



Modernising Judicial Terms and Conditions

JUSTICE consultation response

November 2016

**For further information contact:
Rachel Jones, Lawyer Civil Justice**

email: rjones@justice.org.uk tel: 020 7762 6414

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100
fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

A) Introduction

1. Established in 1957, JUSTICE is an independent, all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. JUSTICE believes that access to justice forms the foundation upon which our legal system and the rule of law rests.
2. On 15th September 2016, the Government opened a consultation: *Modernising Judicial Terms and Conditions: Consultation of proposals to introduce a new tenure for fee paid office holders, provide for fixed term leadership positions, and modernise judicial terms and conditions*. JUSTICE appreciates the opportunity to respond to this consultation.
3. JUSTICE recently established a Working Party looking at increasing the diversity of our senior judiciary¹ (in England and Wales, the Circuit, High Court and Court of Appeal bench; in addition, the UK Supreme Court). Membership is drawn from practitioners (include in-house counsel), former judges, the civil service, and academia. Our Working Party is in the process of formulating recommendations and, as such, any views expressed in this consultation are those of JUSTICE alone, and not the Working Party or any of its individual members. The full Report will be published in spring 2017, making practical recommendations for change, some of which will bear on the issues raised by this consultation (in particular, question 17).
4. The response excludes questions **10-12** and **15**, rather focusing on the questions that fall squarely within JUSTICE's expertise. Please note that the lack of a specific response to these questions does not imply endorsement of those proposals.

¹ <https://justice.org.uk/our-work/areas-of-work/judicial-diversity/> (Accessed 24/11/2016)

B) Response

Background

5. In general, we ask the Government to bear in mind the following key issues:

- a) Ensuring diversity: by itself, fixed-term appointments will not solve our judiciary's pressing diversity crisis. It is very important that careful consideration is given to how to increase the number of female and BAME candidates who are actually appointed to fee-paid and salaried positions, especially in the senior courts where they are significantly underrepresented.² JUSTICE's Working Party will provide a number of practical recommendations to this end early next year. Ideas that are already being explored, and could be expanded with appropriate financial support from the Government, include judicial mentoring and work-shadowing³ and targeted Diversity Support Initiatives.⁴
- b) Training and assessment: if the fee-paid judiciary is to lose the expertise that comes with many years of accumulated service, continuous professional development will be necessary. Proper "people management" is desirable in any event as part of a comprehensive judicial modernisation programme.
- c) Career path: given the Government's stated intention to increase diversity by mapping out a clearer career path, careful thought needs to be given as to where talented fee-paid judges will go after their fixed term ends. In JUSTICE's view support should be targeted on talented judges from underrepresented groups to encourage and enable them to progress to the next step – either a salaried position at their current level, or a fee-paid or salaried position the next level up.
- d) Flexible working: there will be some judges for whom flexible working is desirable beyond the fixed-term of their initial appointment. As such, serious consideration needs to be given to expanding provision of flexible *salaried* working arrangements.

² Although as explained below we do not have any statistics on the composition of the pool of Deputy High Court Judges, given that until recently only certain salaried judicial office-holders were eligible and that white men are overrepresented throughout the judiciary, it is reasonable to infer that women and BAME people are underrepresented as Deputies just as they are as Recorders, Circuit, High Court, Court of Appeal judges and Supreme Court justices.

³ See generally <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/judicial-diversity-committee-progress-report-13-16.pdf> (Accessed 24/11/2016)

⁴ <https://www.judiciary.gov.uk/about-the-judiciary/judges-career-paths/diversity-support-initiative/> (Accessed 24/11/2016)

- e) Monitoring and transparency: JUSTICE welcomes the Government's evidence-based approach but would urge the Government to make its analyses, and the underlying data, publicly available to provide robust empirical support for its proposals. Ongoing monitoring will also be crucial to establish the efficacy of any changes.
6. The starting point for our analysis of the consultation proposals is to distinguish two different groups of fee-paid appointments:
- a) Fee-paid appointments that currently serve as the main stepping stone to senior judicial appointment – i.e., Recorders and Deputy High Court Judges,
 - b) Deputy District Judges (DDJs) and fee-paid Tribunal Judges – where upwards progression is currently limited but, if a proper career path were put in place, could ultimately lead to Circuit and High Court appointments.
7. Different considerations apply to different types of fee-paid appointments, but JUSTICE strongly supports the Government's aim to improve the diversity of our judiciary as whole. It is unacceptable that, in 2016, women and BAME people continue to be underrepresented in both fee-paid and salaried positions. This underrepresentation is most pronounced at the senior levels. Some progress has been achieved but the rate of change is far too slow. For example:
- a) Just 20% of Recorders are female and only 6% declare they are from a BAME background. The equivalent figures for the Circuit bench are 25% and 4%, respectively.⁵
 - b) There are 22 women on the High Court at present.⁶ This means women represent only around **21%** of the High Court bench. Only two members of the High Court are (visible) BAME people⁷ – the highest number ever.
 - c) Female Court of Appeal Judges comprise around **18%**⁸ of the bench and only one of the 12 Supreme Court Justices is a woman. There are no visible ethnic minority judges in the Court of Appeal or above.

⁵ Judicial Diversity Statistics July 2016: <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/diversity/judicial-diversity-statistics-2016/> (Accessed 24/11/2016)

⁶ As at 24 November 2016. There have been recent retirements (including Dame Laura Cox) and appointments (Dame Juliet Mary May DBE and Dame Finola Mary O'Farrell DBE). This percentage (22/104) **includes** Mrs Justice Thirlwall, and Mr Justices Hickinbottom, Flaux and Moylan, who were elevated to the Court of Appeal in September 2016 but do not yet sit there – <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/senior-judiciary-list/>

⁷ JUSTICE's own research - Mr Justice Singh and Mrs Justice Cheema-Grubb at the only non-White judges in the High Court or above.

⁸ Including the Heads of Division, but excluding the judges mentioned in note 5, the total as of 24 November 2016 is 8 women out of 44 Court of Appeal judges. <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/senior-judiciary-list/>

Recorders and Deputy High Court Judges (“Deputies”)

8. A *de facto* career path to the senior judiciary already exists. Senior barristers become either Recorders or Deputy High Court Judges before ascending to the High Court bench.⁹ This talent pool is both narrow and homogenous, so renewal of the pool through fixed terms would be welcome. While the more senior and less diverse cohort of practitioners continue indefinitely, newer entrants to the profession cannot gain the experience needed to become senior judges.

9. JUSTICE has been unable to find any publicly-available statistics on the make-up of the current pool of Deputies, though appointments statistics for the most recent section 9(4) selection exercise (2015) were published in June 2016.¹⁰ This was the first Deputy High Court Judge competition where no previous judicial experience was required.¹¹ Of 18 appointees, slightly under half are women and one appointee is from a BAME background. 17 of the appointees are Queen’s Counsel (senior barristers).¹² 13% of Queen’s Counsel are women and 6% from a BAME background, which compares unfavourably to practising barristers as a whole (35% women and 12% BAME people)¹³ and to the population (50% women and 14% BAME).¹⁴

10. The pressing importance of enabling a wider range of people to gain experience as Deputies has already been recognised; in the 2015 exercise, appointments were for a single four-year fixed term.¹⁵ This has been repeated in this year’s competition, and there is a clear expectation of progression to salaried office within that time.¹⁶ The reasons to refresh the Recorder pool are equally compelling.

11. Research carried out by JUSTICE’s Working Party reveals that of the current High Court Judges, the majority previously sat as both Recorders and Deputies, and almost all previously held at least one of these fee-paid posts. The Government’s Impact Assessment

⁹ There is currently only one judge in the High Court and above who was a solicitor by professional background, Mr Justice Hickinbottom. He is also only the second Circuit Judge to be appointed to the Court of Appeal:

<https://www.lawgazette.co.uk/law/judicial-diversity/5058535.article> (Accessed 24/11/2016)

¹⁰ <https://jac.judiciary.gov.uk/news/judicial-selection-and-recommendations-appointment-statistics-2015-2016> (Accessed 24/11/2016)

¹¹ *Supra* note 10

¹² <https://www.judiciary.gov.uk/announcements/section-94-deputy-high-court-judge-appointments/> (Accessed 24/11/2016)

¹³ <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics/> and https://www.barstandardsboard.org.uk/media/1729995/report_on_diversity_at_the_bar_2015.pdf (Accessed 24/11/2016)

¹⁴ <http://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/ethnicity/articles/ethnicityandnationalidentityinenglandandwales/2012-12-11> (Accessed 24/11/2016)

¹⁵ <https://jac.judiciary.gov.uk/011-deputy-high-court-judge-s94fixed-term-information> (Accessed 24/11/2016)

¹⁶ <https://jac.judiciary.gov.uk/044-deputy-high-court-judge-s94fixed-term-information-web-page> (Accessed 24/11/2016)

confirms this, noting at paragraph 16 that “70% of current High Court judges had previously sat as Deputy High Court judges.” Of the twenty most recent High Court appointments, virtually all had previously sat as Deputies (six of these are women, and one is BAME). Further research by our Working Party revealed that, of the 100 appointments to the Circuit bench between May 2014 and October 2015, 91 had been Recorders (the majority of these were practising barristers for whom Recorder was their only prior judicial post).

12. Clearly then, improving the diversity of the Recorder pool is crucial to improving diversity not just of the High Court, but the Circuit bench too. And yet, the consultation paper reveals that “Recorders currently average 21 years in office”. In the last few decades the diversity of the legal professions has increased, but the rate of change in the senior judiciary has not kept up. Given the significant underrepresentation of women and BAME people in these posts and, correspondingly, our senior judiciary, JUSTICE supports the proposal to introduce a non-renewable time limit for Recorder and Deputies. Greater turnover in these crucial “entry-level” positions will encourage recruitment from outside the traditional cohort – for example, from Government lawyers and Tribunal Judges. This can only improve the make-up of the Circuit and High Court. Given the urgency of the problem (revealed by the statistics at paragraph 7 above), it is justifiable to introduce a six-year time-limit and to apply it both prospectively and to existing office-holders.
13. Consistency between Deputies and Recorders (i.e. the same time limit for both) would be preferable. Advertising last year’s Deputy posts as a single four-year fixed-term does not appear to have deterred women and BAME people from applying; the key is ensuring that candidates from underrepresented groups are appointed. We consider that six years should be long enough to gain sufficient sitting experience to successfully apply for a salaried post. Staggering recruitment so that a whole cohort does not leave at once would also be sensible, as would ensuring that newcomers have support and guidance from more experienced judges (salaried and fee-paid). In tandem, the Government could move existing fee-paid office-holders onto fixed-terms, also on a staggered basis. For instance, those closest to retirement could be moved onto fixed-terms first to free up spaces for new entrants whilst minimising disruption.
14. Short, fixed-term extensions could be granted in limited circumstances – for example for those whose caring responsibilities prevent them seeking salaried office within six years. We expect extensions to be the exception, given that the consultation paper states that women and BAME judges moved from fee-paid to salaried post “in less than the five to six average period for all office holders”. Further, increasing the availability of part-time/job-

share salaried positions would enable smoother transition to salaried office for those seeking flexible work arrangements. There is already one successful job-share arrangement in the High Court.¹⁷

Leadership posts

15. JUSTICE broadly agrees with the Government's analysis for leadership positions, such as Lord Chief Justice. JUSTICE notes with concern that Lady Butler-Sloss remains the only woman to have held one of the five most senior leadership roles within the judiciary: Lord Chief Justice, Master of the Rolls, Chancellor of the High Court, and the Presidents of the Queen's Bench and Family Divisions. Though the consultation paper does not apply to the UK Supreme Court, the same concerns apply to President of the Supreme Court.
16. Such opportunities are clearly important for securing promotions. For example, the current President of the UK Supreme Court previously served as Master of the Rolls, and the current Lord Chief Justice previously served as President of the Queen's Bench Division. Fixed-terms would enable a greater number of people to benefit from these career-enhancing opportunities and hopefully provide a more representative range of visible role models.

Deputy District Judges & Fee-paid Tribunal judges

17. Diversity figures for the Tribunals paint a slightly less depressing picture than the courts. The proportion of female Tribunal Judges now stands at 44% and BAME around 9.5%.¹⁸ As the consultation paper rightly notes, the Tribunals system is far more dependent on fee-paid judicial office-holders than the courts and "the potential loss of expertise as a result of fee-paid judges reaching the end of their term would be felt most acutely in the tribunals". Deputy District Judges¹⁹ fare better in terms of gender than the senior courts (34%), but badly in terms of BAME representation (6%).
18. As matters presently stand there are two problems with the Government's proposal to subject fee-paid DDJ and Tribunal positions to a non-renewable time limit:

¹⁷ <http://www.legalweek.com/sites/legalweek/2016/11/22/women-at-the-bar-social-mobility-and-taking-to-the-stage-lady-justice-hallett-in-the-spotlight/?sireturn=20161028055838> (Accessed 24/11/2016)

¹⁸ SPT Report 2016 <https://www.judiciary.gov.uk/wp-content/uploads/2016/02/The-Senior-President-of-Tribunals-Annual-Report-2016-final-1.pdf> (Accessed 24/11/2016)

¹⁹ Judicial Diversity Statistics July 2016, *supra* note 5. I have aggregated the DDJ (County Courts) and DDJ (Magistrates) statistics.

- a) Unlike Recorders and Deputy High Court Judges, arguably these fee-paid appointments are not primarily a stepping stone to salaried appointment, but a complement to them. As noted above, the Tribunals rely heavily on fee-paid judges.
- b) More importantly, the proposal for fixed-term appointments to be the entry point to a career path only works if there is some prospect of upwards progression. Currently, no such progression is assured. In the absence of a reasonable expectation of progression, time-limiting the positions could decrease their attractiveness and may even make diversity worse.

19. Given its stated commitment to diversity the Government must strive to establish a proper career path for judges with a realistic possibility of progression from the bottom rung – the First-tier Tribunal or Deputy District Judge – to the highest courts. Given that there is greater diversity at the junior ends of the solicitor and barristers’ professions, and given the high attrition rate for women at the Bar in particular, JUSTICE urges the Government to give serious consideration as to how to recruit members of underrepresented groups at between five and 10 years’ post-qualification experience (PQE).

20. However, despite previous recommendations by the Neuberger Advisory Panel on Diversity²⁰ and others to establish a proper career path, successive Governments have so far failed to do so. The “Progression Chart” available on the Judicial Office website is a valuable attempt to illustrate possible paths,²¹ but it is also complicated and confusing.

21. The reality is that there is currently little prospect of progressing from First-tier Tribunal, or Deputy District Judge, to High Court and beyond, so the greater diversity of background and life experience offered in the lower ranks is currently wasted. Anecdotally, JUSTICE understands that a number of First-tier Tribunal judges hold multiple tribunal appointments and that it is not uncommon to remain in the First-tier Tribunal for many years with little hope – or no intention – of further progression. Though it is difficult to draw inferences without knowing dates of appointments or years of PQE, it is nonetheless revealing that a large proportion of Tribunal Judges and DDJs are over 60 years of age.²² Current arrangements are not compatible with a quasi-judicial career path that allows junior practitioners to get a “foot on the ladder” and work their way up to the top.

²⁰ Recommendation 1. http://www.equality-ne.co.uk/downloads/759_advisory-panel-judicial-diversity-2010.pdf (Accessed 24/11/2016)

²¹ <https://www.judiciary.gov.uk/about-the-judiciary/judges-career-paths/judicial-career-progression-chart/> (Accessed 24/11/2016)

²² Judicial Diversity Statistics July 2016, *supra* note 5

22. JUSTICE does not propose to offer solutions to all these problems in this brief Response, but urges the Government to carefully consider our Working Party Report on improving judicial diversity when it is published early next year. For now, we simply draw attention to the fact that fixed-term appointments alone do nothing to solve the lack of progression from DDJ or Tribunal Judge up. We will not solve this problem unless a concerted effort is made to put in place a proper career path and recruit more junior practitioners to entry-level positions – those with *potential* rather than simply experience.
23. At the present time, placing non-renewable time limits on fee-paid, entry-level positions could backfire and perhaps even *reduce* diversity, particularly for the First-tier Tribunal where judges are already far more diverse than the courts. Should a proper career path be put in place enabling DDJs and Tribunal Judges to move up the ranks in greater numbers, time-limiting may be justifiable to allow a more junior cohort to benefit from it. More, especially more flexible,²³ salaried posts would also mitigate the risks. In the meantime though, JUSTICE does not support single fixed terms for DDJs or Tribunal Judges.

C) Summary of answers to individual questions

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.

Courts

Yes: see above **paragraphs 8-14**. In summary, in particular for Recorders and Deputy High Court Judges, the diversity crisis in our senior judiciary necessitates time-limiting these vital “entry level” appointments.

Tribunals

No: see above **paragraphs 17-23**. In summary, the greater diversity at entry level and the current reliance of the Tribunals on fee-paid positions raises concerns about single fixed-terms at this level.

²³ In his 2016 annual report, the Senior President of Tribunals expresses his support for flexible working: “as many judicial posts as can practicably be offered on a part-time basis will continue to be so in the tribunals judiciary.” *Supra* note 18.

Question 2: If yes to question 1, should fee-paid judges 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.

Yes; we see no reason to prevent e.g. a Recorder applying for a Deputy High Court Judge position at the end of her fixed term. However, we would like to see talented candidates from non-traditional backgrounds fast-tracked into the senior judiciary, so it should be possible to progress directly to a salaried position after a single fixed-term as a Deputy or Recorder. Fee-paid judges should be assisted in career planning and there should be a clear expectation of upwards progression.

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.

Yes, in limited situations that will primarily pertain to those from underrepresented groups. See above **paragraph 14**. For example, short extensions may exceptionally be appropriate for those with caring responsibilities, disabilities or ill-health.

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

Yes, for Recorders and Deputies – please see above, especially **paragraph 12**.

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

Yes: see above **paragraph 13**. This would avoid undue turmoil and disruption.

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.

Six years for Recorders and Deputy High Court Judges should suffice as long as appropriate support is in place to progress talented candidates, particularly those from underrepresented groups. Further, in exceptional circumstances a time-limited extension to the initially fixed-term post may be appropriate (see Question 3 above).

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?

As per our general comments at the outset of this Response, proper human resources management is as essential for the judiciary as for any other large, modern organisation. This should include training. Sponsorship/mentoring of new judges by senior judges may be particularly helpful; outgoing fee-paid judges could also be paired with new fee-paid judges to facilitate smooth transitions.

Questions 8 and 9: Should judges and Heads of Division positions be appointed to leadership positions for a fixed term?

Yes, see above paragraphs 15-16.

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

Yes. Succession planning and proactive recruitment have both been shown to facilitate greater diversity, and should also make human resources management simpler and more efficient. This would also bring the judiciary in line with the rest of the public and private sector.

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 reasons.

On balance, for retirements we suggest 12 months would be preferable, since it allows enough time for forthcoming retirements to be factored into annual strategies/workforce planning. It is also likely that most judges are able to anticipate their retirement plans at least a year in advance. Since resignations are less predictable we are inclined towards six months' notice, which affords more flexibility to people who may not otherwise anticipate leaving.

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

JUSTICE is concerned that the key monetised costs of the new single non-renewable tenure for fee-paid judges do not budget for continuing professional development (see question 7

above) – only for additional “induction training”. Assuming that the new fixed terms are successful in significantly improving the diversity of the pools of Deputies and Recorders, this obviously does not guarantee that those from underrepresented groups will succeed in appointment to salaried office at the end of the term. Targeted talent management needs to be factored into costs.

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.

JUSTICE hopes the Government will fully consider our Working Party Report, which will be published in spring 2017. Reform of the judiciary should be on a holistic rather than piecemeal basis. The measures proposed in this consultation should sit alongside more wide-ranging reforms to ensure diversity is a key priority for the judiciary going forward.

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.

As set out in detail above, JUSTICE is not currently persuaded that the diversity impact in respect of Tribunal judges and DDJs will be positive, at least without other measures (including to improve career progression). However, we agree with the Government’s assessment that measures to bring in younger, more diverse judges are amply justified with respect to Recorders and Deputies. Women and BAME people are significantly underrepresented in those groups and they already serve as the gateway to the senior judiciary.

**Rachel Jones
JUSTICE
November 2016**