



Information Commissioner's Office
Promoting public access to official information
and protecting your personal information

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

List of questions for response

We would welcome responses to the following questions set out in this consultation paper. Please email your completed form to: Claire.Gray@tribunals.gsi.gov.uk, or fax to: 0207 340 6580. **The closing date for responses is 22 February 2008.** Thank you.

Chapter 7: Overview of Tribunal Structure

Assignment

Question 1. **Do the proposals on assignment of judges and members strike the correct balance between maintaining judicial expertise and encouraging judicial career development?**

Comments: As set out the criteria should strike the correct balance though the Commissioner is concerned about possible loss of expertise from the Information Tribunal at such an early stage of its role in relation to appeals under the Freedom of Information Act 2000, Data Protection Act 1998 and Environmental Information Regulations 2004.

Proposed Chambers Structure

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

Comments: The Commissioner accepts the need to create a Chambers structure and agrees that the best way to do this is by grouping similar subject matters together.

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

Comments: The Commissioner accepts that the Information Tribunal would fall under the 'General Regulatory' Chamber but has concerns about the wide range of Tribunals proposed to fall under this Chamber and how transferable expertise will be. It will be important that the expertise developed by a new tribunal such as the Information Tribunal is not lost by widening the subject matter judges and members are expected to deal with. The speed at which judges and members are expected to increase the number of 'tickets' they hold will need to be carefully managed.

Chapter 8: The Upper Tribunal

Structure of the Upper Tribunal

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

Comments: The Commissioner can support the proposed three chamber structure but would suggest there is a need for a separate Information Rights Chamber.

Location

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

Comments: The Commissioner would encourage a continuation of the flexible approach to hearing venues that the Information Tribunal has taken to date. This has meant that hearings have taken place in locations outside London, to the benefit of key parties involved.

Jurisdictions of the Upper Tribunal

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

Comments: See comments on q14

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

Comments: No comment

Proposed Changes to and Exclusions from Appeals

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

Comments: No comment

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

Comments: No comment

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

Comments: No comment

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

Comments: No comment

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

Comments: No comment

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

Comments: No comment

First Instance Jurisdiction of the Upper Tribunal

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

Comments: The Commissioner would agree that the caseload of Information Tribunal is small compared to other Tribunals but would not yet agree that the caseload can be described as reducing. 134 appeals were received in 2007, compared to 93 in 2006. There is a mix of cases on a wide range of topics, covering all parts of the public sector. The Commissioner would also observe that there is no trend yet in the number of appeals relating to less complex issues reducing. The Commissioner considers that many members of the public will continue to exercise their rights of appeal beyond the Commissioner's decisions, in part due to the accessible nature of the system in terms of cost (the Commissioner considers this level of accessibility is correct and would not seek to change it). Appeals to the Tribunal even on seemingly simple issues can have wide ranging effects, particularly at such an early stage in the evolution of the legislation. The Commissioner would like to highlight general concerns about any possible dilution of expertise at the Information Tribunal. The Commissioner considers that the current system works well; Information Tribunal decisions provide important case law, guidance and direction for the legislation that is generally well respected. The Commissioner would draw attention to Australia where appeals under Australian Freedom of Information Act are heard by an Administrative Appeal Tribunal. Under this system decisions of the AAT have been criticised, in part because of the lack of dedicated FOI expertise the AAT can bring to bear. The Commissioner considers it will not be in the interests of the FOI and DP systems as a whole if confidence in Information Tribunal decisions are reduced in a similar way.

The ICO has the following comments on each of three options proposed:

Option 1: As expressed above the ICO has concerns about loss of expertise from the Information Tribunal at an important early stage in its role in hearing appeals under the Freedom of Information Act, Environmental Information Regulations and the Data Protection Act. These concerns are greatest if the Information Tribunal is placed in the First tier, within the General Regulatory Chamber where Judges and Members can hold a wide range of 'tickets'. The other implication of the placement in the First tier is that appeals to decisions made in this tier will go to the Upper Tribunal rather than the High Court. It is unclear as to whether this will increase the number of appeals of Tribunal decisions but it is a possible outcome. Whilst the Commissioner acknowledges this may improve access to justice he will also need to ensure he has sufficient legal resources to cope with any increase. The Commissioner would agree that a substantial portion of the cases will always deal with weighty issues and it is vital for the integrity of the Freedom of Information process that these cases are heard at an appropriate level by Judges and Members with relevant expertise. The Commissioner acknowledges that cases being heard in the first tier may make the system seem more accessible to litigants in person.

Option 2: The Commissioner would support transfer to the Upper Tribunal. The

Commissioner would consider it reasonable to characterise his role in the first stage of complaints resolution as that of a first-tier Tribunal.

There is benefit in having expertise within one Chamber compared to the split model across tiers suggested in option 3.

If more cases are heard in the Upper Tribunal the Commissioner considers it is important that information is made available to litigants in person about pro-bono representation to ensure that an appeal to the upper level is not seen as inaccessible. There will be also higher cost implications for involvement in the Upper Tribunal in terms of the representation that parties may need to seek with experience at this level. The Commissioner would also have concerns if transfer to the Upper Tribunal led to an increased number of oral hearings when currently there is a trend towards hearing more appeals on paper.

The Commissioner would welcome clarification as to how the nature of Information Tribunal hearings may change in terms of formality if all of its work was transferred to the Upper Tribunal. The Commissioner would be concerned if transfer to the Upper Tribunal led to greater reliance on leading Counsel when disproportionate to the complexity of the appeal.

There are clearly a substantial number of cases involving issues such as national security, the principle of collective responsibility, complex statutory bars that require hearing at Upper Tribunal level. The number of appeals against enforcement notices served under the Data Protection Act is small but the decisions often have far-reaching effects. The Commissioner considers it important that these appeals are heard in the Upper Tribunal.

The Commissioner would support including the Information Tribunal within the Administrative Appeals Chamber or the creation of an Information Rights Chamber. The Commissioner considers it vital that all appeals to the National Security Appeals Panel are heard by the Upper Tribunal.

Option 3: The Commissioner believes this option has merits but cannot support it without further detail as to how some aspects might work.

It is acknowledged that the nature of appeals handled by the Information Tribunal varies considerably, due in part to the wide range of organisations the Freedom of Information Act covers. Issues covered can range from a short hearing to decide whether a document is held by a local council to a four day hearing about multiple exemptions applied to information relating to national security and international relations. He would also refer back to the point about many cases seeming less complex but having far reaching effects in outcome (decisions relating to the definition of personal data being one example).

The Commissioner has concerns that it may be harder for expertise to be shared on cross-cutting issues (e.g. section 40 FOI) across two tiers. The Commissioner would require further information about mechanisms that would be put in place to ensure consistency.

Using both tiers might be a solution to deal with the range of appeals received by the Information Tribunal but more detail is needed about how the management mechanisms might work. The Commissioner can identify some types of appeals that could be heard in each tier but many cases could fall in either tier. There is a risk that cases allocated to the lower tier are not subject to level of expertise required as some complex issues only emerge during the course of an appeal. At these early stages of the evolution of the legislation the Commissioner considers there may be many risks in using such a mechanism with the result that important appeals are sent to the First Tier with results that do not command enough weight create precedent.

Making broad decisions to allocate by exemption, 'sensitivity' or sector might lead to

inappropriate allocations. If this option were to be implemented the Commissioner would suggest that he would be well placed to make a recommendation as to what tier should be used when an appeal is received. However, taking this role may place the Commissioner in a drawn out procedure if parties involved cannot agree as to where the appeal should be heard.

The Commissioner accepts there is some merit in appeals relating to the Privacy and Electronic Communications Regulations being heard in the First-Tier Tribunal.

The Commissioner's position is that none of the options above are ideal but that option 2 is the most preferable.

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

Appointments and Tribunal Composition

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

Comments: The Commissioner agrees with this approach

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

Comments: No comments

Categories of Non-Legal Member

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

Comments: The Commissioner would highlight the fact that expertise in the field of Information Rights is a developing concept and the LLM course in Information Rights is currently offered by University of Northumbria.

Titles

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

Comments: No comment

Question 19. **Would the term 'member' suffice?**

Comments: No comment

Chapter 10: Tribunal Procedure

Improving the Service to Tribunal Users

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

Comments: No comment

Question 21. **Are there any functions of a tribunal which should never be performed by staff, whatever the safeguards?**

Comments: No comment

Costs

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

Comments: No comment

Chapter 11: Tax Appeals Modernisation

Tax Appeals Modernisation

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

Comments: No comment

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

Comments: No comment

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

Comments: No comment

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

Comments: No comment

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

Comments: No comment

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

Comments: No comment

Chapter 12: Land, Property and Housing

Land, Property and Housing

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

Comments: No comment

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

Comments: No comment