Ministry of Justice consultation
Modernising Judicial Terms and Conditions
The Law Society response
December 2016
PREFACE

The Law Society (‘the Society’) is the professional body for solicitors in England and Wales, representing over 170,000 registered legal practitioners. The Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law.

The Society welcomes the opportunity to respond to the Ministry of Justice’s (‘MoJ’) consultation on the proposed reforms. We have sought the views from the Society’s policy Committees and formed a focus group of solicitor judges as well as members who are considering a career in the judiciary.

EXECUTIVE SUMMARY

“our judges are the real asset of the judicial system, which is, rightly, the envy of the world. It must also be better understood that the judiciary, as guardian of the rule of law, is central to the proper functioning of our democracy. Therefore, the judiciary and its independence must neither be taken for granted nor in any way diminished"

Lord Thomas of Cwmgiedd,
Lord Chief Justice’s Report 2016

1. Diversity within the judiciary is as fundamental to the proper administration of justice as judicial independence; it directly impacts on the public confidence in the courts and their decisions. The demographic of the judiciary should reflect the rich diversity of England and Wales, which could be achieved by:-

- actively promoting the judiciary as a realistic aspiration for all;
- making the recruitment process as streamlined, efficient, fair and transparent as possible;
- encouraging applications from all candidates that possess the qualities and attributes required to become a judge; and
- creating a tangible, attractive and long-term career path in the judiciary.

2. The Society shares the Government’s desire to ensure that members of the judiciary are “drawn from the widest possible pool of talent which includes women, those from the BAME community and those from a socially disadvantaged background”. We look forward to working with Government in order to strive to achieve this aim and would welcome the opportunity to meet with the MoJ, perhaps on a quarterly basis, to work together to increase diversity within the judiciary.

3. We are uncertain as to whether the five proposals set out in the consultation will increase the diversity of the judiciary or improve judicial career prospects. On the contrary, three of the proposals applicable to fee-paid officeholders are likely to make the terms of judicial appointment considerably less attractive and could lead to a reduction in applications. This includes the introduction of a fixed non-renewable term, removal of guaranteed sitting days and removing the right of fee paid judges to claim travel expenses for their primary court.

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2 Source: Transforming Our Justice System - Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals, September 2016, page 5 paragraph 2:
4. Before addressing the questions posed, the Society will set out its summary position as to how the options proposed may have the following unintended consequences on the existing and future fee paid officeholders:

- **Reducing security of tenure and limited opportunities for advancement.** By introducing a lack of permanency to part-time roles without creating a clear path for career progression into salaried positions, the proposals could lead to a serious decrease in candidates for judicial office. Put simply, at present there are not the requisite salaried positions becoming available for current fee paid judges to progress into. In order for this proposal to create a long term career path there would have to be increased numbers of salaried positions becoming available, yet there is nothing in the proposals which suggest any changes to the current practice of appointments.

- **Mutual flexibility of part time roles has been overlooked.** It appears that the consultation is predicated upon the aim to convert fee paid judges into salaried officeholders, assuming a ‘one size fits all’ career model. The practical reality is that the justice system heavily relies on the flexibility and experience of part time office holders in order to function properly.

- **Dilution in expertise within the fee paid judiciary.** A fixed, non-renewable term is highly likely lead to a high turnover of judges and new appointments may sit for no longer than six to ten years on a part time basis. If the proposal were to apply to existing fee paid judges there is a serious risk that a diverse body\(^3\) of experienced judges could be lost with immediate effect, particularly in tribunals where there is a heavy reliance on the fee paid judiciary.

- **Anticipated cost implications may be much greater than those set out in the accompanying impact assessment.** The impact assessment has been set out adopting the most optimistic outlook and does not take into account the substantial training costs that will be required if a fixed tenure is implemented.

- **Removal of guaranteed sitting days removes any guarantee of income.** This proposal is likely to be problematic and has the unattractive prospect of introducing a contractual model into judiciary where there is no reliable pay but officeholders must make themselves available. This approach would contravene the Government’s own guidance on appropriate circumstances in which such contracts might be used.

5. The consultation states that if the five proposals are implemented together they would help to achieve the following objectives:

- improving judicial career prospects;
- promoting greater judicial diversity;

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\(^3\)Out of 627 appointed Deputy District Judges (Civil) 231 are female – 37%. This is the highest proportion of female judges when compared to all Court appointments. Similarly, 69% of DDJs are from a non-barrister background. Judicial Diversity Statistics Table 1.1 https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/diversity/judicial-diversity-statistics-2016/
introduce flexibility of deployment when required; and
introduce modern business practices.

For ease of reference we have adopted these as subheadings in our response to question one below.

6. We have addressed questions one and 17 substantively. The questions pertaining to the other proposals that are presented in conjunction with a fixed, non-renewable tenure have been addressed where appropriate at Annex A.

RESPONSE

Question 1: Should new fee-paid judges in both the courts and tribunals be on a single non-renewable fixed term? Please give your reasons.

1.1 We do not believe that the introduction of a fixed, non-renewable term for fee paid judges will achieve the government’s objectives, for the reasons outlined below.

Improving judicial career prospects

Availability of salaried positions

1.2 It is stated in the consultation that the proposals aim to map out a clear career path for not only for new entrants to the judiciary but:

"potentially for existing office holders who wish to progress to a salaried office".

1.3 The Society has serious concerns that whilst the underlying objectives of the proposal are well intended, there are insufficient salaried positions available at present for those who wish to take up full time office. This is particularly prevalent in the Social Entitlement and Asylum and Immigration tribunal chambers.

1.4 According to the list of salaried judicial members published on the judiciary.gov website, no salaried appointments to the First Tier Tribunal(Immigration and Asylum) chamber have been made since 2011 and only 12 appointments to the Upper Tribunal have taken place in the last five years. The Social Entitlement chamber has not made any appointments for the last two years and there have been only seven appointments to the Property Chamber in six years”. Competition for these very limited vacancies will only be increased if the proposals were to apply to existing fee paid judges.

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The table below provides the number of appointed salaried judges in the First Tier tribunal (FTT), Upper Tier tribunal, and Employment tribunal as well as the number of appointed district and circuit judges since 2010:

<table>
<thead>
<tr>
<th>First Tier Tribunal Appointments</th>
<th>2015</th>
<th>2014</th>
<th>2013</th>
<th>2012</th>
<th>2011</th>
<th>2010</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Health, Education &amp; Social Care</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>Immigration &amp; Asylum</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>7</td>
<td>71</td>
<td>78</td>
</tr>
<tr>
<td>Property</td>
<td>1</td>
<td>1</td>
<td>5</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td>Social Entitlement</td>
<td>0</td>
<td>22</td>
<td>1</td>
<td>9</td>
<td>25</td>
<td>3</td>
<td>60</td>
</tr>
<tr>
<td>Tax</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td>War Pensions and Armed Forces Compensation</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>Upper Tier</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Administrative Appeals</td>
<td>0</td>
<td>6</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>8</td>
</tr>
<tr>
<td>Immigration &amp; Asylum</td>
<td>8</td>
<td>1</td>
<td>0</td>
<td>3</td>
<td>6</td>
<td>24</td>
<td>42</td>
</tr>
<tr>
<td>Lands</td>
<td>0</td>
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<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Tax &amp; Chancery</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td><strong>Employment Tribunal</strong></td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>0</td>
<td>18</td>
<td>2</td>
<td>11</td>
<td>12</td>
<td>45</td>
</tr>
<tr>
<td>Circuit judge appointments</td>
<td>72</td>
<td>45</td>
<td>38</td>
<td>51</td>
<td>26</td>
<td>38</td>
<td>270</td>
</tr>
<tr>
<td>District judges appointments</td>
<td>9</td>
<td>46</td>
<td>26</td>
<td>24</td>
<td>32</td>
<td>32</td>
<td>169</td>
</tr>
</tbody>
</table>

Opportunities for advancement into the full time judiciary are very limited. The number of circuit judge appointments varies greatly from region to region. For example, almost half of the 45 circuit judges appointed in 2014 were recruited in the South Eastern circuit.

The proposal to introduce non-renewable limited tenure assumes that there is a tangible career path to follow at the expiry of a fixed term. In light of the information above, and with no indication in the consultation of an increase in salaried appointments becoming available, it is likely that fee paid judges will, in the absence of an alternative, pursue a career outside of the judiciary at the end of their fixed term.

Having such a frequent turnover of judges is likely to lead to a reduction in the quality and consistency of decision making, resulting in a greater reliance on judicial resource by way of increased appeals. Inexperienced judges are also likely to take

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*Information that appears in the table has been collated from the members lists published on the Courts and Tribunals Judiciary website (correct as at 13 September 2016) which has then been organised by year and where applicable, by chamber / circuit. Courts: https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/list-of-members-of-the-judiciary/ Tribunals: https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/list-of-members-of-the-tribunals-judiciary/
longer to complete tasks and consequently have a lower productivity whilst they are developing into the role.

1.9 If implemented, a retrospective, non-renewable fixed term will dictate that no fee paid office holder will have more than 6-10 years of sitting experience. Although this may sound like a significant period of time in which to develop skills, the practical reality is very different. Take for example Deputy District Judges (DDJs), these part time positions currently require a minimum of 15 sitting days but in some regions are restricted to no more than 50 per year\(^9\). In a six year term a fee paid office holder could have as little as 90 days and no more than 60 working weeks of sitting experience, before being required to:

(a) apply for a position in a different jurisdiction;
(b) apply for a full time salaried post (if indeed there are suitable vacancies); or
(c) leave the judiciary.

1.10 The enforced turnover of part time roles, lack of permanency and limited full time opportunities is likely to present a significant impediment to all candidates considering a career in the judiciary. It is difficult to envisage how such a proposal would increase judicial diversity.

Promoting greater judicial diversity

Rationale for change

1.11 The consultation has used the examples of the composition of Recorders and Deputy District Judges to illustrate the need for change:

"only a fifth of Recorders and a third of Deputy District Judges (DDJs) are female"\(^{10}\)

1.12 Using these examples alone does not justify the changes proposed, as it overlooks the largest subset of fee paid judges, those that sit in the First Tier Tribunal (FTT). The greatest volume of fee paid work is heard in the tribunals, and in the FTT alone there are 3,487 fee paid judges, over three times the number of Recorders in post. Incidentally FTT judges are much more diverse in their composition, almost half are female (46%), 13% come from BAME groups and 86% are from a non-barrister background. The below table\(^{11}\) illustrates the diversity of the different fee paid roles in the judiciary.

\(^9\) The limitation of 50 days per year has been provided anecdotally by DDJs who currently sit in the Northern circuit.

\(^{10}\) Consultation paragraph 3 page 11: https://consult.justice.gov.uk/digital-communications/modernising-judicial-terms-and-conditions/

\(^{11}\) Source: MoJ Courts and Tribunals Diversity Tables as at 1 April 2016 (updated 29 November 2016), Diversity Statistics 2016 Tables as at 1 April 2016 (Updated 29 November 2016) see tables 1.1, 2.1 and 2.3; https://www.judiciary.gov.uk/publications/judicial-statistics-2016/
### Appointment name (ordered by tier of court) | Total fee paid office holders in post\(^{12}\) | Gender | Ethnicity | Profession |
<table>
<thead>
<tr>
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<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Recorders</td>
<td>1,035</td>
<td>20%</td>
<td>6%</td>
<td>7%</td>
</tr>
<tr>
<td>Deputy District Judges (County Courts)</td>
<td>627</td>
<td>37%</td>
<td>6%</td>
<td>69%</td>
</tr>
<tr>
<td>First Tier Tribunal Judge</td>
<td>3,487</td>
<td>46%</td>
<td>13%</td>
<td>86%</td>
</tr>
<tr>
<td>Employment Judge</td>
<td>258</td>
<td>41%</td>
<td>7%</td>
<td>66%</td>
</tr>
</tbody>
</table>

1.13 The consultation does not provide information pertaining to the average tenure for other fee paid positions, only referencing the average term for a Recorder. If the Government does proceed to implement a fixed term retrospectively, we recommend that full information on tenure is provided in the Government's response. This would indicate, in real terms, what the impact of introducing a fixed term would have on the current composition of fee paid judges. One explanation for the increasing length of terms within part time roles may be due to the infrequency of salaried positions becoming available. The Society reserves the right to make further submissions in the event that this information is provided.

### Flexible deployment and modern business practices

1.14 The Society agrees that efficiencies can be realised through the flexible deployment of the judiciary. However, this expediency must not come at the cost of the proper and effective administration of the justice system. The judiciary must be well equipped and adequately experienced in order to discharge their professional duties.

#### Advantages of fee-paid positions

1.15 It appears that the consultation is predicated upon the aim to convert fee paid judges into salaried officeholders. The proposals overlook the mutual flexibility and benefits that experienced fee paid judges bring to the post, assuming that progression to a full time position is a natural corollary and career model that fits all potential candidates.

1.16 Officeholders may have chosen a part time role to allow them to remain in legal practice, to retain the benefit of contemporaneous knowledge and practical experience that comes with continuing to manage a case load as a practitioner:

> “I have enjoyed balancing part-time work as a judge with other work, if a single non-renewable term had applied to me, then I would have given up my part time judicial role”

- Deputy District Judge and practising solicitor

1.17 Fee paid positions also offer flexibility for those with children or childcare commitments. Although there are some part-time salaried positions becoming available, at present a successful candidate will not be able to return to legal practice.

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\(^{12}\)Source: the figures are taken from the Diversity Statistics 2016 Tables as at 1 April 2016 (Updated 29 November 2016), Tables 1.1 (Column B), 2.1 and 2.3 (Column Y).
practice. Therefore, certain benefits which are likely to attract the most diverse spectrum of applicants will become an uncertain prospect if a fixed term is introduced. This uncertainty may not be mitigated by the alternative positions becoming available in other jurisdictions. For those trying to manage a work and family life balance, it may not be possible to commit to travelling further distances or re-locating in order to continue developing their judicial skillset. It is also a disincentive for those with disabilities.

1.18 The practical reality is that the justice system heavily relies on that flexibility in order to function properly. The proposals are likely to have the unwanted impact of making the justice system more difficult to administer. Indeed, the consultation correctly observes the essential role that the fee paid judges play in ensuring that demand for judicial time is met as workloads fluctuate. What remains unclear is how that continued demand for varying deployment will be met by significantly curtailing the opportunities for fee paid judges to gain the requisite skills that may only be obtained through practical experience.

Cross ticketing and training

1.19 The flexible deployment of the judiciary is frequently demonstrated in the short and medium term by fee paid judges. Cross-ticketing has been possible in tribunals since the implementation of Part 1 of the Courts, Tribunals and Enforcement Act 2007. The Government responded to concerns that assignment of the judiciary to different tribunals would result in a dilution of judicial expertise as follows:

“The Government recognises this concern, but considers that the proposals address these and will preserve specialist knowledge whilst also increasing expertise. The overriding principles behind assignment include the requirement for the judge or member to have the necessary skills and ability to hear cases within the Chamber to which they are assigned. There is no diminution in what is deemed to be the necessary skills and knowledge in any individual jurisdiction as a result of the creation of the Chambers structure, and mapping and app they are assigned to unless they have the appropriate skills and knowledge for that jurisdiction” (emphasis added)

1.20 The advantages of cross-ticketing training were also highlighted by the Judicial Studies Board (now the Judicial College) as it enabled delegates to share different and diverse tribunal experiences and backgrounds, helping to “promote an inclusive and collegiate tribunals family”.

1.21 Cross-ticketing training is currently delivered by the experienced fee-paid judiciary, who provide courses for judges in other jurisdictions as well as giving ‘on the job’

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13 Source; Court and Tribunal website, Becoming a Judge: https://www.judiciary.gov.uk/about-the-judiciary/judges-career-paths/becoming-a-judge/

14 Consultation see page 6 paragraph 2: https://consult.justice.gov.uk/digital-communications/modernising-judicial-terms-and-conditions/


Cross-ticketing already operates and doesn’t require a full, ‘fresh’ application to the Judicial Appointment Commission (JAC) for cross-deployment, making the process quicker and cheaper than other recruitment exercises. As deployment is short term (between 1-3 years), it presents an attractive and quick solution to meet short to medium term fluctuations in demand for judicial time.

The proposal does not take into account those fee paid tribunal judges who, by virtue of this cross deployment, sit in different chambers and therefore already operate in more than one jurisdiction. This is particularly relevant in the Asylum and Immigration tribunal where judges from other chambers have been deployed in order to meet the increase in workload. It is unclear as to what options would be available to those who already operate across different jurisdictions.

The introduction of a fixed non-renewable term would place a heavy burden on the training judiciary, due to the increased number of new judges that would be required each year. ‘On the job’ training is only possible at present because there is a large pool of experienced fee paid judges that can assist with office holders cross ticketing in. If the proposals were to apply to existing fee paid judges, resulting in a large and immediate loss of experience, such training would not be possible. In any event, the proposal will have the long term consequence of diluting the expertise which cross-ticketing training using experienced officeholders aims to preserve.

The responsibility for training judges lies with the Judicial College (JC). The JC has seen a 23% decrease in their budget from 2011 to 2014 and it is likely that there will be further reductions. The JC will be more reliant on judges to provide training to new recruits but this proposal will reduce the availability of those judges in future, or immediately if it is applied retrospectively.

Commercial reality in which potential candidates operate

The proposal overlooks the commercial reality and the factors which candidates must weigh up when making career choices, particularly those pertaining to long term job security. Those who are employed (as opposed to self-employed), already have difficulties in negotiating the time off with their employer in order to undertake a fee paid role. For solicitors who are employed full time, the proposal would require potential candidates to approach other colleagues to request:

1. Time off for a part time role, with the possible prospect of leaving the practice altogether after a six year period; and
2. Whether they would be able to return to full time practice in the event that they cannot secure a salaried post.

This is an unattractive and high risk compromise for both parties. For younger candidates who are still establishing their position within a firm, an intimation to leave practice may present too much of a gamble with their long term career prospects as a practitioner. For the firm, there is likely to be little commercial incentive to permit a candidate to undertake a part time role with the underlying prospect of losing them altogether.

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1.27 Such a predicament is likely to narrow the diversity of applications as the proposals appear to be more favourable to those who have more secure financial circumstances, who are closer to retirement age or have less care-giving responsibilities.

1.28 For reasons outlined above the Society recommends that a fixed, non-renewable tenure should not be implemented to fee paid judges now, or in the future.

Question 17: Are there any proposals, other than those in this consultation, that you consider would improve the judicial career path, help modernise the judiciary in line with wider reform, or improve judicial diversity? Please give reasons and supply evidence as appropriate

Improving the judicial career path

17.1 The recommendations set out in the 2010 Report of the Advisory Panel on Judicial Diversity\(^\text{18}\) should continue to be considered, including but not limited to:

- **A change in focus from judicial appointments to the concept of a judicial career.** Whilst the consultation continually reiterates a move towards converting fee paid officeholders into full time posts there is no indication of an intention to actually increase the number salaried opportunities available.
- **Clearer career paths should be identified and published.** This would provide candidates with a better understanding of the options available to them.
- **Open and transparent selection process.** Applicants should be assessed on criteria, which should also be published.

Promoting judicial diversity

17.2 The judicial career approach must move beyond the appointment process, engaging with young and diverse legal professionals. From the consultation it is unclear to what extent the MoJ is aware of wider initiatives that aim to achieve the same objectives. The Law Society is involved in, or responsible for the following schemes aimed at improving judicial diversity:

a) Three outreach events per year targeted at under-represented groups. These are joint initiatives with the Bar Council, CILEx, the JAC and the JC.

b) Two workshops a year for BAME candidates, these sessions provide tailored advice on the judicial application form and the competencies required (10 candidates per workshop). This has resulted in four successful applications from these workshops over the past five years.

c) Solicitor judges division which provides members with regular newsletters, upcoming vacancies

d) Active member of the Judicial Diversity Forum Working Group and the Judicial Diversity Forum.

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\(^{18}\) Source: [https://www.judiciary.gov.uk/publications/advisory-panel-recommendations/](https://www.judiciary.gov.uk/publications/advisory-panel-recommendations/)
e) Represented on the Pre Application Judicial Training Working Group chaired by Lord Ouseley which is developing a formal training scheme for aspiring judicial appointees.

f) Role modelling diverse holders of judicial office through events and speaking engagements to raise awareness and aspirations about the range of judicial appointments.

g) Reviewing advice for solicitors to aspire to judicial appointment and gain the skills and experience necessary during their work to make them credible candidates.

Increasing application success rates

17.3 A recent JAC recruitment exercise to fill 162 vacancies in the Social Entitlement chamber attracted 733 applications and resulted in only 142 recommendations for appointment\(^{19}\). This would suggest that whilst there is significant interest in applying for fee paid roles, there may be insufficient clarity and guidance on how candidates can prepare themselves ahead of applying.

17.4 The Society recommends that research is carried out into failure factors along with analysis of the findings. This data could be used to shape a pre-application programme of training that assists prospective candidates from the earliest possible opportunity.

17.5 We would recommend greater transparency about appointees and their professional background. This would include collating data on those groups which are currently excluded from the equalities statement as there is insufficient data to draw any findings.

Encouraging applications from non-barrister backgrounds

17.6 The Society agrees with the Government’s clear aim to attract candidates from “different walks of the legal profession”\(^{20}\). Solicitors are an under-represented group, making up only 28% of the judiciary and the vast majority of those office holders occupy entry-level positions in both salaried and fee paid positions.\(^{21}\)

17.7 Solicitors are a more diverse subset of the legal profession than barristers. Women now account for 48.8% of practising certificate holders,\(^{22}\) and 18,547 solicitors identified themselves as from a BAME group. At the bar, women account for only 35% of practising barristers and BAME representation totalled 1,891 in the same period.\(^{23}\)

17.8 Solicitors are more likely to have corporate background more suitable for leadership positions compared with the Bar where the majority are self-employed or sole practitioners.

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\(^{20}\) See consultation page 9 paragraph 11.

\(^{21}\) Source: Ministry of Justice Judicial Diversity Statistics 2015. There are 8,781 salaried and fee paid judges, of whom 2,463 are solicitors: https://www.judiciary.gov.uk/publications/judicial-statistics-2015/


\(^{23}\) Out of 15,899 practising barristers in 2015, 5660 were female: https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics/
Additional considerations

17.9 In order to make the judicial career path more attractive the Society would also suggest that the MoJ considers:

- removing the ban on officeholders from applying for a transfer to a different location within five years of appointment; and
- removing the bar on return to practice after a judge resigns or retires.

FOR FURTHER INFORMATION

Officer's Name : Alice Owen
Officer's Title : Policy Adviser (Modernising Justice)
Officer's Email address : Alice.Owen@lawsociety.org.uk
ANNEX A

Question 2: If yes to question 1, should fee-paid judges should be able to apply for a different fee-paid role at the end of their term as an alternative to applying for salaried office?

Please give your reasons.

2.1 Notwithstanding the position outlined to question one above, if the Government is to proceed with the proposal to implement a fixed tenure, then we recommend that any applicant should be entitled to apply for any fee paid vacancies, including those which arises in the same jurisdiction as an alternative to applying for a salaried position. However, we do not believe that such a measure will be sufficient to safeguard against the risk of uncertainty that will be faced by prospective candidates and in turn narrow the pool of talent from which members of the judiciary are selected.

Question 3: Are there exceptional circumstances in which the length of the fixed term should be extended? If so, which circumstances do you have in mind? Please explain.

3.1 We repeat our position outlined above at question one. If the Government proceeds to implement a fixed non-renewable tenure then exceptional circumstances should be considered for those part time office holders who have been unable to gain sufficient experience due to circumstances beyond their control. This should include those who may have had to take a long period of absence due to sickness or care giving responsibilities.

Question 4: Should existing fee-paid judges also move onto the new fixed term? Please give your reasons.

4.1 The Society does not believe that this proposal should apply to existing fee paid judges. The justice system heavily relies on the flexibility and experience that fee paid judges possess in order to function properly. Fee paid judges represent 57% of court appointed judges, 79% of legal tribunals. The operational disruption and cost of potentially extinguishing a large body of the judiciary overnight should not be underestimated.

4.2 The impact assessment has applied a 3.5% discount rate for those fee paid judges that reach the end of their term and are unable to obtain another position either in a salaried post or another fixed term in a different jurisdiction. However, no detail has been given as to the number of judges that would immediately be ineligible to continue if the proposal was to have retroactive effect.

4.3 Fee paid office holders have taken long term career decisions based on an expectation of service up to the age of retirement. For example, a fee paid judge may have retired from practice (as a barrister or solicitor) at 60 on the expectation that they will continue to gain income by sitting on a part time basis. It is generally these experienced officeholders, who are no longer practising that have the availability which enables them to be quickly deployed to fill in the last minute listing vacancies, which
occur as a result of unforeseeable judicial resource issues (such as illness, bereavement etc) and would otherwise have to be removed from hearing lists.

4.4 A decision to retrospectively alter the terms of appointment of an existing fee paid judge is susceptible to legal challenge, particularly those terms which state that appointment would terminate on retirement.

4.5 If the Government were to apply this proposal retroactively, then their response to the consultation should contain the number of fee paid judges who have served the following terms:

- Six years or more;
- Eight years or more; and
- Ten years or more.

4.6 This would give a context, in real terms, of the number of fee paid judges that would need to be replaced immediately if a fixed non-renewable term was implemented to current officeholders. It would also illustrate what the impact would be at those fixed tenure periods suggested by the MoJ in terms of the scale and cost of recruitment as well as the loss of experience and skill.

4.7 Such information is not provided in the impact assessment and thus not considered in the additional recruitment costs to the JAC (estimated at £0.3m to £0.8m) or the training costs that the MoJ would incur as a result of a large scale recruitment exercise, currently estimated to cost £1.9m to £3.9m per year. The Society reserves the right to make further submissions in the event that this information is provided.

4.8 Application of a non-renewable fixed term to all existing fee paid judges would result in a substantial and immediate loss in judicial experience which is required for the proper and effective administration of justice. For the reasons outlined above, the Society recommends that existing fee paid judges should be excluded from the proposals.

Question 5: If existing fee paid judges were to move onto the new fixed term, should this be on a staggered basis? Please give your reasons.

5.1 Please see our responses to questions one and four.

Question 6: If the new term were introduced, what would be the most appropriate length of tenure: six, eight or ten years, or another period? Please give your reasons.

6.1 The majority of fee paid judges are unlikely to have fully developed their skills during a six year term, particularly if there are also proposals to remove the number of guaranteed days a person can sit (as suggested at question 11 below). Fee paid work may only account for a fifth or a quarter of a person’s time, so ten years might only equate to two and a half years of practical experience. An officeholder may only

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sit for 12 days in a year which is the number of guaranteed days for the Asylum and Immigration chamber. This would total just 72, 96 or 120 days for the respective length of terms outlined above.

6.2 If a fixed term is to be implemented, then the length of tenure should not be determined simply by reference to the number of years; the number of sitting days should also be taken into account. Notwithstanding the position set out in question one, the Law Society suggests that, if a fixed tenure is introduced, it should be for no less than ten years to minimise the loss of experience that will be inevitable if a compulsory turnover is implemented.

Question 7: If you think the new fee-paid tenure would be desirable for new appointments and/or existing office holders, what steps should be taken to ensure the courts and tribunals retain the necessary level of expertise?

7.1 We reiterate the position set out in our responses to questions one and four above. The Society does not consider that retention of sufficient expertise will be possible if a fixed tenure is introduced across the board, particularly in tribunals which rely almost entirely on fee paid office holders. Paragraphs 1.8 - 1.10 are repeated.

7.2 The long term package must be kept desirable to retain and increase diversity within the judiciary. Please see our response to question above.

Question 8: Should judges be appointed to leadership positions for a fixed term? Please explain.

8.1 The proposal provides a consistent approach to leadership roles. At present some leadership positions are on fixed terms, others that are not, and some which have been left vacant (such is the case in the Asylum and Immigration tribunal). Although good governance would be to refresh leadership from time to time, there would be little benefit in removing an effective leader from their position at a time when new reforms may still be bedding in and for which a consistent officeholder would be a great advantage. The appointment of leadership positions would be largely dependent on the recruitment cycles envisaged to accommodate any changes to the terms or tenure of the fee paid judiciary.

8.2 The length and additional cost of recruitment should also be considered if any fixed term was to apply to these roles.

Question 9: Should Heads of Division positions also be set for a fixed term? Please explain.

9.1 Please see our response to question eight above.

Question 10: Would a temporary uplift in remuneration for the duration of a fixed term leadership role be appropriate? Please give your reasons.
10.1 The Society agrees that in order to encourage applications for leadership roles there should be an increase in remuneration as recognition of the additional responsibility that would be expected from those positions.

Question 11: Should all current fee-paid judges across the courts and tribunals be required in their terms to be available for a number of days rather than have a guaranteed number of sitting days? Please give your reasons.

11.1 Removal of guaranteed sitting days and therefore guaranteed income, in conjunction with a fixed tenure would make fee paid positions significantly uncertain and unattractive to prospective candidates. The Government has provided guidance for employers which states that zero hours contracts:

“should not be considered as an alternative to proper business planning and should not be used as a permanent arrangement if it is not justifiable...Zero hours contracts are rarely appropriate to run the core business, but might be useful for unexpected or irregular events.”

11.2 The Government has also published a list of examples where such contracts might be appropriate, including starting up new businesses, seasonal work, special events and unexpected sickness. The Law Society does not consider that such circumstances are comparable to the business of the proper and effective administration of justice, nor would it be justifiable to use such contracts for judicial posts.

11.3 This would also exacerbate the predicament which we have outlined at paragraphs 1.24-1.26 above for prospective candidates wishing to negotiate time off in order to take up a part time post. The current position enables those working full time to be able to approach their employer with a firm idea of the minimum time they would be required to sit as a judge. Moreover, a guaranteed minimum number of days is essential to ensure that fee paid judges are afforded the opportunity to develop and retain a base level of experience.

Question 12: Should the terms and conditions of current fee-paid office holders be amended to remove the right to claim travel costs to their primary base in line with salaried office holders? Please give your reasons.

12.1 We refer to paragraph 4.4 above.

12.2 The proposal overlooks the fact that a considerable number of fee paid office holders do not have a primary base from which they operate. A common feature of tribunals is that the location in which the hearings take place tend to be in more informal settings that are convenient for the user. Mental Health Tribunal (MHT) judges continue to sit at over 900 different hospital and trust venues. Similarly, the Agricultural Land Tribunal (Wales) operates in venues such as local hotels to enable easy access to sites. As such, fee paid judges do not sit in a "primary" venue; it

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would be impracticable to limit travel costs to fee paid to a single venue in these circumstances.

12.3 Immigration tribunals are heard in a limited number of venues and judges are therefore required to travel across the country, with some claiming accommodation. Imposing this condition is likely to result in a high rate of resignations as it may be unviable for fee paid judges to meet these costs. This could have a negative impact on the diverse composition of the FTT, of which 46% are female and at least 10% are from the BAME community. Paragraph 1.12 above is repeated.

Question 13: Do you agree that judges should be required to give notice of their plans to resign or retire? Please give your reasons.

13.1 The Law Society has no objections to the proposal to require judges to give notice of their intention to resign or retire in order to assist HMCTS with medium and long term business planning. Six months would seem to be an appropriate period which would reflect standard practice in the legal profession.

Question 14: If a notice requirement for retirement or resignation were introduced, what would be the most appropriate period: three, six or twelve months, or another period? Please give your reasons.

14.1 Please see our response to question 13 above.

Question 15: What period of notice should be given prior to the proposed changes to terms and conditions in this chapter being made? Please give your reasons.

15.1 Please see our response to questions one and four above.

Question 16: Have we correctly identified the extent of the impacts under each of these proposals? Please give reasons and supply evidence as appropriate.

16.1 Please see our response to question one above.

Wider context of other reforms

16.2 The impact of the proposals put forward in this consultation must be considered in context. Salaried judges have already seen cuts to their pensions and pay which diminishes the overall appeal to candidates considering leaving their practice or chamber to enter salaried office. A recent judicial attitude survey showed that almost all judges in England and Wales feel that their pay and pension together do not adequately reflect the work they do, and that they have suffered a loss of net earning over the last five years.²⁸

16.3 The proposals come at a time where wider reforms are also subject to consultation. For example, the MoJ’s Transforming Our Justice System consultation proposes to introduce a default position which would reduce a three person tribunal panel to a

single judge. If this proposal is taken forward this too would be a factor that could have a significant impact on those considering a role in the judiciary. New entrants would not be afforded the same access to expertise (provided by non legal members) which is currently enjoyed by tribunals judges.

16.4 There is also a wider concern about whether a reform which reduces the security of tenure of judges could impact on judicial independence, particularly for an officeholder when making decisions that the Government doesn’t like.

16.5 The impact assessment has been set out adopting the most optimistic financial outlook and lacks detail. It appears to overestimate the likely savings from removing guaranteed sitting days, and fails to take into account the substantial training costs that would be required if a fixed tenure is implemented. Paragraphs 1.22 and 1.23 are repeated.

Impact on judges in Wales

16.6 The consultation is unclear as to the application of the proposals in relation to certain Welsh tribunals. For example, the Mental Health Review Tribunal for Wales (MHRT), sit outside HMCTS but is under the MoJ for the purposes of judicial appointments. The practical reality is that the MHRT has the same remit as the MHT, provides services to the same user group and users may be interchangeably detained on either side of the Welsh border. Any discrepancy between the devolved MHRT (which is not covered by HMCTS) and any reforms applicable to the MHT will be open to challenge. The real risk of a lack of consistency in approach has not been addressed in either the consultation or the impact assessment. Moreover, as the MHRT operates entirely on fee paid judicial resource, there are no salaried positions for candidates to progress into. If applied, the fixed tenure will lead to a large scale loss of talent and a dilution of expertise in the MHRT. Paragraph 16.3 is also relevant in these circumstances.

16.7 If the proposals do apply to Wales then clarity needs to be established as to how funding will be made available to address the increase in training requirements.

**Question 18: Does the equalities statement correctly identify the extent of the equalities impacts under each of these proposals? Are there forms of mitigation in relation to impacts that we have not considered? Please give reasons and supply evidence as appropriate.**

18.1 Please see our response to questions one and 16 above.

18.2 The equalities impact statement outlines a position predicated upon the assumption that increased turnover of judges will lead to increased judicial diversity, primarily because recently appointed judges are more diverse in their composition. This is an incorrect comparison to draw as those recent appointments have not been granted on fixed, non-renewable terms. It would be incorrect to draw inference from applications made on substantively different terms than those set out in the consultation. Moreover, it does not take into account the other initiatives which are currently operating to increase diversity in the judiciary. Please see our response to question 17 above.
18.3 The equalities impact statement is incomplete, the frustration noted by the Advisory Panel on Judicial Diversity in 2010\textsuperscript{29} remains the same - there is no reliable data and therefore no analyses provided on impacts on certain under-represented groups.

18.4 We would also like to highlight the following groups:

- **Candidates with disabilities**: To remain in a fee paid position would require a person to either apply for a salaried vacancy (if available) or in a different jurisdiction. This could result in prolonged travel and could have a disproportionate impact on those with disabilities.

- **Candidates with children or childcare responsibilities**: a short tenure whereby candidates will be faced with the unattractive prospect of applying for a salaried position (if a suitable vacancy arises), or a different fixed term position in another jurisdiction. As we have already highlighted above, the opportunities for advancement are limited and alternative might require longer travel times or even relocation which may be impracticable for those with school age children.

- **Younger candidates**: people are unlikely to compromise their career path by going into the judiciary at the earliest possible juncture. Paragraphs 1.25 to 1.27 are repeated.