowed to attend e-hearings. This could be more problematic than observers attending a hearing on the day to go through the witness statement/bundle. A decision will need to be taken as to how long these papers will be made available publicly. Tribunals do not currently allow papers to leave the Tribunal room.

The employment relationship is also explicitly a personal relationship. When employment continues whilst a claim is being pursued, maintaining that relationship can be very important. Justice needs to be dispensed with a view to preserving the relationship where that is appropriate, both through care in the manner in which it is delivered and, where necessary, through the application of special protections for employees and witnesses.

Care must also be taken to exercise judicial power in a manner that is sensitive to, and consistent with, the industrial context. From the time that industrial tribunals were first created in order to handle unfair dismissal and other claims linked to the employment relationship, the law has been reluctant to interfere unnecessarily with normal industrial practice, particularly where it is accepted as appropriate by employers, employee representatives and employees. This is especially the case where there may be separate and effective workplace mechanisms for the resolution of disputes. Employment Tribunals are specifically constituted to take into account these considerations.



Personal communication between litigant, witness and judge is fundamental to the existing system. The employment relationship is often said to be next in importance only to the family relationship. It is therefore particularly necessary for employment disputes to be seen to be handled fairly. The Employment Tribunals have also traditionally recognised that there is an inherent inequality of bargaining power between employers and their workers. Any review of the role of the Employment Tribunal must bear this in mind.

*Claims not suitable for online resolution, irrespective of value*

With the exception of straightforward unlawful deductions from wages claims, simple claims for holiday pay and claims for non-payment of a statutory redundancy payment (in connection with an acknowledged redundancy dismissal), ELA considers most employment disputes to be too complex for online resolution without a full hearing, whether that be "virtual" or in person.

Many employment claims, whilst quantifiable financially, are not purely about money. Preservation of reputation, for example, can often be a key feature. This is demonstrated by the availability of declarations and recommendation, as remedies in claims for unfair dismissal and discrimination. A declaration or recommendation can be as, or even more, important to a claimant, than a financial remedy. In ELA's view any claims that may result in a non-financial remedy are not suitable for online resolution. Parties may be able to recognise there can be a difference of view, and, even that their interpretation can be wrong, but judgments or recognition as to their honesty, bona fides, especially in regulated employments such as healthcare, financial services and teaching, can have longer lasting significance in relation to, for example, their career prospects in the future.

Certain types of claim would also, in our view, not be suitable for online determination, if they may turn on findings of fact which are best made after hearing live evidence. Advocates' examination can reveal vital facts and

evidence fundamental to the findings of a judge. Some cases, such as unfair dismissal, can also require a more nuanced consideration of matters such as reasonableness and fairness, and in the case of discrimination claims, unconscious bias. That can only be fairly determined after hearing and considering full evidence from both parties. Certain jurisdictions, such as equal pay and TUPE, have developed extensive case law, both within this jurisdiction, and emanating from the Court of Justice of the European Union (CJEU). That makes them unsuitable for online determination. It is difficult to envisage how interactive online software could be designed to elicit the correct information and documents in such claims. Further, given the speed at which legislation and case law changes within employment jurisdictions, it would be a significant task continually to update the system to ensure the correct information is given.

With this in mind, a non-exhaustive list of the type of claims we regard as being unsuitable for an online system, without a hearing (virtual or in person), would include:

- (a) Unfair dismissal and automatic unfair dismissal;
- (b) Discrimination;
- (c) Equal Pay;
- (d) Claims related to protected disclosures;
- (e) Claims related to TUPE;
- (f) Claims regarding employment/worker status (the judgments in Uber and CitySprint show the importance of cross examination and witness evidence in order to delve beneath the surface of the documents);
- (g) Claims involving multiple claimants or respondents;
- (h) Trade union issues and issues concerning employee representatives and collective consultation.

**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?**

Scope for delegating judicial functions to caseworkers should be seen in the context of the underlying objectives set out in the consultation paper, namely:

- to allow procedural decisions that do not determine the outcome of a case, to be made at a proportionate level;
- to enable judges to focus on matters where their legal expertise and knowledge is needed; and
- to speed up the resolution of cases.

The Government has also expressed the overarching intention to implement reforms in a way that preserves the current strengths of the Employment Tribunals and the EAT.

We note that in paragraphs 11 and 12 of the Impact Assessment confirm the intention to use lessons from the Social Security and Child Support Tribunal to refine proposed reforms in other tribunals. We accept there may be some lessons to be learned from other tribunals but at the same time there are factors unique to the Employment Tribunal/EAT, that must also be taken into consideration.

In particular, the Employment Tribunals and the EAT deal with a significant number of litigants in person. For them, alleged breaches of employment rights can be a very emotive issue. There is also the fact that employment law has evolved into a highly specialist area, the intricacies of which can be difficult for a lay person to appreciate. To ensure effective access to justice, such litigants in person will expect to be able to deal with appropriately qualified staff, who can explain legal concepts to them. This is particularly the case when they face a legally represented employer. Further, litigants in person often feel that when they attend an Employment Tribunal and have

a judge hear their case, it is the first time that they have actually been listened to. Decision making by the judiciary, at all stages of the process, has the confidence of litigants in person, and so the perception of these users, which is discussed further below, needs to be considered carefully to ensure that this is not lost.

This is something the senior tribunal judiciary responsible for delegating such functions must recognise when they determine which powers to delegate to case workers, particularly those case workers who are going to directly interact with tribunal users. Litigants' expectations as to what case workers can deliver when they are performing delegated functions, must be managed appropriately.

It is also important to recognise that whilst some decisions may be regarded as being "procedural", and cannot be said to be "determinative" as far as the outcome of the case is concerned, they may, nonetheless, have a significant impact on the overall result of any litigation. Indeed one particular feature of employment tribunal litigation is that decisions which are "procedural" in one case may, with a different set of facts, go beyond mere procedure, and have a greater impact on the ongoing litigation.

For example, decisions concerning the evidence to be adduced before an Employment Tribunal (such as applications for witness orders or disclosure of specific documents) may be crucial to one or more of the parties in terms of their ability to put forward their case (or to challenge an opposing party's case). The potential impact of these decisions is likely to be greater than dealing with matters such as requests to withdraw claims, or the making of simple case management directions. We also doubt it would be appropriate for case workers to perform other "standard" case management tasks, such as confirming a list of legal and factual issues to be determined at a final hearing.

Paragraph 119 of the Impact Assessment sets out a broad list of *"tasks in which some of the volume has been assumed to transfer to case workers in ETs"*. These include:

- initial case assessments

- case management hearings
- reconsidering applications
- dismissals
- Rule 21 judgments
- postponements
- applications for witness orders
- processing decisions on witness orders
- adding/removing representatives
- ACAS/private settlement and withdrawal requests
- reinstatements of applications

We appreciate this list may only be indicative of some of the decisions that may potentially be delegated (given the final decision will rest with the senior tribunal judiciary). However, some of the tasks listed are not as clear as they might be.

For example, it is not clear what is meant by “*initial case assessments*”. If this relates to checking whether a Form ET1 or Form ET3 contains the minimum required information, this could be a matter suitable for caseworkers, rather than judges. However, in our view if it relates to an initial “sift” of cases (whether at Employment Tribunal or EAT level), this is a function that ought properly be carried out by a judge.

Similarly, it is not clear in what circumstances a case worker might be asked to “reconsider” applications, or deal with the “reinstatement” of an application that, presumably, will already have been considered by someone else.

For this reason, we would urge that any delegated functions are precisely defined. We suggest a duty is imposed upon the senior tribunal judiciary to have due regard to the objectives set out above, when considering which powers they are going to delegate away from the Judiciary.

It may also be appropriate to consider whether Presidential Guidance should be published for all delegated functions. Case workers may be put under a duty to

document the reasons for their decisions by reference to any such guidance. This will ensure that case workers have clear boundaries within which to make decisions, and that there is full transparency in relation to decision-making criteria, so as to promote confidence amongst users of the system.

We have noted above that the Impact Assessment is based upon “*some of the volume*” being transferred to case workers. This suggests that certain functions may be exercised by either case workers or judges. We believe there is merit in having a clear delineation between the judges’ roles and those of the case workers, with any delegated judicial functions being dealt with exclusively by case workers.

We say that for two reasons. First, it accords with the objectives listed above, in ensuring that administrative tasks are dealt with at an appropriate and proportionate level. If judges are still dealing with matters that the senior tribunal judiciary has determined could be delegated to case workers, they will not (on the Government’s own analysis) be focusing on matters where their legal expertise is most needed. Secondly, it avoids a perception on the part of litigants whose cases are dealt with by a case worker, that they are somehow receiving an inferior service, when, on another day, their application or case management hearing might have been assigned to a judge.

Indeed more generally, we believe the issue of perception amongst Employment Tribunal and EAT users will be key to the success of any delegation to case workers. Litigants must be confident that case workers are competent and qualified, and that they have been appropriately trained to execute their delegated functions.

We support the fact that “*a party unhappy with a decision taken under a delegated provision may apply to the tribunal in writing for the decision to be considered afresh by the judge*” (paragraph 28 of the Consultation Paper). The difficulty, however, is that if more than a small proportion of case worker decisions are challenged in this way, it will undermine the whole system, and ultimately defeat the (stated) purpose of freeing up judges and speeding up the case management process. It will also only add to the cost of the process, rather than contain it. We therefore believe the right

environment must be created at the outset, if delegating functions in this way is to be a success.

Clearly case workers are going to have to be supervised to some extent by the Judges. That being the case, we believe it would make sense for case workers to be situated in the same location as judges, rather than in a central “hub”. This will ensure there is an appropriate level of support and interaction with the Judiciary, so as to promote their learning.

The proposed delegation of judicial functions must be seen as part of the move to make case management more efficient in overall terms. For if cases are appropriately managed from the outset, we believe there may be some matters that will not go on to require further consideration by an Employment Tribunal (whether by a case worker or by a judge).

We are aware that some Employment Tribunals (although not in Scotland) send out “standard” directions and list a hearing date as a matter of routine. This happens without consulting the parties or convening a Preliminary Hearing to consider any case management issues. In our experience, this is often counter-productive. Litigants are left with a timetable that may simply be unworkable in the context of the particular case. For example, they may be assigned a hearing date (and length) that takes no account of the complexities of the case, the amount of evidence (both oral and documentary), and the availability of litigants, their representatives and witnesses. This only leads to parties having to apply for postponements, extensions of time and revised directions.

Many of these applications are perfectly avoidable if only proper consideration is given to the requirements of the parties (and the likely Tribunal resources needed to deal with them). Such considerations can be ascertained during the course of a short telephone case management discussion. In our experience, it is normal practice in Scotland for the Employment Tribunal to organise a Preliminary Hearing to deal with case management right at the outset of the case. The Parties are advised of the date when the Claimant’s Form ET1 is sent out to the Respondent(s). We consider that

adopting this practice across England and Wales will, in itself, lead to greater efficiency and speedier resolution of claims.

Whether the decision is taken to reserve such functions to judges only, or to delegate them to case workers, what we will need in our view, is a consistent and proactive approach to case management across all the hearing centres. This would be in line with the overarching principle that there should be “*more active judicial case management*”, as identified in the Impact Assessment. It would, also in our view, improve the experience of Employment Tribunal users, who are now, it should be appreciated, having to pay for the service.



**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?**

Because ELA members practise as solicitors and barristers predominately in the field of employment law, it is naturally difficult for us to compare the skills that may be required by caseworkers in the Employment Tribunal and the Employment Appeals Tribunal, with those of caseworkers in other tribunals.

That being said, some of our members have experience of other tribunals and have suggested that the following specialist skills, as distinct from those required by caseworkers in other tribunals, may be required for caseworkers in the ET and EAT.

*Understanding and dealing with represented and unrepresented parties*

According to the Department of Business Innovation & Skills' *Findings from the Survey of Employment Tribunal Applications 2013*, 60% of employers and 52% of claimants used a day-to-day representative (generally solicitors or barristers) to help with their case in the ET and EAT<sup>3</sup>. We do not have access to more current information in this respect, but anecdotally imagine that levels of representation for both respondents and claimants can only have increased since the introduction, in 2013, of the fee regime for bringing and progressing a claim in the ET and the EAT.

Such relatively high levels of representation, may mean there could be higher expectations so far as the competence and performance of caseworkers in the ET and EAT is concerned. That could lead to the decisions of caseworkers (and, to a lesser extent, Judges) being more frequently challenged. Representatives are more likely to have a deeper knowledge of the procedural process in the ET and EAT, and will have greater time and resources to challenge decisions with which they disagree.

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/316704/bis-14-708-survey-of-employment-tribunal-applications-2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316704/bis-14-708-survey-of-employment-tribunal-applications-2013.pdf)

As we have noted above in relation to question 3, despite the high levels of representation in the ET and EAT, there still remains a substantial number of litigants in person. These can be claimants advancing their own claims with little or no support, and often with only a limited knowledge of employment law. That being so, it is imperative that caseworkers are able to adapt to deal with both represented and unrepresented parties. They will need to be able to accommodate their different levels of sophistication and experience. They will have to be able to notice when there is a potential imbalance – i.e. where one litigant is represented and the other unrepresented – and ensure that effective justice is done, without appearing unfairly to favour one or the other.

#### *Different types of jurisdiction and claims*

Both the Employment Tribunals, and the EAT have to deal with complicated legislation and case law. For example, there are some 63 types of Type A claim.<sup>4</sup> Any claims other than those listed in the Type A table are classified as Type B. In addition there are numerous other pieces of potentially relevant legislation. This statutory framework is constantly evolving, requiring regular learning to keep up-to-date with the frequent changes.

So a key skill caseworkers in the ET and EAT are going to have to have will be a sufficient level of knowledge and understanding of the legal area in which they will operate. This knowledge is also going have to be regularly refreshed and built upon.

Caseworkers are going to need an adequate understanding of how the tribunal system works, particularly in relation to live hearings and where there are litigants in person. This should form part of the induction training for all new caseworkers, and should be reviewed and evaluated at regular intervals.

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<sup>4</sup> table 2 of sch.2 to the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (SI 2013/1893)

General skills required by caseworkers in the ET and EAT

The specialist skillset required for DJOs, will need to be adequately defined. ELA has already made substantial submissions in this respect: see our response to LJ Briggs' Review in November 2015 (the "**November 2015 Response**"). We respectfully suggest these points are taken into consideration for the purposes of this consultation as well. We have included the relevant section at Appendix 2.

In our view DJO's are going to have to be legally qualified and will require practical experience of employment law in order to be able to perform the envisaged delegated functions. The exact definition and the specific level of legal qualification are questions that can be addressed once we have further detail as to what specific delegated functions the DJOs will be carrying out.

The use of Delegated Judicial Officers in Employment Tribunal claims

This is not an easy question to answer until we know the precise functions that a Delegated Judicial Officer (DJO) will perform.

The working party has considered some of the issues that should be taken into account in terms of legal qualifications, experience and training for DJOs, and how they might vary, depending upon the specific function being performed, and the type of case in question.

In general terms, we understand LJ Briggs' proposal is that some employment tribunal functions could be dealt with by DJOs instead of ET judges, and that these will include some routine and simple functions.

If it were to be decided that DJOs should carry out what some would regard as being *judicial* functions, this will of course influence the level of qualification, experience

and training which will be required.

We address this question by looking at the types of functions which could be undertaken by DJOs, providing our comments on the level of qualifications, experience and training which we consider would be required, for each type of decision.

### Simple cases

It is not clear if it is proposed that DJOs will have full decision making power over some substantive claims, in their entirety, or for parts of those claims only. It is also unclear whether it is envisaged DJOs would exercise some or all of their powers via any On-Line Court that may be created. This will need to be clarified.

If the case is a simple claim, and deals with a settled and straightforward area of the law (such as an unlawful deduction of wages or a holiday claim not involving the Working Time Regulations 1998), and there is only a dispute of fact, it *may* be possible for a DJO to deal with all or part of a claim. However, the decision as to whether the claim is suitable for consideration in full or part by a DJO, must be taken by an employment judge, who would have the experience and qualification to determine if the case was indeed “simple”. Assuming it was, it may be that a legal qualification would not be a pre-requisite in such cases, although a knowledge of the law, the ET process, and an ability to understand and apply the facts in dispute would be.

In the event that it is proposed that DJOs would be able to determine in whole or in part, substantive claims, the considerations regarding qualifications, experience and training and would have to include:

- The ability to identify the issues, the facts in dispute and the law. As such we suggest a minimum period of time working in the field of employment law of at least 5 years. That experience would further have to be at a reasonably advanced level (that could be defined).

- Training would be required so that a DJO would know when to refer to a judge, would have the skills to consider evidence, determine its admissibility, how to deal with objections by parties and their representatives, and making determinations on credibility and reliability. (This is assuming DJOs could hear cases in person, as well as via any On-Line Court). Regular legal update training would also be required.
- We appreciate a large upfront training cost may be involved. This would need to be weighed alongside the likely duration of the appointments, the potential saving to be gained by the use of DJOs, and the possibility of there being appeals against the DJO decisions, and if so the costs of determining them.

#### Low value cases

In the Law Society's discussion document 'Making employment tribunals work for all – is it time for a single employment jurisdiction?' published in September 2015, it is suggested that cases may be categorised according to complexity and value.

The ELA working party's main concern relating to 'low value' claims being dealt with by DJOs, would be the creation of a two-tier justice system based upon level of earnings.

It is a particular characteristic of the ET, that in the majority of cases, the value of the claim is directly linked to the level of earnings of the claimant. To have a system in which lower earners receive unqualified decision makers, whilst higher earners receive qualified decision makers seems to be unfair and may be seen to deny equal access to justice to some users of the ET system. It could be perceived as a barrier to justice for lower earners.

Furthermore, in employment cases there can be no link between the legal complexity of a matter and its value. Low value claims are often brought by unrepresented parties, who may not be able to present their case in the best way, or refer to the

appropriate legislation or case law. Those claims, and those litigants, would benefit from a skilled judge with legal knowledge, who can extract the relevant information, and ensure that the tribunal system is accessible to them. Their cases may thereby be managed properly. As an illustration, holiday pay cases under the Working Time Regulations 1998 are often complex, yet can be of low value. To add to the complication, low value claims such as these can also require an understanding of EU law, and its applicability to the UK.

Save for very simple unlawful deduction of wages claims, we do not consider that there is any category of employment claim, categorised by value, that should be dealt with by those without legal qualifications, training and experience.

#### Case management decisions

If a DJO is to perform certain case management decisions, then the level of qualification, experience and training which this working party considers to be appropriate is as follows:

- Whilst we can see it may be suggested that no formal legal qualifications are necessary, we nonetheless think they are desirable.
- Experience of the ET system or civil courts system is crucial. We suggest previous work in the ET system or civil court system should be required, for a minimum number of years, and at a minimum level. It would not be necessary to have experience of employment law in a wider setting (outside the ET) although such experience could be a substitute for ET or civil court experience where a proposed DJO has employment litigation experience as a solicitor or barrister. Experience of the ET claim, acceptance and case management procedure would be required, perhaps through having worked with a Judge carrying out that function.
- Training would be the most important element. This would require a period of initial training and supervision, followed by regular training on any changes in

law and procedure. This could be in conjunction with a system to ensure all DJOs were up-to-date with changes in law and procedure. There should be a requirement for a certain number of relevant training sessions or hours per year, and some system of ensuring that the training was effective, such as assessments and review of some decisions by judges.

- In addition, DJOs would need to be supervised by more qualified, experienced personnel, and for some tasks, by judges. There would need to be a system whereby the DJO could refer to a judge for assistance, and a system of checking decisions at random, to ensure consistency and accuracy.

### General considerations

This working party has concerns and reservations about whether it is possible to provide adequate training, and whether it would be economic to do so, given the skills required and the likelihood that the majority of substantive issues will be deemed unsuitable for determination by a DJO.

In addition to qualifications, training and experience, there would need to be provision for access by DJOs to proper resources to enable them to fulfil their role. This would include both academic resources, and also human resources in the form of legally qualified and experienced personnel, and, where necessary judges, to supervise and provide help and guidance where required. Again, the cost involved would need to be set against the benefit of DJOs as an alternative to judges, for some types of decisions in the ET.

We query whether there would be a waiver of fee, or a different level of fee, depending on whether the claim is heard by a judge or a DJO?

We would caution that a claim may appear simple at first, but then become more complex, such that it requires the experience and qualifications of a legally qualified judge. In such circumstances, there would need to be a mechanism for claims to be referred to judges. For example, a simple claim for a redundancy payment may turn

out to involve a complicated argument over whether there is a redundancy situation at all. This may involve a consideration of case law which the DJO would not have the necessary qualification and/or experience to consider. The DJOs would need to have the requisite knowledge and expertise to understand when to refer claims. We are concerned as to how a new system would be monitored to ensure that the DJOs were identifying such cases, referring them on to the appropriate person/Judge in such circumstances.

Appeals will necessarily involve additional costs. Therefore the extent to which the use of DJOs would actually make the ET system more efficient and cost effective, given the costs involved in training them and ensuring they are allocated the right cases only, would need to be considered very carefully.



**Question 5: Are there 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?**

We refer first to our paper responding to the earlier consultation 'Proposals for Transforming our Justice System: Panel Composition in Tribunals' dated 21 November 2016, in relation to the broader tribunal system (the "Panel Paper"). A copy is appended to this response at Appendix 2. It sets out in detail our response to (i) whether the Senior President of Tribunals should be able to determine panel composition for Employment Tribunals and the Employment Appeal Tribunal and (ii) what factors should be considered to determine whether multiple specialists are needed to hear individual cases. It also sets out the particular features of Employment Tribunals that distinguish them from other tribunals and the background to the reasons they have always been afforded a separate identity in the past. That paper therefore stands as our response to this part of the consultation, supplemented by what follows.

An important element in our thinking is the need to achieve amongst users, the perception that they have had a fair hearing. Over many years this has been achieved in part by the presence of a full panel to hear the cases.

The Government's paper refers to the broader consultation on changes to panel composition for the wider tribunal system, stating that the purpose of those proposals is to reflect the needs of the modern system and users, rather than the historic needs of those tribunals. We do not accept that this is relevant to panel composition in the Employment Tribunal system. In particular we do not consider the idea that the features that have contributed to the acceptability of employment tribunals and their success are 'historic needs', that do not belong in a 'modern reformed tribunal system'. The virtues identified by Sir Andrew Leggatt and the judges, referred to in our earlier paper, and all those who have reviewed tribunals over the last 50 years, have not changed, nor has their value to users.

We do however, accept that the world of work is changing. When, where and how

people work is evolving rapidly. The typical workplace is not what it used to be, and varies enormously. We think this only serves to underline the need for lay members who are familiar with the changing working environments to educate and assist judges, who in reality will have worked largely in Solicitors Firms or Barristers Chambers. They may not be accustomed to the work landscape, let alone a vastly modernised and dynamic one. These can be important factors when it comes to determining what is fair and what is a detriment, in many cases.

Paragraph 32 of the Consultation Paper seems to propose a default position whereby a panel will not include lay members, save in cases assessed on an individual basis *"where circumstances require it and [the lay members'] expertise is relevant to the outcome of the case"*. This presupposes that the role of lay members is to contribute particular non-legal expertise in a specific area, such as disability or local property knowledge.

However, it is critical to appreciate that lay members have a fundamentally different role within the employment tribunal system. They do not provide specialist expertise in a discrete area. They are not recruited for their experience in specialist areas. To the contrary, a key part of their role (and the contribution most valued by Employment Tribunal judges according to research carried out in 2011) is to provide general workplace experience<sup>5</sup>. Access to this experience is fundamental to the Employment Tribunal being able to assess key aspects of many typical employment claims. The most obvious example is unfair dismissal. All such claims (regardless of the particular facts) require a determination as to whether the dismissal was within the 'band of reasonable responses', including whether there was a fair process before reaching a decision to dismiss. Decisions on these issues of reasonableness and fairness, requires an understanding of the operation and demands of a modern workplace. On this, Employment Judges may have insufficient knowledge. Similarly, workplace experience is important in discrimination cases where, for example, inferences may be drawn as to motivation, and what amounts to detriment.

In our view this fundamental difference between the role lay members perform in

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<sup>5</sup> 'The role of lay members in employment rights cases – survey evidence' November 2011 by Professor Susan Corby and Professor Paul L Latreille

Employment Tribunals, as compared to other tribunals, demands a different approach. Given that judges rarely depart from the default position, it is important that this reflects what is appropriate for the majority of claims of a particular type. We consider that, in relation to unfair dismissal and discrimination claims, as we made clear in our earlier paper, the move away from using lay members, is both misconceived and damaging. If the law is to change, we believe the starting position should be that they take place before a full panel, and that it should be exceptional cases only where criteria should allow for a hearing by judge alone. To omit the full panel from unfair dismissal cases, where at issue is what is a fair practice or decision, seems to us to be fundamentally wrong. The same applies to the issue of detriment in discrimination cases. Subsequently, the 2011 research referred to above, noted that over 80% of Employment Tribunal Judges considered that lay members add value to decision-making, in relation to both unfair dismissal and discrimination claims.

We therefore believe there is a case for maintaining a full panel as the default position for all Employment Tribunal cases. We appreciate this may run counter to the desire to reduce costs. An important element in our thinking, is the need to achieve a perception amongst users that they have had a fair hearing. Over many years this has been achieved in large part, we believe, through having a full panel. The 2011 research indicates that Employment Tribunal Judges consider that the second most important contribution made by lay members (after providing general workplace experience) is the fact that they give parties greater confidence through the decision being made by three persons, and not one.

Having said that our earlier paper acknowledged a minority view that there were some issues associated with the use of lay members, and in particular with their ability to offer knowledge of the workplace, and also because of their variable quality in some instances. We believe these problems can be said to have arisen as a result of underinvestment, and a failure to renew and refresh a cadre of lay members whose experience of the workplace may have become outdated through the passage of time. Given the rapidly changing nature of the workplace, we do accept this may be a drawback. We acknowledge, however, that the legal profession is frequently

criticised for having a narrow recruitment base (no one could call a barrister's chambers a typical workplace for example) yet without lay members on a full panel, it is from this group, that Judges will be appointed to determine what is fair and what is a detriment in most cases. We believe the solution is to provide for regular recruitment of new panel members, and the introduction of a cap on the period of time they can serve. Any fear of indirect discrimination on the basis of age could, we believe, potentially be justified because of the need to be in touch with current and rapidly changing work practices, although we accept this is a point that will need to be looked at carefully. This is, after all, one of the main purposes behind having lay members sit on employment cases.

As to the criteria required, the existing provisions of section 4 (5) of the Employment Tribunals Act (set out in paragraph 2.2 of our earlier Panel Composition paper) are not helpful. There are not many tribunal cases where there is no dispute on the facts, or many where the issues of law are so complex that the case should be heard by judge alone. In our opinion the strong presumption should be for a case to be heard by a full panel, unless on specified criteria, a judge exercised discretion to the contrary. This may be where:

- The background or subject matter are particularly complex (equal pay, financial sector and contractual claims are good examples)
- There are difficult issues of law making it desirable for the case to be heard by judge alone.
- Where both parties request a judge alone

We note that in the Consultation Paper the view appears to be taken that what is appropriate for the Employment Tribunal, will automatically be applicable to the Employment Appeal Tribunal. This is, we believe, to misunderstand the nature of the EAT. It is a superior court of record that deals almost exclusively with errors of law. This is a hugely different role from that of the Employment Tribunal, and arguably, the composition of the EAT should reflect that fact. The Enterprise and Regulatory Reform Act 2013 provides that appeals heard by the EAT are heard by judge alone unless a hearing with lay members is directed at the permission to appeal stage. The

decision is made by a judge and confined to cases where the court will profit from the input of lay members. Given the nature of the jurisdiction in the case of the EAT we believe no change in the law is needed.

As to who should decide the composition of a tribunal, our preference would be to keep this in the hands of experienced tribunal judges, irrespective of whether the rules are set by the Senior President of Tribunals or Ministers. What matters more than this, is that the rules themselves favour a full panel. We do not know whether the Senior President will have different access to advice than a government minister. We are not convinced by the proposition (made in the Paper) that the proposed change 'will allow the better and more proportionate use of the expertise of non-legal members in industry specific or discrimination issues'. This assertion is not supported by evidence. In addition there should also be provision to ensure the Senior President takes into account the primary need of the parties to have confidence in the tribunal, and to have familiarity with general workplace practices.

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

As claims heard throughout most of the Tribunals Service are very different from court-style employment tribunal litigation, it is important to maintain a chair (and/or members) with active experience of the Employment Tribunal Rules and how they are applied in practice. There is limited scope for a common approach to be taken in the Employment Tribunal, to that in the tribunal system as a whole. Employment tribunal litigation is closer in approach to the High and County Courts, albeit with greater informality, and this can assist the resolution of disputes particularly where parties act in person.

We believe that in order to complement a regional or experienced Employment Judge, the new employment practitioner member should be an employment solicitor, barrister or other legal professional with at least 5 years' post qualification experience of employment tribunal litigation, to include active experience of employment appeals. Their experience of employment claims should be as wide as possible. If in some way they had ready access to the employment law community, say through membership of the Employment Lawyers Association or the Law Society Employment Law Committee that could be an advantage, although we are not suggesting that be a specific criteria for selection. Thought might be given to asking one of the Regional Employment Judges to sit on the 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?**

The Consultation Paper does not identify the proposed legislative changes so it is difficult to comment upon them. Any legislative changes to the Employment Tribunals Act 1996 (Section 4) must retain discretion for Employment Judges to continue to have the principle role in active case management of claims from an early stage, including what directions are proportionate for the hearing of the claim, and what tribunal panel is appropriate to the size, complexity and significance of the dispute.

**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.**

We do. The costs of repeated challenges to caseworker decisions or appeals from judges sitting without members, would impact on small or micro sized businesses which do not have the financial or personnel resources to engage in protracted procedural disputes in complex employment claims.

The Government should take into account that passionate, or even litigants in person that may sometimes be described (unkindly) as being obsessed, often challenge every employment tribunal decision that goes against them. The employment tribunal is unique in that financial or commercial considerations may not often be at the dispute. The worker/claimant can be highly motivated. His/her job and employment contract may be central to his/her identity and self-worth, and the employer/respondent similarly, because they do not want their authority undermined by a finding that they mistreated an employee. That is why the introduction of fees has not deterred many unmeritorious claims.

One factor which may prevent multiple challenges is the full tribunal including the industrial members. Litigants in person in particular may perceive such Tribunals as being able to reach better and fairer determinations. Caseworker decisions may not be respected by litigants in the same way. Employment claims are often highly complex (even if of relatively low value) and both sides are likely to challenge, review and appeal procedural decisions of caseworkers or judgments of tribunals without members. The substantial increased cost of such challenges can be borne more easily by large businesses with broad shoulders, but would impact more heavily and disproportionately on small and micro businesses.



**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?**

It is impossible to assess the equalities impact of these proposals without the single biggest factor affecting employment tribunal claims being taken into account – that is ET fees. The adverse impact on access to justice is so significant that the impact of changes to ET and EAT procedure can only be considered in the light of what changes will be made to the fees system to address the obvious concerns which will be highlighted in the completed but unpublished Ministry of Justice review.

The Equalities Assessment notes that “the recent fee changes may have had an impact on the profile of Employment Tribunal users”. It has certainly had a profound effect, and the assessment must be redone in light of those changes, and any changes to fees are proposed to remedy the adverse impact.

Removal of members from tribunal panels has an impact on ET users with mental health, learning disabilities and communication disabilities. A three person panel including industrial members who have training and experience in diversity issues, is more likely to have understanding or experience of getting best evidence from such a litigant or witness than a judge sitting alone. This is because lawyers often have limited personal experience of diversity in the workplace or diversity training.

The assessment records that digitisation may have an adverse equalities impact in the absence of assistance. The assessment does not reflect that:

- many ET users form a subset of people with the specified protected characteristics, namely people whose financial means has often been reduced or removed by loss of employment and so for whom access to digital devices at home and in the hearing room could be even more difficult.
- many ET claims involve thousands of pages of documentary evidence and are much more difficult to digitise than claims in other tribunals.

Effective assistance including provision of electronic devices and access to the digital platform and services to scan and manage large documentary bundles will be required to reduce the risk of indirect discrimination against users with difficulties in accessing digital cases.

### Appendix 1

#### **Members of Working Party**

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Appendix 2 – attached as separate documents

1. ELA Response to Civil Courts, Structure Review: Interim Report by Lord Justice Briggs of December 2015 dated 26 February 2016;
2. ELA Response to Consultation on Draft Order in Council for the Transfer of Specified Functions of the Employment Tribunal to the First Tier Tribunal for Scotland dated 24 March 2016;
3. ELA Response to Proposals For A Single Employment Court dated 12 April 2016;
4. ELA Response to Proposals For Transforming Our Justice System: Assisted Digital Strategy dated 9 November 2016;
5. ELA Response to Proposals For Transforming Our Justice System: Panel Composition in Tribunals dated 21 November 2016.