



## **Bar Council response to the MOJ's consultation: Modernising judicial terms and conditions**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice's consultation: Modernising judicial terms and conditions ("the Consultation").
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

### **Overview**

4. The Bar Council's response addresses questions from the online questionnaire: <https://consult.justice.gov.uk/digital-communications/modernising-judicial-terms-and-conditions/consultation/>

**Q1: Should new fee-paid judges in both the courts and tribunals be on a single non-renewable fixed term? Please give your reasons.**

5. No. Whilst the objective of ensuring the judiciary is more representative of the general population is to be applauded this proposal is not an effective or appropriate method to achieve it.

6. The consultation paper contrasts the unrepresentative nature of the judiciary generally against the fact that Recorders and DDJs who are aged 40-49 years old are more representative of the general population. The unspoken assumptions are that this difference can be accounted for by an improvement in the recruitment process, and that the fee-paid judiciary has a valuable role as a feeder for the salaried judiciary, so that improving diversity in the former will result in greater diversity in the latter.
7. In fact the BAME diversity of the Recorders is already better than that of salaried High Court appointments.
8. Whilst changes to the appointment process (e.g. advertising vacancies and the creation of the JAC) have undoubtedly improved diversity, the statistics contained in the paper do not necessarily lead to that conclusion. Logically, age does not necessarily correlate with date of appointment. A better method of assessing whether the recruitment process has improved diversity is to consider the statistics produced by the JAC<sup>1</sup>.
9. For example, if we look at the results of the previous four Recorder competitions (2008, 2009, 2011 and 2015) we can see that the percentage of applicants that are women has increased from 27% in 2008 to 40% in 2015 whilst the percentage of those recommended for appointment that were women has increased from 24% to 56%. Looking at the same exercise the results for BAME applicants is much more disappointing. The percentage of applicants that identified as BAME in 2008 was 13% and 14% in 2015. However, the percentage of applicants that were recommended for appointment that identified as BAME in 2008 were 4% and 5% in 2015. Accordingly, BAME people remain underrepresented amongst those being appointed as Recorders in the most recent appointment exercise. So the problem lies elsewhere and in our view the statistics cited in the consultation paper are not sufficient to support the unspoken assumption.
10. There is a further crucial flaw with the proposal in that, there being a finite number of judicial posts (whether salaried or fee paid), it is difficult to see how the introduction of fixed-term appointments will improve the diversity of the judiciary faster than ought to occur due to the retirement of existing judges and their replacement by judges appointed under the current appointments system. The problem appears to be the lack of diversity of historic appointees. The proposal will not adequately address this; rather it will rotate in and out a much more diverse pool of judges without improving the diversity of the total pool of judges.
11. Additionally, as the Impact Assessment notes the proposal will see a marked increase in the costs of recruitment to the judiciary (approximately £500,000 pa) and the costs of

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<sup>1</sup> Judicial Selection and Recommendations for Appointment Statistics, England and Wales, April 2015 to March 2016

judicial training (approx. £2,000,000). This increase in costs without the corollary of an increase in diversity beyond that which would naturally occur is, in our view, a waste of public funds. At a time of huge constraints on public funding it makes no sense. The increased expenditure involved in recruitment is unlikely to be ameliorated by allowing fee-paid judges appointed to a fixed term to apply for alternative judicial roles at the end of their fixed term – rather the number of applicants would likely increase as the fixed-term judges apply for new roles. Nor will allowing such judges to apply for other positions reduce the increase in the training budget.

12. There is also a risk of a fall in the number of candidates applying for fee-paid appointment if appointment is for a fixed term. The process of applying for judicial appointment is time consuming. Sitting is likely to be of minimal commercial benefit to the practitioner (or their employer) and will incur both the costs/opportunity costs arising from sitting and the time given up to train. Many good applicants may well be put off applying given these costs for a time limited appointment.
13. There is a likelihood of a drop off in applications for appointment by younger lawyers. If fee-paid judicial appointment is viewed as the first stage in a potential application for salaried appointment, an applicant in her early or mid-thirties might be less inclined to apply if she is considering applying for a salaried appointment when in her mid to late forties. This is because the benefits of sitting (e.g. exposure to the current work of the judiciary and exposure to judges that might be able to provide references for further applications) will become stale within a few years of the end of the fixed-term appointment. An applicant appointed for six years will not want to apply at 36 years old if they are thinking of appointment to the salaried judiciary in their late forties.
14. Finally there are really important issues of legal principle why judicial posts should not be held on this “up or out” basis. It is sometimes forgotten that much work has already been done on the relationship between the terms on which judicial appointments are held and the degree of judicial independence that they have. As judges only ever exercise soft power and must rely on other organs for the enforcement of their rulings and orders the highest level of actual and perceived judicial independence is essential for the rule of law to work in a democracy. It needs to be borne in mind that rules and orders are obeyed and are not the subject of debate or disregard because of judicial independence.
15. Putting judges in a position in which their appointments are subject to early termination (i.e. before retirement age) at a point at which they remain quite capable of continuing but do not wish or are unable to progress to another level has the capacity to undermine that independence. Judges subject to such a rule will become concerned about the extent to which their rulings and orders meet with approval at that point when they begin to feel subject to the termination rule.

16. Both the Council of Europe and the Commonwealth have emphasised the obligation on member states to secure that judges appointments are not subject to early termination precisely because of its chilling effect on independence.
17. In a Recommendation from a committee of ministers, the Council of Europe<sup>2</sup> has made it quite clear that normally judges should be appointed until retirement age and that the only grounds for not renewing fixed terms should only be those of merit. Paragraphs [44], [45], [49] and [51] of the Recommendation in particular make the point -

## **Chapter VI - Status of the judge**

### **Selection and career**

44. Decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.

45. There should be no discrimination against judges or candidates for judicial office on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, disability, birth, sexual orientation or other status. A requirement that a judge or a candidate for judicial office must be a national of the state concerned should not be considered discriminatory.

46. The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers.

47. However, where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary (without prejudice to the rules applicable to councils for the judiciary contained in Chapter IV) should be authorised to make

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<sup>2</sup> See Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies) which can be found at <https://wcd.coe.int/ViewDoc.jsp?id=1707137>

recommendations or express opinions which the relevant appointing authority follows in practice.

48. The membership of the independent authorities referred to in paragraphs 46 and 47 should ensure the widest possible representation. Their procedures should be transparent with reasons for decisions being made available to applicants on request. An unsuccessful candidate should have the right to challenge the decision, or at least the procedure under which the decision was made.

#### **Tenure and irremovability**

49. Security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists.

50. The terms of office of judges should be established by law. A permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions. Early retirement should be possible only at the request of the judge concerned or on medical grounds.

51. Where recruitment is made for a probationary period or fixed term, the decision on whether to confirm or renew such an appointment should only be taken in accordance with paragraph 44 so as to ensure that the independence of the judiciary is fully respected.

18. These provisions are inconsistent with an “up or out” policy for part-time judges; because it is proposed that such a policy would apply to no other class of judge and so would be introduced solely for part-time fee paid judges, this would contravene [45].
19. Moreover [51] makes it clear that fixed term appointments should be renewed on terms of merit “having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity” in accordance with [44].
20. Similar points have been made in the so-called Latimer House Principles agreed by the Commonwealth Law Ministers (including those from the United Kingdom) and endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, in 2003.<sup>3</sup> These state that –

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<sup>3</sup> <http://thecommonwealth.org/history-of-the-commonwealth/latimer-principles>

#### **IV) Independence of the Judiciary**

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Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties.

21. Though it is indeed correct to note that the Latimer House Principle also refer to the need to increase the gender balance in the judiciary, there is no reason at all why that has to be done by removing one cadre of judge but not any other. In short if there is a need for a greater turn over to achieve this result then it has to be applied to all levels of the judiciary and not merely to one class.

#### **Q2: Can they apply for a different fee paid role at the end of fixed term rather than applying for salaried office?**

22. If contrary to the views expressed above there were to be such a change then in our view, Yes of course they can and to prohibit them would be both wasteful and contrary to the principles set out above. Every fee-paid judge will have been the recipient of judicial training. This will have paid for by the public. We would expect that through sitting they will have gained valuable skills. It is difficult to see the benefit to HMCTS in preventing the reuse of these skills.
23. It is worth keeping in mind, however, that there is a relative lack of suitable alternative appointments for many practitioners. A criminal practitioner is likely to only apply for appointment as a DDJ (Magistrates) and/or Recorder. Family practitioners are probably only going to be drawn to apply for appointment as a DDJ in the family courts or as Recorders.

#### **Q3: Are there exceptional circumstances in which the length of the fixed term should be extended?**

24. Obviously Yes. If a fee-paid judge has had to take time out due to parental leave, illness/ disability, to take a career break so as to raise young children or due to her being a reservist and being called up.

#### **Question 4: Should existing fee paid judges be moved on to fixed term? Please give your reasons.**

25. No. Indeed they could not be so moved without breaking the principles set out above in the Council of Europe guidelines and the Latimer House Principles.

26. It might be thought that the policy underlying the proposal to introduce fixed term appointments (increasing diversity amongst the judiciary) would tend to support the idea that existing fee paid judges be moved to a fixed term, on the basis that a proportion of existing judges will have been recruited/appointed under a system that produced less diversity than the current recruitment process. However, current appointees applied on the basis that they would remain in post unless their conduct fell short of expected standards. To change this would undoubtedly create ill feeling, demotivate much of the fee-paid judiciary and result in reputational damage to the fee-paid judiciary that might have a knock-on effect on the quantity and quality of applicants for such posts in the future. It might also be unlawful.
27. Further, the introduction of fixed terms for existing fee paid judges would lead, in due course, to a large volume of fee-paid judicial posts needing to be filled. This would almost certainly lead to a marked increase in the costs and administration of recruitment and training and to an exodus of experienced fee-paid judges out of the judiciary.

**Question 5: Should existing fee paid term judges be moved over on a staggered basis? Please give your reasons.**

28. As set out above it is not accepted that they could be moved.
29. If however they are to be moved then the answer to this question is Yes. It would be essential to ensure that there was not a massive loss overnight (whenever the fixed period came to an end) of experienced judges and to prevent the administrative nightmare of having to fill many judicial posts and train the appointees when the existing fee-paid judges' fixed term came to an end.

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

30. The longer the better, so the Bar Council would favour ten years.
31. In our view, the longer the period of appointment the better the rate of return on the recruitment and training costs. Further, given that the bar on salaried judges returning to private practice it is essential that fee-paid judges have as long a period as is possible to decide whether they would want to apply for a salaried appointment.

**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.**

32. Not applicable.

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

33. No. Neither the consultation paper nor the Impact Assessment sets out a proper case for introducing such a change. The current system works well. In the absence of a case for change we can see no benefit in the proposal.

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

34. No. Neither the consultation paper nor the Impact Assessment set out a proper case for introducing such a change. The current system works well. In the absence of a case for change we can see no benefit in the proposal.

**Question 10: Would a temporary uplift in remuneration for the duration of a fixed term leadership role be appropriate? Please give your reasons.**

35. Yes. If the uplift in remuneration is attributable to the assumption of a fixed term leadership role it is difficult to see the justification for the uplift to continue beyond the expiry of the fixed term.

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

36. No.

37. To impose a requirement for fee-paid judges to be available to sit a certain number of days without giving them an entitlement to expect to sit a minimum number of days would be to import the problems with "zero-hour" contracts of employment into judicial terms and conditions.

38. Those applying for fee-paid judicial appointment will work to be trained and the application process will involve a serious time commitment. If appointees have no guarantee of work / payment for work appointment becomes less attractive and may well cause the best qualified applicants to avoid applying.

39. Further, if appointees are no longer to be given a guaranteed number of sitting days any system for allocating sittings to fee paid judges would need to be monitored to ensure no



unfairness (on grounds of protected characteristics or otherwise) in the allocation of sitting days.

**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.**

40. No. The comparison with a salaried judge is flawed. A salaried judge has the option, on appointment, of relocating to be closer to his / her “home court” so as to reduce the duration and expense of commuting. It is unlikely that it would be practicable for fee-paid judicial office holders to relocate to be closer to their primary base –even more so if fee-paid judges no longer have guaranteed sitting days and may have time-limited appointments.
41. Presumably the need to deploy the fee-paid judiciary where there is an operational need will often mean that the judge’s “primary base” will not necessarily be the court closest to her. Further, the large number of court closures since the financial crisis may well increase the distance that will need to be travelled by the fee-paid judge to get to her primary base.
42. Disproportionately, women and BAME practitioners tend to work in areas of law that are publicly funded. They are likely to have lower incomes than the average income for practitioners generally. Further, many women who sit as fee-paid judges are more likely to have additional costs that they will need to pay for out of the sitting fee – e.g. childcare costs.
43. The removal of the right to claim travel costs to their primary base will impose a financial cost on practitioners that might apply for fee-paid judicial appointment that will be disproportionately more burdensome on women and BAME applicants. In the medium-term there is a real risk that such a change to the terms and conditions may result in a drop off in applications from women and BAME practitioners.

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

44. Yes. There is no principled basis for judges to not give notice of their retirement. No or short notice will cause operations problems for the HMCTS. Further, the giving of notice is a standard aspect of public and private sector contracts of employment.

**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.**

45. Not less than three months' notice.

46. Three months' notice is the norm across the public sector. There is no reason in principle for requiring judges to give longer notice.

47. The imposition of too onerous terms and conditions of appointment may well put off potential applicants.

48. Given mandatory judicial retirement, it is not accepted without more data that the current system is causing marked difficulties in the operation of HMCTS. Accordingly, any changes ought to be limited in nature.

**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**

49. The Bar Council does not agree with these proposed changes. They cannot be made with regard to current office-holders without breaking the terms on which they hold office. Accordingly if they are to be introduced they will have to be introduced as part of the package of terms and conditions for new appointees only.

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

50. We have no comments to make save those set out above.

**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.**

51. There is a real need for pre-application judicial training. No other major profession recruits first and trains later. Such training which could be targeted at groups that are under-represented has the capacity to increase the quality of applicants and therefore of appointees to a great degree.

52. Diversity statistics should be collected by the Judicial Office on no less than a triennial basis just as the legal profession is required to do.

53. There should be a greater emphasis and creating awareness of mentoring and work shadowing for prospective applicants for judicial appointment from underrepresented groups such as women and BAME practitioners. Greater awareness of the role of judges and the application process may help diminish this diffidence.
54. There should also be greater emphasis on job-sharing and part-time work for the judiciary so as to encourage more women and applicants with responsibilities as carers to apply.
55. It would also be sensible to commission independent research on why the success rate of BAME applicants for judicial appointment is so poor and to identify an action plan to deal with any issues identified. The figures demonstrate that BAME applicants appear to do less well when applying than other groups. This fact is troubling as it might suggest that there is some institutional bias in the recruitment process. Urgent action is needed to address this.

**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.**

56. We have no comments to make save those set out above.

**Conclusion:**

57. The Bar Council is completely opposed to this suggestion for the reasons set out above.

**Bar Council<sup>4</sup>**

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*For further information please contact:*

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<sup>4</sup> This response was drafted jointly by the Bar Council Equality Diversity and Social Mobility Committee and the Legal Services Committee.