



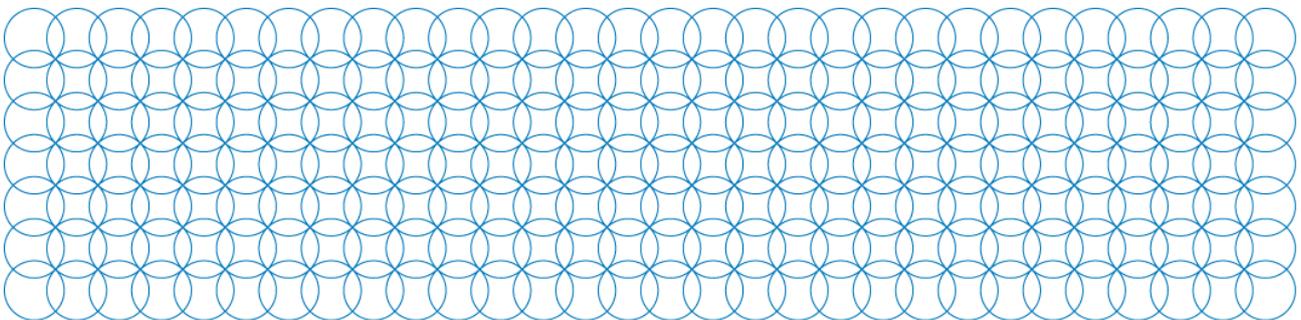
Ministry  
of Justice

# **Modernising Judicial Terms and Conditions**

Consultation on proposals to introduce a new tenure for fee paid office holders, provide for fixed term leadership positions, and modernise judicial terms and conditions

This consultation begins on 15<sup>th</sup> September 2016

This consultation ends on 10<sup>th</sup> November 2016







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A consultation produced by the Ministry of Justice. It is also available at <https://consult.justice.gov.uk/>

## About this consultation

- To:** All judicial office holders deployed across courts and HMCTS tribunals in England and Wales, who are appointed by the Lord Chancellor and/or on terms and conditions set by the Lord Chancellor. This includes all salaried and fee-paid office holders both legal and non-legal, in the courts and tribunals. Please note that this consultation **excludes** Magistrates, Supreme Court Justices and office holders in non-MoJ tribunals.
- Duration:** From 15 September 2016 to 10 November 2016
- Enquiries (including requests for the paper in an alternative format) to:** Judicial Policy  
Ministry of Justice  
102 Petty France  
London SW1H 9AJ  
Tel: 07580 701 443  
Email: [judicialterms@justice.gsi.gov.uk](mailto:judicialterms@justice.gsi.gov.uk)
- How to respond:** Please send your response by 10 November to:  
Judicial Policy  
Ministry of Justice  
102 Petty France  
London SW1H 9AJ  
Tel: 07580 701 443  
Email: [judicialterms@justice.gsi.gov.uk](mailto:judicialterms@justice.gsi.gov.uk)
- Response paper:** A response to this consultation exercise is due to be published by January 2017 at: <https://consult.justice.gov.uk/>

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## Foreword

Our judges are rightly renowned around the world for their independence and role in upholding the rule of law. Their expertise and skilful directions allow the courts and tribunals to determine innocence or guilt in criminal cases, resolve disputes between individuals, families and businesses, protect vulnerable children and allow the public to hold the government to account.

We want courts and tribunals to continue to deliver justice, whilst increasing the effectiveness and accessibility of court processes and procedures. Through no fault of their own, too much of judges' time can currently be spent dealing with uncontroversial, routine or straightforward tasks which could just as easily be dealt with outside of court, either online or by staff working under judicial authority. This is just one of the initiatives for improving the experience of those using the system and providing better value for the taxpayer that I have today set out in a joint statement with the Lord Chief Justice and Senior President of Tribunals. This is a sign of our ongoing commitment to building on our strengths and maintaining our international reputation.

The reforms we are proposing provide an ideal opportunity for us to consider how the judiciary in England and Wales will work in a modernised system and how we can ensure that it is able to continue delivering justice effectively. One of the key factors in supporting that aim, and to sustain the quality of our judiciary, is for us to continue to attract and recruit the best individuals from all walks of life to office. So, along with the senior judiciary, my department has been looking at how we can best do that. And if we want to retain these individuals, as well as keep the best judges we already have, we must look at ways of improving the judicial career path to enable development and progression.

I look forward to reading your views on the proposals and, following careful consideration of your responses, we will announce any changes we will be making towards the end of this year.

The Right Honourable Elizabeth Truss MP  
Lord Chancellor and Secretary of State

## Introduction

### Background

The statement by the Lord Chancellor, Lord Chief Justice, and Senior President of Tribunals explains how fundamental reforms to processes in the courts and tribunals will provide the public with a justice system that is just, proportionate and accessible.

For example, court and judicial time will be reserved for cases which require the full majesty of the court and less time will be spent on cases that do not need to come to court. There will be far-reaching enhancements to technology including through the better use of virtual hearings where appropriate or by allowing certain claims, such as divorce proceedings or probate applications to be submitted online. These reforms will improve accessibility and effectiveness of the system for everyone that uses it and provide better value for the taxpayer. The government has been working closely with the senior judiciary to identify how the judicial system itself might need to be reformed to allow judges to continue working effectively in a modernised system.

### The Provision of Judges Steering Group

In 2013, the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals established a Steering Group to look at the use of the judiciary and to formulate strategic proposals for their consideration and agreement. The scope of the Steering Group's work included particular consideration of "the terms and conditions of salaried and fee-paid judicial office holders, the promotion of diversity and the deployment of the judiciary within the modernised courts and tribunals."

The Steering Group explored several potential areas of reform that might achieve these aims. The final set of proposals presented in this paper are those that the Group considered should be prioritised for wider consultation during a time when the courts and tribunals system itself will be undergoing significant reform.

### The proposals

Consultation on the package of measures has been agreed in principle by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals, following consideration by the Steering Group. The government would now welcome your views on the following proposals:

- introducing a new single fixed term for new fee-paid judges;
- introducing the ability to recruit to leadership positions for a fixed term, with accompanying temporary remuneration;
- introducing an expectation – rather than guarantee – of number of days existing fee-paid court judges are required to sit;
- removing the entitlement of existing fee-paid judges to claim travel expenses for journeys to their primary courts; and
- introducing a requirement for existing salaried and fee-paid judges to provide notice of intention to resign or retire.

The first two proposals would require primary legislation and are discussed in more detail in chapters 1 and 2. The final three proposals would be implemented through changes to terms and conditions of existing office holders following an appropriate period of notice. They are considered in more detail in chapter 3.

Taken together, and if implemented, they would help to achieve the Steering Group's central intentions of improving judicial career prospects, promoting greater judicial diversity, introducing flexibility of deployment where required and introducing modern business practises which will be required in a reformed Her Majesty's Courts and Tribunals Service (HMCTS). These objectives are discussed in more detail below.

Aside from the specific proposals discussed in this paper, the government recognises that respondents might have views on other options for achieving these objectives and will carefully consider any suggestions received (see question 17 in the questionnaire).

### *Promoting Judicial Diversity*

It is critical that judicial appointments continue to be made on the basis of merit. At the same time, the judiciary needs to be reflective of the society it serves. We must pursue further efforts to attract and retain high quality office holders from the broadest possible range of backgrounds. The Lord Chancellor, alongside the Lord Chief Justice with whom she shares a statutory duty in this area, is committed to this aim. The government, along with representatives of the judiciary, legal profession and the Judicial Appointments Commission are members of the Judicial Diversity Forum which meets regularly to identify ways of increasing diversity within the judiciary, continuing to draw high calibre candidates but from the wildest eligible pool as possible.

It is anticipated that the proposal for a new, non-renewable fixed term for fee-paid judges would help meet this aim by ensuring that the fee-paid judiciary is regularly refreshed with new appointments. By mapping out a clearer career path, it would also attract applicants from a wider range of backgrounds and support them in developing their skills, experience and career aims. If the proportion of women and black and minority ethnic judges entering the fee-paid judiciary can continue to be increased, it is hoped that this might have a corresponding effect on the proportion of such applicants applying for salaried office at the end of their fixed terms. Government analysis of those taking up salaried judicial office has shown that the majority of salaried judges were appointed after having gained experience as a fee-paid judge<sup>1</sup>. The supporting facts and figures are examined in in 'Chapter 1' where the proposals for a new fixed-term for fee-paid judges are set out in more detail.

### *Enhancing judicial career prospects*

Members of the judiciary have made clear their own desire to improve opportunities for career development. The proposals for a new fixed term for fee-paid judges would help to map out a clearer career path, not only for those entering the judiciary for the first time but potentially for existing officer holders who wish to progress to salaried office. Under the government's proposals fee-paid judges who reached the end of their term and wanted to remain in the judiciary could either apply for a salaried post or apply for a different fixed term post in another court or tribunal jurisdiction.

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<sup>1</sup> Internal government analysis

In addition, the proposals to reform the role of leadership judges seek to enhance judicial career prospects. They would not fundamentally alter the excellent work already carried out by leadership judges, but rather implement a more systematic approach to the nature and duration of their appointment and the way they are remunerated. This recognises the extra responsibilities they are taking on in addition to their sitting commitments. The government and the senior judiciary are particularly mindful of such responsibilities in the context of the courts and tribunals reform agenda in which leadership judges will play a fundamental role in helping to develop and embed new approaches to deliver a courts system fit for the 21<sup>st</sup> century. Fixed terms for leadership positions would potentially increase the number of judges benefiting from such appointments and encourage talented judges to apply for these posts. Strengthening the role of leadership judges would also mean that newer judges could look to strong leaders for guidance and advice on how best to develop their potential and progress their own judicial careers.

#### *Flexibility of deployment*

Within the modernised courts and tribunals service, it is critical that the senior judiciary have the powers to deploy judges flexibly to meet changing demand. Fee-paid judges play an essential role in ensuring that demand for judicial time and expertise is met when peaks in workload arise. Equally, at times when demand for judicial resource decreases, it is not appropriate to pay judges a daily fee when they do not sit. Given that courts and tribunals reform is likely to have an impact on the flow of cases progressing through the courts and tribunals, the government and senior judiciary would like to make sure there is flexibility to respond to changes in demand for judicial resources.

Some current fee-paid judicial office holders are guaranteed a minimum number of sitting days per year in their terms and conditions. These conditions are problematic for three reasons. Firstly, they limit how flexibly these office holders can be deployed – especially in scenarios where demand for judicial time fluctuates substantially. Secondly, guaranteeing a minimum number of sitting days also imposes a financial constraint on HMCTS. Thirdly, the current system creates inconsistency between those office holders who do have minimum guarantees (primarily in the courts) and those who do not (tribunals). Office holders who have such stipulations in their terms are currently entitled to claim for any days that have not been offered. Having established that justice and courts reform is likely to cause fluctuations in judicial demand, it is clear that paying fee-paid judges for days on which they do not sit is not a good use of public money. The terms and conditions of new fee-paid judges for relevant offices have already been amended to remove minimum sitting day requirements, so this proposal focuses on making similar changes to the terms and conditions of existing judges.

#### *Modern Business Practice*

The Steering Group identified two specific aspects of existing judicial office holders' terms and conditions that do not reflect modern working practices: the lack of any requirement to give notice of retirement or resignation; and the fact that fee-paid office holders in the courts and tribunals can still claim travel allowances to their primary bases, where salaried counterparts have no such allowance.

Sudden or unannounced departures from office have the potential to severely disrupt the effective delivery of justice. Although instances of sudden retirement are rare and most judges give adequate notice, the Steering Group considered that formalising a notice period would help HMCTS and the judiciary prepare for the reallocation of work and possible succession planning.

Fee-paid office holders in the courts and tribunals currently nominate a primary court for tax purposes and this is often the court at which they sit to hear the majority of their cases. Under current terms and conditions, existing fee-paid office holders are able to claim travel costs when travelling to their primary court or tribunal. The Steering Group considered it important to consult on whether this remained appropriate when most people who work in the public sector are not paid to go their normal place of work unless the journey is particularly complex or unusual. Salaried members of the judiciary do not benefit from such arrangements. If these changes were pursued, fee-paid judges would, of course, still be able to claim for unusual travel.

### Scope of this Consultation

The changes proposed in this consultation are relevant to judicial office holders deployed across courts and HMCTS tribunals in England and Wales who are appointed by the Lord Chancellor and/or on terms and conditions set by the Lord Chancellor. This includes all salaried and fee-paid office holders, both legal and non-legal, in the courts and tribunals. There are also certain judicial posts in the courts in Scotland and Northern Ireland where the level of pay and/or terms and conditions are set by the Lord Chancellor. The proposals in this paper do not extend to those posts. Further consideration will be given, in liaison with the devolved governments and judiciary in Scotland and Northern Ireland, to the extent to which any of the proposals in this paper might be workable in those jurisdictions.

Some of the proposals in this paper relate specifically to fee-paid judges, others to salaried and some to both cohorts in England and Wales.

The latest figures detailing the numbers of judicial officer holders across HMCTS can be broken down as follows:

- Courts – 1386 salaried and 1816 fee-paid judges.
- Tribunals (legal) – 389 salaried and 1505 fee-paid judges
- Tribunals (non-legal) – 6 salaried and 3460 fee-paid<sup>2</sup>.

The consultation **does not cover** Supreme Court Justices; their terms and conditions are set by the Chief Executive of the Supreme Court in which provision is made for the unique work that the court carries out.

The consultation **does not cover** the terms of magistrates due to their unique work and mechanism of appointment. The role of the magistracy is exceptionally important in the delivery of justice in England and Wales and the government is also undertaking work – separate to this – examining how their role and workload will change in the wake of justice and courts reform, and what subsequent changes need to be made in relation to their working arrangements so that they continue to play an important part in the judicial system. Proposals on leadership will have implications on the magistracy as part of the overall judicial cohort.

The consultation **does not cover** the terms and conditions of judicial office holders who sit in non-MoJ tribunals.

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<sup>2</sup> Judicial Diversity Statistics 2016 <https://www.judiciary.gov.uk/publications/judicial-statistics-2016/>

We would be particularly interested in the views of judicial office holders who would be directly affected by the proposals. We would also invite views from judicial office holders outside the scope of this consultation, anyone working in the courts and tribunals, those considering a judicial career and representatives from or members of the organisations listed below:

- Lord Chief Justice of England and Wales
- Lord Chief Justice of Northern Ireland
- Lord President of the Court of Session, Scotland
- President of the UK Supreme Court
- Senior President of Tribunals
- Association of High Court Judges
- Association of High Court Masters
- Association of HM District Judges
- Association of Part Time Judges
- Bar Council
- Council of Appeal Tribunal Judges
- Council of District Judges (Magistrates' Courts)
- Council of Employment Judges
- Council of HM Circuit Judges
- Council of Immigration Judges
- Council of Upper Tribunal Judges
- Forum of Tribunal Organisations
- Law Society
- Judicial Appointments Commission
- Northern Ireland Courts and Tribunals Service
- Northern Ireland Judicial Appointments Commission
- Judicial Pensions Committee
- Magistrates Association
- National Bench Chairmen's Forum
- Salaried Tribunal Judges Association
- Tribunal Chamber Presidents

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

An Impact Assessment and Equalities Statement have been published alongside this document. The Impact Assessment discusses the potential impact of the proposals on HMCTS, existing judicial office holders and prospective appointments. The Equality

Statement discusses the potential impact of the proposals on groups with protected characteristics under the Equality Act 2010.

Comments on the accompanying Impact Assessment and on the Equalities Statement are also welcome.

## Chapter 1: New Tenure for Fee-Paid Judges

This chapter seeks views on whether to introduce a new, non-renewable tenure for new (and possibly existing) fee-paid judges, in both the courts and tribunals, as a stepping stone to salaried office.

### Background

Fee-paid judges play an important role in the delivery of justice. In the courts, they offer vital flexibility to cover periods of extra judicial demand and some are specialists in particular fields (e.g. Judges in the Commercial Court).

Holding office as a fee-paid judge can be beneficial to the individual office holder and it acts as a critical entry point for the judiciary. Legal professionals can continue to practise and fee-paid office offers the opportunity to see whether they would be suited to a judicial career before deciding whether to apply for salaried office. Importantly, as future salaried judges in many cases, particularly in the courts, fee-paid office offers individuals the requisite experience, training and development opportunities that support them in that regard.

Under current arrangements, fee-paid judges are usually appointed for a renewable, fixed-term period of four or five years. Renewal normally occurs automatically and, following the first point of renewal, office holders effectively become permanent until they reach the mandatory retirement age of 70.

The government wishes to explore whether a new tenure for fee-paid judges characterised by a fixed and non-renewable term would better enhance fee-paid office so that it becomes a progressive grade with a clear development structure. This would lead to swifter turnover, a more transparent route for development and more regular recruitment of fee-paid judges. This would also seek to improve diversity and, indeed, recent data from the Judicial Appointments Commission has consistently shown younger fee-paid judges are a more diverse group<sup>3</sup>.

Towards or at the end of the fixed term, it is envisaged that fee-paid judges who wished to stay in the judiciary would either seek a salaried post or apply for another, separate fixed term fee-paid position. Office holders would not be able to apply for the same fee-paid role they had already held because that would undermine the policy objectives of improving diversity and creating a pipeline of new candidates to salaried positions. It is anticipated that there might be exceptional circumstances in which the length of the term could be extended - for example, to compensate for periods of leave connected to parenting responsibilities or ill-health.

Capable judges who wanted to extend their careers in the judiciary would be mentored and supported to do so. Consequently, following the introduction of the new tenure, fee-paid office would be seen as the first step on the judicial career ladder.

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<sup>3</sup> <https://jac.judiciary.gov.uk/news/judicial-selection-and-recommendations-appointment-statistics-2015-2016>

Chapter 2 discusses the role leadership judges would play in identifying and nurturing judicial talent and other initiatives Judicial Office are pursuing, such as introducing a universal appraisal system. The proposals in this chapter should, therefore, be considered in the context of these wider initiatives.

For reasons discussed in more detail below, the government's initial view is that this proposal should only apply to new appointments, but there is an argument that existing office holders should also be offered or moved on to the new tenure. We would be particularly interested to hear views on this subject.

## **Rationale for change**

### *Improved Judicial Diversity*

Across nearly all jurisdictions within the judiciary, women and people from black, Asian and minority ethnic (BAME) groups tend to be under-represented when compared with the population as a whole.<sup>4</sup> For example, only a fifth of Recorders and a third of Deputy District Judges (DDJs) are female. Only 6 per cent of Recorders and 6 per cent of DDJs come from a BAME background.<sup>5</sup>

The current cohort made up of younger judges is, however, more representative. For example, amongst the 40-49 age bracket, 50 per cent of DDJs are women. Additionally, between 10 per cent and 13 per cent of DDJs and Recorders come from a BAME background. This is equally true in the tribunals where younger cohorts tend to be more representative. We also want to attract candidates from a greater range of social background and therefore different walks of the legal profession, ensuring that the makeup of our judiciary is truly representative of the society it serves. Ensuring that fee-paid office is an attractive opportunity for all these individuals, particularly those who have the greatest potential to succeed in office, is paramount.

We know that fee-paid posts are an important route of entry into permanent salaried judicial office. Data from the Judicial Appointments Commission (JAC) shows that over 70 per cent of judges recommended for appointment to salaried office during the period 2011-2014 had previous experience as fee-paid judges<sup>6</sup>. Carrying out more regular recruitment campaigns when existing fee-paid judges are reaching the end of their fixed term could positively impact on diversity within the fee-paid judiciary and have a corresponding impact on the range of applicants applying for salaried posts. The Advisory Panel on Judicial Diversity acknowledged in its 2010 report the potential benefits for judicial diversity of moving fee-paid judges on to fixed term tenures.<sup>7</sup>

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<sup>4</sup> According to Census data in 2011, 51 per cent of the population in England and Wales were female, while 14 per cent identified as being Black, Asian or from a minority ethnic group

<sup>5</sup> Judicial Diversity Statistics 2016 <https://www.judiciary.gov.uk/publications/judicial-statistics-2016/>

<sup>6</sup> <https://jac.judiciary.gov.uk/news/judicial-selection-and-recommendations-appointment-statistics-2015-2016>

<sup>7</sup> [https://www.ucl.ac.uk/laws/judicial-institute/files/Report\\_of\\_the\\_Advisory\\_Panel\\_on\\_Judicial\\_Diversity.pdf](https://www.ucl.ac.uk/laws/judicial-institute/files/Report_of_the_Advisory_Panel_on_Judicial_Diversity.pdf)

### *Clearer Career Progression*

The Advisory Panel on Judicial Diversity identified the lack of a defined judicial career path as a barrier to applications to the judiciary<sup>8</sup>. Potential applicants are currently unclear of their career path options and the skills they would need to move into different offices. The Panel also recommended that, in order to promote career progression and development within the judiciary, fee paid judges should not normally be appointed for more than three renewable terms.

This proposal would mean that judges who wanted to remain in office at their end of their fixed-term would need to consider whether to apply for a salaried post or apply for another fee-paid role which might allow them to develop a wider range of skills (for example, if it were in a different discipline or at a more senior level). Those judges making the transition into different fee-paid roles or salaried office, however, could point to a better defined career path which offered the prospect of variety and further development.

Internal analyses of data from the Judicial Office indicate that, across the courts and tribunals system, most current salaried office holders who were previously fee-paid judges made the transition into salaried office after an average of five or six years of service. When the same analysis was carried out focussing on women and those from a BAME background, they moved to a salaried position in less than the five to six year average period for all office holders. We have used this data to suggest options as to the length of the new fixed term as outlined in the following section.

### **Consideration**

The government recognises that there is likely to be a range of views about the advantages and disadvantages of these proposals. The potential benefits in relation to career progression and judicial diversity outlined above might have to be balanced with the potential risk of some very good judges leaving the judiciary altogether at the end of their first fixed term. There is no guarantee that every judge in this position would apply for another fee-paid role or a salaried post, particularly if he or she has enjoyed balancing part-time work as a judge with other work. As an example, Recorders currently average 21 years in office,<sup>9</sup> which suggests that many may be content to hold a single office for the duration of their judicial career.

The government would need to consider whether the lack of permanency could deter some promising candidates from applying for fee-paid roles in the first place, potentially undermining the drive to increase diversity, and take into account the cost of running more regular recruitment campaigns.

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 where fee-paid judges are fundamental in delivering justice. Not only is judicial demand considerably more volatile than in the courts, but the majority of judicial work is undertaken by fee-paid judges. In addition, given that

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<sup>8</sup> The Advisory Panel on Judicial Diversity was created in 2009 by the then Lord Chancellor, Jack Straw, to address concerns that the judiciary remained, despite concerted efforts, under-representative and homogenous. The Panel published a report in 2010 outlining their findings and recommendations on improving judicial diversity.

<sup>9</sup> Internal analysis of Judicial Office data

there are so few salaried non-legal positions in the tribunals system<sup>10</sup>, opportunities for non-legal members moving to salaried office are very limited. If this proposal were pursued, the government would be keen to ensure that the new tenure, when combined with training and development activities led by the judiciary, allowed office-holders to develop the skills they needed not only for their initial fee-paid role, but also to give them the breadth of experience that would help them to progress to different fee-paid roles or salaried office in the future. This of course will need to take into account the nature of different judicial roles, including those of a more specialist nature. The government recognises that the operating models of the courts and tribunals are very different and would be keen to hear views on whether this proposal should apply to all fee-paid office holders in both the courts and tribunals.

The government's initial view is that the new tenure should apply only to new appointments to minimise the potential for operational disruption described above. It acknowledges, however, that there might also be arguments for moving existing fee-paid judges on to the new tenure. The fact that a fee-paid judge might sit in the same jurisdiction for over twenty years without moving on to a different role does not necessarily align with the vision for a modern, flexible and adaptable judiciary which is committed to personal development and career progression. There is no requirement to apply for salaried appointment and therefore, once appointed, a fee-paid judge can continue to sit until reaching the age of 70, which potentially limits opportunities for new entrants.

Management information on the average age of the fee-paid judiciary and length of time to retirement, suggests that if no action were taken to move current office holders on to the new tenure, around half would still be in post in ten years' time following mandatory and voluntary retirements.<sup>11</sup>

There are challenges, though, to such proposals. If this proposal were extended to existing office holders, it would be impractical for them all to move onto the new tenure at the same time. Such a move would have significant operational implications (of all office holders ending tenure at the same time) and prevent effective succession planning. Consideration, therefore, needs to be given as to whether office holders should move to the new tenure on a staggered basis. There would also be a need to consider the fairest means of staggering that transition. If this option were pursued, the government remains open to considering views on how this transition could best be managed.

The government would be grateful for views on whether the proposal for a new tenure could or should be extended to current fee-paid judges.

In terms of duration of the new tenure, the government anticipates a period of six, eight or ten years might be appropriate. Six years has been marked as the lower boundary in line with government analysis that this is the average point at which those fee-paid judicial office holders who gain salaried office do so.

The upper boundary of ten years has been proposed as government data demonstrates that of the fee-paid judges who move into salaried office, over 80 percent do so within ten

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<sup>10</sup> <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/list-of-members-of-the-tribunals-judiciary/salaried-non-legal-members/>

<sup>11</sup> Internal analysis of Judicial Office data

years of their appointment<sup>12</sup>. This would ensure that talented judges who might take longer to gain the skills and experience for salaried office have the opportunity to do so.

The final proposal is for a tenure which lasts for eight years. This is proposed as a middle ground and would help to ensure the new fixed term would be long enough to allow fee-paid judges sufficient time to gather the requisite experience for salaried office.

**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.**

**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.**

**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.**

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

**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.**

**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.**

**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?**

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<sup>12</sup> As above

## Chapter 2: Fixed Term Leadership Judges

This chapter invites views on whether legislation should be introduced to create fixed terms of appointment for salaried judges undertaking leadership responsibilities and to provide an uplift in pay for as long as they undertake such duties. The fixed term would only relate to their leadership position, not to their position as a judge generally. The proposals could apply to any leadership position at any level of the judiciary.

### Background

Judicial leadership is a function which is undertaken by the judiciary itself. Judges are supported in executing their roles in this regard by the Judicial Office, who also support them on human resource matters. There is common agreement between the senior judiciary and the government that reform of the courts and tribunals will affect the way that judges work in the future. It is important that they have the ability, accountability and support to make such changes – and to lead others through them. Effective judicial leadership will be more essential than ever throughout courts and tribunals reform and the government is committed to supporting the judiciary in achieving its aims in this regard.

The current system of leadership judges across all levels and throughout jurisdictions is varied in terms of tenure, pay, responsibilities and duties. This has led to a number of inconsistent practices which this proposal seeks to address. The judiciary will, however, continue to be responsible for defining the expectations regarding the specific responsibilities and duties of leadership.

At present, some leadership roles are held on a fixed term basis whereas others are not. This can lead to limitations on the ability of the judiciary to ensure that they have leadership in place to best meet judicial need. In addition some leadership roles are rewarded by extra remuneration while others are not, and in many cases the current arrangements mean that an office holder's salary does not decrease correspondingly when their leadership post ends.

The senior judiciary has expressed a desire to standardise leadership responsibilities throughout the judiciary and across jurisdictions. This proposal would empower Judicial Office to set the appropriate tenure for leadership judges and make provision for additional remuneration to be granted for the duration of the post. When twinned with the senior judiciary's plans to better define the roles and responsibilities of leadership judges, this policy will help in appointing effective judicial leaders through courts and tribunals reform.

### Rationale for change

Recognising that courts and tribunals reform is likely to impact on the work judges carry out and the amount of judicial time required, the Lord Chancellor, Lord Chief Justice and Senior President of Tribunals all wish to encourage strong judicial leadership to support the reform agenda for the courts and tribunals. It is hoped that leadership judges will ensure that the transformation to new working practices is smooth and that judges at all levels are engaged with, and involved in, the changes that will affect them.

There are several changes that the judiciary themselves are considering in order to strengthen the role of leadership judges, including the possible introduction of a more comprehensive appraisal system for fee-paid judges and a voluntary mentoring scheme which would be open to members of the judiciary at all levels. The proposals in this chapter are therefore designed to support the senior judiciary and Judicial Office in delivering a talented cadre of judges who can instigate real cultural change within the judiciary itself.

The use of leadership judges to drive such initiatives forward currently varies across jurisdictions. Some have a defined leadership structure, in others the involvement of leadership judges is less clear. As an example, Circuit Judges often seek advice from Presiding Judges who in turn seek advice from the Senior Presiding Judge. The latter two are considered as holding leadership positions. Yet in practice there is evidence that leadership duties, in particular pastoral support, is often provided outside this structure and roles are not clearly specified or defined to reflect such responsibility. This is even evidenced in the job description for resident judges which states that 'scale of a Resident Judge's administrative, leadership and other responsibilities varies widely'. There is a clear need to better define roles and responsibilities to greater unify practices, and leadership structures, across court jurisdictions.

It is expected that in providing for fixed term leadership positions, the opportunity to assume leadership responsibilities would arise on a more regular basis. This will help clarify the leadership structure and might also help a wider range of judges to develop their skills in leadership posts and gain the experience required to move into higher levels of the judiciary. The improved remuneration package for the duration of the post should also help ensure that talented judges are incentivised to apply for and carry out such roles.

It is anticipated that leadership judges would mentor junior judges, identifying those who have the potential to progress, advising them on the additional skills or experience they might need to do so, and where appropriate encouraging them to go on to be leadership judges themselves. Leadership judges could also play a valuable role in increasing diversity at higher levels of the judiciary by mentoring and encouraging under-represented groups to apply.

### **Consideration**

If this proposal were pursued, some legislation would be needed to ensure that the policy could be applied to all relevant office holders. Some leadership positions such as the Chamber President and Deputy Chamber President of the Upper and First Tier Tribunal are statutory offices in their own right and may not have a separate office underlying them to which a judge could return when his or her leadership position ended.

One option would be to ensure through legislation that any judge who took on a leadership position for a fixed term always held an underlying office. If that judge had not retired and was not appointed to another role when the leadership position came to end, he or she would revert to the underlying office. The judiciary themselves would determine the duration of the tenure of individual leadership positions according to business need and whether or not it should be renewed when an office holder came to the end of his or her term. This would give more security to the judiciary in periods where a suitable replacement could not be found or where the skill and experience of a particular office holder needed to be retained.

Particular consideration would also need to be given to Heads of Division roles; these are distinct roles, providing leadership across the whole judiciary. Nonetheless, fixed term appointments may also be appropriate for these roles, potentially opening up opportunities for younger judges to apply for such key posts as part of a judicial career.

In order to focus resources in the most effective way extra remuneration paid to leadership judges in respect of their leadership role would only last for the duration for which they held the specific leadership post. Current arrangements mean that some existing judges carrying out leadership duties continue to receive their pay uplift on a permanent basis, even if they no longer continue with their leadership duties.

In keeping with the manner in which judicial remuneration is set, it would likely be appropriate that uplifts be considered and set by the Senior Salaries Review Body (SSRB) on the request of the Lord Chancellor. The SSRB's 2011 major review made a recommendation that a standardised 5% uplift should be given to judges with management responsibilities<sup>13</sup>. While this recommendation was not implemented, and has now been withdrawn, the SSRB will be invited to make recommendations to the Lord Chancellor on how best to reward judicial leadership as part of their upcoming major review of judicial pay. Detailed evidence will be provided to the SSRB to allow them to consider this matter.

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

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

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

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<sup>13</sup> 33<sup>rd</sup> Report on Senior Salaries - [https://private.ome.uk.com/SSRB\\_Reports.aspx](https://private.ome.uk.com/SSRB_Reports.aspx)

## Chapter 3: Modernisation of Existing Terms and Conditions

This chapter outlines three further proposals identified by the Steering Group on the Provision of Judges that are intended to modernise the terms and conditions of existing office holders to ensure that judicial resources can be used most effectively. They include:

- Introducing an expectation – rather than guarantee – of the number of days existing fee-paid judges in the courts are required to sit;
- Removing the entitlement of existing fee-paid judges to claim travel expenses for journeys to their primary courts and tribunals;
- Introducing a requirement for existing salaried and fee-paid judges to provide notice of intention to resign or retire.

Although the government recognises that these proposals would reduce individual judges' entitlements in some instances, the modernisation of judicial working practices is an important part of wider reforms in the courts and tribunals which aim to increase flexibility and efficiency in the delivery of justice.

In relation to the first two proposals which affect current fee-paid office holders in the courts, the government's analysis shows that if no action were taken to modernise these aspects, around half of the current cohort would remain on unmodernised terms in ten years' time (when retirement rates are taken into account). The government and the senior judiciary consider that swifter action is needed to ensure that fee-paid judges in the courts are on the same terms as their counterparts in the tribunals and to ensure there is sufficient flexibility in a reformed HMCTS.

Office holders would be given sufficient notice of the proposed changes to their terms and conditions so that they could take any steps necessary to consider how the changes might affect them and prepare for the possible implications.

Proposal: Introducing an expectation – rather than guarantee – of the number of days existing fee-paid judges in the courts are required to sit

### *Background*

Historically the terms and conditions of courts fee-paid judges made reference to a guaranteed number of minimum sitting days. This means that they can claim fees for that number of days irrespective of whether they have sat on those days or not. This contrasts with the terms and conditions of fee-paid judges in the tribunals, which were modernised in 2010 and in which there is no guarantee as to the number of minimum sitting days. Instead, tribunals judges are expected to make themselves available for a set number of days per year, but without a guarantee that they will have to sit. This proposal would bring the terms and conditions of existing fee-paid judges in the courts into line with their counterparts in the tribunals.

### *Rationale for change*

The changes to fee-paid judges' terms and conditions in the tribunals recognised the fact that previous arrangements could limit the flexibility of the tribunal service to deploy judges as and when the business demanded and could impose an unnecessary financial burden on the public purse. The Lord Chancellor has already begun to address this issue

in the terms and conditions of more recent appointments. Newly appointed Deputy District Judges and Recorders (since 2015) have been appointed on terms similar to those of the fee-paid judiciary in the tribunals stipulating the number of days they should make themselves available.

The proposal would help to make sure that the supply of fee-paid judges in the courts matched demand in the light of proposed courts reform. The existing guarantee would be replaced with an expectation that they make themselves available to sit for a specified number of days each year. Such an expectation would be set on an annual basis by HMCTS in agreement with the senior judiciary based on projections about the number of sitting days likely to be required.

**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.**

Proposal: Removing the entitlement of existing fee-paid office holders in the courts and tribunals to claim travel expenses for journeys to their primary base

#### *Background*

At present, the fee-paid judiciary in the courts and tribunals are able to claim travel expenses for travel to any venue when travelling on official business, even if they sit almost exclusively at a single or primary court. Fee-paid judges do have a primary base which they must identify for tax reasons. This proposal would amend the terms and conditions of current fee-paid office holders to remove their entitlement to claim travel costs when travelling to their primary base.

#### *Rationale for change*

Salaried judges are not able to claim for travel to their primary court. Given the wider work to equalise remuneration between fee-paid and salaried judges we consider that this proposal, which would bring greater parity between fee-paid judges and their salaried counterparts is right in principle. Of course, should fee-paid judges be required to sit in jurisdictions other than their primary court, they would continue to retain their entitlement to claim for travel costs in line with other judicial office holders.

**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.**

Proposal: Introducing a requirement for existing salaried and fee-paid judges to provide notice of intention to resign or retire

#### *Background*

At present, most judicial office holders are not required to give notice of their intention to retire or resign. Salaried office holders are asked to give the longest possible notice, but formal notice is not stipulated in their terms and conditions. The current system allows for judges to retire and/or resign with no notice period. The government therefore proposes to amend the terms and conditions of all existing judicial office holders (salaried and fee-paid) to require them to give notice of their intention to retire or resign if that is not already required.

### *Rationale for change*

While it is very rare in practice for a judge to retire without notice, such situations can cause serious operational issues in judicial availability for scheduled court time and create gaps in the judicial workforce while recruitment campaigns are being carried out.

In order to have an effective cross-deployable judiciary the Steering Group recommended it would be helpful if retirement notice periods were clearly specified for all office holders. The recruitment or assignment process for filling a judicial vacancy takes an average of 20 weeks but in some circumstances can take longer, so a sufficient notice period is required in order to allow for robust succession planning. This includes time to plan recruitment so that outreach is as effective as possible in encouraging as diverse a range of candidates to apply for office as possible and, where available, provide them the support to do so. The 2010 Advisory Panel on Judicial Diversity<sup>14</sup> also recommended that judges should be required to give appropriate notice of their intention to retire for these reasons.

A reasonable period of notice in respect of retirement would also offer individual judges the ability to plan for retirement and allow the MoJ to make sure pension arrangements are in place in time. The Lord Chancellor has begun to address this issue in the terms and conditions of recently appointed judicial office holders by mandating that office holders must give six months' notice of their intention to retire or resign.

If this proposal were pursued, the government would welcome views on what the length of the notice period should be. Three options for retirement notice are proposed here, namely three, six or twelve months.

- A three-month notice period would be in line with pay groups in the public sector, and most groups within the private sector, and would allow enough time for judges' pension arrangements to be confirmed. However, three months would limit time to recruit for a replacement and would limit HMCTS's and the judiciary's ability to plan strategically for judicial resource requirements.
- A six-month notice period would be in line with international judicial comparators and better reflects the importance and standing of judicial office. This would also allow more time for succession planning than a three month notice period.
- A twelve-month notice period, in line with international comparators, would allow ample time for succession planning and recruiting for a replacement. There are instances when recruiting and training a judge can take in excess of six months. This would minimise the adverse impacts on the delivery of justice. A twelve month notice period is, however, long by public sector standards and could be considered restrictive by office holders.

If the relevant notice period for existing office holders were set at anything other than six months, the terms of new appointments would also be amended to reflect this new notice period. This would ensure consistency across all office holders.

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

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<sup>14</sup> [https://www.ucl.ac.uk/laws/judicial-institute/files/Report\\_of\\_the\\_Advisory\\_Panel\\_on\\_Judicial\\_Diversity.pdf](https://www.ucl.ac.uk/laws/judicial-institute/files/Report_of_the_Advisory_Panel_on_Judicial_Diversity.pdf)

**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.**

**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.**

## Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

**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.**

**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.**

**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.**

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

**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.**

**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.**

**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?**

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

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

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

**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.**

**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.**

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

**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.**

**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.**

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

**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.**

**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.**

**Thank you for participating in this consultation exercise.**

## About you

Please use this section to tell us about yourself

<b>Full name</b>	
<b>Job title</b> or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
<b>Date</b>	
<b>Company name/organisation</b> (if applicable):	
<b>Address</b>	
<b>Postcode</b>	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

**If you are a representative of a group**, please tell us the name of the group and give a summary of the people or organisations that you represent.

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## Contact details/How to respond

Responses to the consultation questions should be submitted online by **10 November 2016** at <https://consult.justice.gov.uk/>.

Responses can also be submitted to the 'Enquiries' contact details below.

If you have any enquiries about this consultation, including requests for the paper in a different format, please contact the department at:

**Simon Quinn**  
**Ministry of Justice**  
**Judicial Policy**  
**2.53, 2<sup>nd</sup> Floor Tower**  
**102 Petty France**  
**London SW1H 9AJ**

**Tel: 07580 701 443**

**Email: [judicialterms@justice.gsi.gov.uk](mailto:judicialterms@justice.gsi.gov.uk)**

### Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

### Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <https://consult.justice.gov.uk/>.

Alternative format versions of this publication can be requested from the 'Enquiries' contact details above.

### Publication of response

A paper summarising the responses to this consultation will be published by January 2017. It is not anticipated that the department will respond to individual comments. The response paper will be available on-line at <https://consult.justice.gov.uk/>.

### Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

### Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry of Justice.

The Ministry of Justice will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

## Consultation principles

The principles that government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<https://www.gov.uk/government/publications/consultation-principles-guidance>



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