

Ministry of Justice consultation on Modernising Terms and Conditions

JAC response
November 2016

Introduction

1. The Judicial Appointments Commission ('JAC') is the independent body that selects candidates for judicial office in courts and tribunals in England and Wales, and for some tribunals covering Scotland and Northern Ireland. We encourage applications from a wide range of candidates and make selections for judicial appointment on merit, through fair and open competition.
2. The JAC welcomes the opportunity to respond to the Ministry of Justice's (MoJ) consultation on 'Modernising Judicial Terms and Conditions'.
3. In our response, we have limited our comments to the potential impact of the proposals on the JAC's three core statutory duties:
 - to select solely on merit;
 - to select candidates of good character; and
 - to have regard to the need to encourage diversity in the range of persons available for selection.
4. With the above in mind, we have focussed on the impact the proposals may have on the following:
 - increasing judicial diversity;
 - the attractiveness of judicial office; and
 - the JAC's own resources and capacity.
5. We have not commented on the broader merits of the proposals, or potential impacts that do not relate to our statutory remit. Our response is structured according to the three chapters of the consultation.

Questions 1 to 7: New Tenure for Fee Paid Judges

6. MoJ proposes that fee-paid judges in courts and tribunals should be appointed for a single, non-renewable fixed term. We have outlined below some of the potential impacts.

Impact on judicial diversity

7. A non-renewable fixed term has several potential benefits in relation to judicial diversity:
 - It may create greater opportunities for more legal practitioners to gain fee-paid judicial experience, which is an important step towards a salaried judicial office.
 - It may increase the diversity of the pool of fee-paid judges, given the progress made in recent years by the Law Society, Bar Council and CILEx in increasing the diversity of those entering the professions.

- Greater diversity amongst fee-paid judges could have positive implications for diversity within the salaried and more senior judiciary if those fee-paid judges pursue a salaried judicial career.
8. However, the proposal also presents several risks:
- Candidates with parental or caring responsibilities, who may otherwise be attracted by the flexibility of a fee-paid role, may be deterred by a fixed term, particularly if the term is of short duration. For example, they may not wish to take up a short fixed term appointment if they are expected to apply for a salaried post when that term comes to an end, as a salaried post may involve less flexibility or a change of location. If the proposal is implemented, it is important that compensating measures are considered, such as making more salaried part time posts available.
 - A shorter fixed term may be unappealing to younger candidates, who may like to have greater flexibility to remain in practice before committing to a salaried judicial post. This could result in younger, more diverse candidates deciding to wait until later in their careers before applying for judicial appointment, which may mean that improving judicial diversity takes longer than MoJ anticipates.
 - Implementing this proposal may lead to a perception that a fixed term appointment is an inevitable step towards salaried posts, and candidates may be concerned that their organisation will view taking a fixed term appointment as an indication that they are intending to leave their full-time role. Candidates may be wary of the impact that taking up a fixed term role may have on their career prospects. This is more likely to affect solicitor candidates, who are less likely to feel supported by their employer in applying for judicial posts.¹
 - Candidates will need to have the necessary skills and experience to be able to successfully apply for salaried posts. It will be important to ensure that talented fee-paid judges, particularly those from diverse backgrounds, are encouraged to develop a broad range of skills so that they will be well placed to seek a salaried position, otherwise they could be a loss to the judiciary at the end of a fixed term fee-paid appointment.

Impact on attractiveness of judicial office

9. The impact of non-renewable fixed terms on the attractiveness of judicial appointment is unclear. The potential benefits of the proposal include:
- Some candidates may be attracted by the limited term of the role, and the encouragement to move between different roles and jurisdictions.

¹ *Barriers to Application to Judicial Appointment*, 2013, page 5.

- If leadership judges take a more active role in encouraging and mentoring fee-paid judges as envisaged in the consultation, a fixed term role may help candidates to decide whether to pursue a long-term, salaried career.

10. However, there are also risks, including:

- Some potential candidates may be deterred by a fixed term appointment, including those with parental or caring responsibilities as mentioned above. Some candidates may not aspire to full-time judicial appointment because they prefer the flexibility of sitting as a fee-paid judge, or because they are content with a combination of practising and sitting.
- Practitioners with specialist expertise may not be attracted by the prospect of moving from one area of specialism to another at the end of the first fixed term appointment. This is more likely to affect the Tribunals judiciary, where the proportion of fee-paid judges is significantly greater than in the courts with correspondingly fewer salaried opportunities. In addition, some tribunal judges already sit in more than one area (for example, we understand that several employment tribunal judges also sit in immigration). If it were not possible to re-apply for the same post, such judges may find their opportunities to move jurisdiction were limited, because they already sit in more than one jurisdiction. MoJ may wish to consider whether there are circumstances in which it would be appropriate to enable judges to re-apply for their current post in order to continue to meet the business need.
- As mentioned above, some candidates may be dissuaded from applying for a fixed-term post because of concerns that their employer will view this as an intention to move to a salaried role within 6 to 10 years, and related concerns about the detrimental impact on their career prospects.

Impact on JAC

11. As recognised in the consultation paper, there are likely to be resourcing implications for the JAC if a fixed term is introduced. These include:

- Selection exercises for fee-paid roles may need to be run more frequently – although this may be offset by the prospect of a fewer number of roles following HMCTS reform, which is also envisaged in the consultation paper.
- The above would have resource implications; the impact assessment estimates the cost of running additional recruitment campaigns would be £0.3 million to £0.8 million per year for the JAC.
- Greater call on judicial time, as judges are involved in JAC selection exercises - for example, sitting on sift and interview panels.

Length of fixed term

12. MoJ is consulting on the appropriate length of the fixed term: six, eight or ten years.
13. The JAC suggests that, if the single fixed term is implemented, the longer period of ten years would be appropriate for the reasons set out below.

Impact on judicial diversity

14. A longer term would provide more time for fee-paid judges to gain the skills and experience they need to progress to salaried roles or fee-paid posts in other jurisdictions, if that is what they wish to do. This longer term could be particularly important for fee-paid judges who do not have guaranteed minimum sitting days, and consequently may need more time to gain the relevant amount of sitting experience to progress. In addition, it is more difficult for fee-paid judges with greater parental or caring responsibilities, or those who have busy practices, to sit at short notice. It may take such judges longer than others to build up enough sitting experience to apply for salaried roles.

Impact on attractiveness of judicial office

15. A longer term may also be more attractive to candidates who are not able to sit as often as others due to personal circumstances, caring responsibilities, or because of the demands of their practice.
16. Also, having been appointed, judges may wish to gain a broad range of experience in one jurisdiction before they apply to take on a salaried role in that area, or in another field.

Impact on JAC

17. A longer fixed term would be likely to mean vacancies arising less frequently, thus mitigating the resource impacts referred to above.

Extending the proposal to current fee-paid judges

18. MoJ is consulting on whether the proposal for non-renewable fixed terms should be extended to current fee-paid judges.

Impact on judicial diversity

19. As mentioned above, if existing diverse judges are moved to non-renewable fixed terms and are not successful in applying for different roles, this may decrease, rather than increase diversity in the short term. Given that the impact assessment states that it is anticipated wider HMCTS reforms will reduce the total number of fee-paid judges required, there is a real risk that there will not be enough available opportunities in other jurisdictions for judges to apply for at the end of their fixed term.

Impact on the JAC

20. If the same fixed term was applied to all current fee-paid judges at once, this would mean that the terms of a large number of judges would necessarily end at the same time. Careful

planning would be required to ensure that a sufficient number of salaried posts were available for which talented fee-paid judges could apply.

21. In order to continue to meet the business needs of our courts and tribunals, a large number of new fee-paid judges would also presumably need to be recruited within a short period to fill the fee-paid posts that would be left vacant. If this all took place within a short period, it would place a significant peak demand on the JAC. It is difficult, at present, to see how such a high level of demand could be met within the existing structures and resources.
22. The alternative proposal that fixed-term appointments could be “rolled out” to the current fee-paid judiciary in a staggered way appears to present a more manageable approach. This could be done by moving current judges onto the fixed term a specified length of time after their date of appointment; for example, after ten years. This would have fewer logistical difficulties than moving all judges onto the fixed term at once, and would mean that judges appointed more recently still have time to build up the necessary experience to apply for other posts. It would also mitigate the risk of losing a great deal of current expertise at the same time.

Questions 8 to 10: Fixed terms for leadership positions

23. The JAC recommends candidates for those leadership roles in the courts and tribunals listed in Schedule 14 of the Constitutional Reform Act 2005, as amended by the Crime and Courts Act 2013. These include roles such as Resident Judge in both courts and tribunals. However, selections for some other leadership roles fall outside Schedule 14 and are made by the judiciary rather than the JAC.
24. We are also involved in the selection of other more senior leadership roles, including Heads of Division. For these roles, the JAC convenes a selection panel which determines the selection process and makes a recommendation.
25. The consultation paper envisages that introducing fixed terms for leadership positions would create more regular opportunities for diverse candidates to apply for such posts, as well as help a wider range of judges to develop their leadership skills and gain the experience required to progress to more senior judicial posts. The JAC considers that these proposals may have a positive impact on both diversity and the attractiveness of leadership roles.

Impact on judicial diversity

26. Although the JAC does not recommend candidates for all judicial leadership posts, the proposals to appoint judges to leadership positions for a fixed term, and for leadership roles to attract an uplift in remuneration for the duration of the term, may help to open up such roles and make them more attractive to a broader range of candidates. This may have a positive resultant impact on the diversity of those who are able to apply for leadership roles that are within the JAC’s remit.
27. Currently, JAC selection exercises for leadership roles have the least diverse outcomes, with low numbers of female and BAME individuals applying, and being recommended. If

more diverse candidates apply, and are recommended, for leadership roles, they may also have greater opportunities to gain the experience and skills they need to progress to other more senior judicial roles.

28. While a positive impact on diversity cannot be guaranteed, the risks identified above in respect of the fixed term for fee-paid roles would not appear to apply to the same extent here, not least as the current diversity of judges in leadership roles is relatively low. However, the career support envisaged in the consultation paper will be crucial if diverse judges are to progress into leadership roles in greater numbers.

Impact on candidate attraction

29. At present there is a significant additional burden attached to many leadership posts and, in some cases, no additional remuneration. Greater consistency in the remuneration of leadership roles would recognise the importance of leadership posts and make them more attractive to potential candidates. It will also be important to recognise the development opportunities which leadership roles provide, and the value of this as part of a judicial career. If that can be recognised, many leadership posts are likely to become more attractive to candidates, who may see them as a limited term opportunity to acquire much-needed leadership skills.

Impact on the JAC

30. Increased turnover in leadership roles will have resourcing implications for the JAC; more frequent selection exercises for these posts will need to be run, which will have resultant impacts on both JAC and judicial resources. The anticipated resource costs of this for the JAC are not identified in the impact assessment.

Questions 11 to 17: Modernisation of existing terms and conditions

Requiring judges to give notice of anticipated retirement or resignation date

Impact on JAC

31. The JAC is not in a position to express a view on whether a requirement to give notice should be introduced, or on the length of any proposed notice period. However, in terms of practicality, more notice of forthcoming retirements or resignations would be helpful to the JAC.
32. Most judges give notice of retirement or resignation, and this enables more efficient planning of recruitment by the Complement Group responsible. If all judges were to give notice of anticipated resignation or retirement date, this would assist the Group by enabling more efficient workplace and succession planning for the judiciary. It would also hopefully minimise the number of short-notice vacancies. This, in turn, should mean that the JAC is given more notice of vacancies, allowing us to plan earlier outreach – which would assist in attracting candidates and allowing them to plan their careers.

Other proposals that would improve the judicial career path, modernise the judiciary or improve judicial diversity

33. The JAC welcomes the recognition that the success of the proposals in the consultation paper will depend on support for judicial office-holders to move into other roles within the judiciary.
34. More generally, there should be continued focus on the recommendations of the Advisory Panel on Judicial Diversity (the 2010 'Neuberger' report), many of which are cited in the consultation paper.
35. The JAC suggests that the following would help to modernise the judiciary, improve the judicial career path and boost judicial diversity:
 - a) **Extension of career support throughout the judiciary.** Effective career support for existing office holders, including use of mentoring and appraisals, is fundamental to supporting moves from one judicial role to another. The consultation recognises that this will be essential if the single fixed term is implemented (page 16).
 - b) **Greater flexible working opportunities.** Whilst fixed term appointments may assist in creating more opportunities for new candidates to join the judiciary, those potential new candidates must be encouraged to apply for such posts, and any structural barriers to application removed. Research commissioned by the JAC shows that lack of flexible working opportunities is a real disincentive to application for judicial office. We consider that making salaried part-time working much more widely available would have positive implications for judicial diversity. The availability of salaried part time working should be the default position, with clear justification where it is not available.
 - c) **Reviewing the restriction on return to practice for salaried judicial office holders.** This could make salaried roles more attractive to a wider range of candidates, some of whom may be deterred by the permanent nature of the role. However, by the same token, it would be likely to lead to increased judicial attrition. This proposal would therefore need careful consideration to ensure that the potential advantages were not outweighed by the impact on the make-up and experience of the bench.