



Modernising Judicial Terms & Conditions

Response on behalf of the Criminal Bar Association of England and Wales

1 December 2016

INTRODUCTION

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.
2. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.
3. The CBA is the largest specialist Bar association, with over 4,000 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained

The CBA's responses are focussed on the likely impact of these proposals on Recorders appointed to the Crown Court. We have seen the Bar Council's draft Response, and we adopt it insofar as it applies to fee-paid judicial posts in general.

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.

No. The CBA is against the proposal. We believe that that such a change would be to the detriment of the justice system, and therefore the public, substantially reducing the experience and expertise of fee paid judicial officeholders. What is proposed would amount to a pointless waste of experience and talent.

As Recorders normally sit for no more than six weeks per year, a period of 6 years amounts to only 36 weeks sitting. At the end of the period, the Recorder will have reached peak skill and experience, and may be dispensed with, for the whole process to start again with a beginner.

The notion of "rolling recorders" in the Crown Court pays no attention to the need for experienced recorders in the Crown Court. It particularly ignores the current need for "ticketed" recorders to sit in sex cases, and recorders who are experienced enough to deal with more complex and serious trials. Recorders ticketed for sex cases invariably have several years' experience in sitting, and have been trained further to deal with more difficult and sensitive cases. The proposal would lead to their loss, at a time when the volume of sex cases shows no sign of falling as a proportion of Crown Court work.

Our view is the proposal has risks that have not been evaluated and weighed against any potential benefits. The risks are both to the quality of the judiciary, and to the financial costs of the proposed scheme.

The following points require consideration:

- a) Experience within the judiciary is of inestimable value. There is no substitute, whatever training is provided, for actual work in the role, both in terms of efficiency and speed and in terms of judgment. The proposal will restrict the benefits of such experience to victims of crime and defendants. It is not in the public interest to churn the fee-paid judiciary, as envisaged.

- b) There will always be more applicants than there are permanent positions, and therefore the effect of the proposal is the guaranteed loss of able and experienced fee paid judges, at the stage in their development when they are providing their best service to the public. It makes no sense, it is suggested, to create a system where there is deliberate wastage of the most experienced and able officeholders, not least when one considers the substantial cost and resource that has been put into selecting and training them;

- c) The loss of able Recorders will limit the pool of applicants for full-time judicial posts, particularly if younger Recorders return to practice after a single term and leave a gap, perhaps lasting several years, before they consider re-applying for Recorderships or applying for full-time posts – by which time they will have lost at least some of the benefits of regular judicial work. They may feel less of an incentive to resume it after long break, even if they remained suitable candidates. The most experienced and able Recorders who had not reached the point at which they wished to apply for a salaried position by the end of a fixed term appointment would be lost;

- d) Many practising barristers and solicitors who currently apply for fee paid judicial appointments do so wishing to continue in practice, at least in the medium term. The majority wish to combine a mark of career progression (appointment) with an evolving and progressive practice, not necessarily with a view to a salaried position in the short to medium term - albeit they may wish to consider that option in the longer term. The attraction of part time appointment includes its longevity. The imposition of a fixed term contract would dissuade the best applicants from applying, or certainly encourage them to delay such application. This would have the opposite effect of the one intended, in that it would discourage application by younger members of the profession, whom, it is noted, are more likely to be drawn from a wider pool of the community and include more BAME and women candidates (although the CBA notes an encouraging general increase in diversity within the profession, which in itself is increasingly having an effect upon appointments and will continue to do so). In fact, if, as believed, the proposals will deter applicants, this deterrence will apply equally to

BAME and female applicants and is unlikely therefore to lead to an increase in diversity within the profession;

- e) The rigorous application and selection process itself requires considerable dedication and time commitment by the applicants. The reduction in term of office will undoubtedly reduce the numbers of those prepared to apply. It should be noted that it is already those whose practices are the busiest and most demanding who are likely to be the best candidates;**

- f) The appointment process and training provided to new fee paid judges takes considerable resources and time. The period from initial application to final appointment, after residential training, prison and probation visits and judicial shadowing is (most recently) nearly 12 months (and formerly, even longer). To limit the subsequent contribution of those appointed will result in huge waste to the justice system, and of course the expense of holding competitions and training will be greatly increased with the more frequent turnover of candidates;**

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.

The CBA answered No above, but wishes to address this issue in the event that the current proposals are enacted.

In essence, the answer is Yes. If they wish to, there should be no constraints placed upon those who have held part time judicial posts applying for other such roles. However, it is the firm and considered view of the CBA that fee paid judges, even if subject to a fixed term of office, should not be prevented from further sitting in the field in which they have already gained experience, as set out above.

We are of the view that enabling fee paid judges at the end of their fixed term to apply in a different field is unlikely to be attractive to many It is noted that at present relatively few practitioners apply to sit in jurisdictions in which they do not practise. It is anticipated that very few of the best candidates who have

completed fixed term appointments would wish to change discipline, having been unsuccessful in application for a salaried position, or if they simply do not yet wish to cease to practise.

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. Should fixed terms be imposed, these should be extended in the event of life events which prevent a fee paid judicial office holder from sitting the requisite period in successive years – such as illness, pregnancy, maternity leave and career breaks. Otherwise the proposed scheme would discriminate against parents, those suffering ill-health, or other adverse circumstances.

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

No. The current fee paid judges applied for and were appointed to positions in which the terms were made clear in advance. The CBA takes the view that it would be unfair, and possibly unlawful, to unilaterally alter the terms of their appointments. Some of those recently appointed may not have applied, or may not have applied ~~when applied~~ when they did, had they been aware of the possibility of a fixed term appointment at the end of which they were expected to apply for a permanent position, or cease sitting altogether. There would have been very different considerations in timing for many. For example, those who do see a fee paid appointment as a direct route to a salaried post are likely to delay application until at a point later in their careers.

The CBA also anticipates that moving existing fee paid judges onto the new scheme might destabilise the provision of criminal justice in the short to medium term. The CBA believes that a change in the terms of appointment will have an adverse effect upon new applications and their quality, and that it would therefore be unwise to extend it with the result that hundreds of existing fee paid judicial position holders will cease sitting in 6-10 years' time. In any event, the loss to the justice system, whether in 6 years or 10 years, of the considerable contribution made by existing part time judges would be devastating.

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.

The negative impact of the introduction of the new scheme may be temporarily mitigated by a staggered introduction, but it is difficult to comment further in the absence of any precise proposal. It may be fairest, if it is to be imposed, to take into account the period of time existing fee holders have been appointed, and introduce fixed terms to the longest serving first, on the basis that they may be in a better position to decide whether to apply for a permanent post than those with less experience in the role. However, it is noted that this may have an adverse effect upon diversity in the judiciary, as those who have been appointed longest are likely to be a less diverse group than those appointed more recently. This will not mitigate the core difficulties that are inherent in the scheme.

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.

The CBA takes the view that any fixed terms should be the longest possible, in order that maximum return upon selection, training and experience can be made, and waste is avoided. Therefore the answer to this question is more than 10 years, but it should be noted that the CBA is fundamentally opposed to fixed terms of office.

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?

Please see 6. above.

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

No firm view

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

No firm view

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

Yes. It is plain that any increase in responsibilities and duties should be rewarded both as a matter of fairness and to ensure that the best candidates apply.

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.

Recorders sitting in crime are currently required to sit for up to 30 days per year. An expected sitting requirement is entirely necessary if the circuits are able to maintain business levels in the Crown Court. Recently, on some circuits, Recorders have been encouraged to sit for longer periods, and long lists of urgent vacancies are communicated frequently. Currently demand outstrips supply.

The authors are unaware of any Recorders sitting in crime claiming a fee for days sitting guaranteed but not provided, and doubts that this causes any unnecessary expense. Notably the consultation document provides no statistics or examples of this.

The CBA considers that current minimum sitting requirements should be maintained, but that the maximum should be increased generally, in the hope that this will go some way to alleviate the pressure upon the courts at the current time.

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.

No. The CBA believes that it is wrong to alter the terms and conditions of existing fee paid office holders in relation to expenses. There is, in any event, uncertainty as to how "primary base" is defined. Criminal practitioners, are not, for good reason, supposed to sit part time in the Courts where they appear regularly, for obvious

reasons. It is not clear exactly what is meant by “primary base” but presumably in most cases this will be nearest court centre, and therefore frequently the one where a practitioner appears most regularly. As a result, it is assumed that criminal recorders rarely sit in their local court, and so rarely claim expenses for doing so, and where they do, so such expenses will be minimal. If “primary base” is in fact, further away from home, there seems no good reason for what in effect will amount to discriminating against some Recorders fulfilling their sitting obligations.

Moreover, Recorders are often invited (and sorely needed) to sit at short notice, and are therefore unable to reduce their own travel costs, for instance by purchasing advance or season tickets. This does not apply to full time judges.

The CBA believes that it is unfair to unilaterally and retrospectively change the terms and conditions of appointment for existing Recorders, some of whom applied, and were encouraged to apply, to sit on circuits where they do not actually practise, necessitating both travel and accommodation costs. It would be wholly wrong for their terms of appointment to be altered after the event.

The CBA is extremely concerned that any withdrawal of expenses will not remain limited to a “primary base”. Should this policy be rolled out further, it will have an adverse effect upon the willingness of part time judiciary to travel any distance to sit, despite the difficulties that many courts experience in obtaining part time judges to fill gaps at short notice. The principal virtue of maintaining a fee paid judiciary is that they are available for deployment at short notice over a wide geographical area. The Midland Circuit, for example, stretches from Lincoln to Hereford. Many recorders sit at a number of different courts, rather than at a single court centre. Courts struggling to arrange for recorders to sit at the last minute will undoubtedly struggle even more if travel expenses were removed.

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. We accept that there is an adverse impact caused by retirements without notice, but as fee paid judges such as recorders are required to sit only for a certain period in 12 months, it is hard to see how any reasonable term of notice, such as 6 months, would have any real practical effect.

For full time judges, we agree that a period of 6 months' notice seems reasonable, with provision for judges whose health or personal circumstances mean that it is fair and reasonable for them to give a shorter period of notice.

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.

Please see answer to 13. In relation to part time judges, it is hard to envisage circumstances where a notice period would have any effect upon the conduct of business in the courts, save where sitting periods have been pre-booked. In this case, we suggest a 3 month notice period would be fair unless there are circumstances such as ill health or personal difficulties which mean that it is reasonable to give shorter notice.

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.

The CBA takes the view that the terms of appointment of existing fee paid judges should not be subjected to any unilateral changes. It follows that as much notice as possible should be given of any changes lawfully imposed.

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

The effect of the proposals will be to de-skill the whole judiciary. The CBA considers that insufficient consideration has been given to the impact upon the justice system of losing so many highly skilled and experienced part time judges, or to the value of that experience gained over many years. It is our view that the experience gained by sitting cannot be replicated by training and that any proposal which disposes of office holders who provide an expert service is misconceived. The current position is that there is a shortage of judges available, evidenced by the frequent requests from courts all over the country for criminal recorders to sit at as little as a day's notice. Any proposal which will result in a loss of a number of

highly experienced and trained judges, or adversely affect the quality and number of applicants to the role, should not be considered.

Insufficient consideration has been given to the increasing need for specially trained recorders to try sex cases and more serious crime. It is usually only after a number of years that recorders are able to try the more serious cases and those that can do so are sorely needed. It is precisely those part time judges who will be lost through the imposition of a fixed term. The proposals militate against the deployment of the most experienced and able members of the part time judiciary.

We can see no reason whatsoever why the application of an arbitrary time limit should prevent successful and highly regarded practitioners, with experience of several years sitting from continuing to play an important role as members of the part time judiciary.

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.

We feel that the single most destructive element in reducing diversity in the profession, and therefore the judiciary, is in the reduction of fees in relation to publicly funded work. There are fewer and fewer pupil barristers with the means to begin practising in publicly funded areas of work, particularly crime. The effect of this upon diversity within the profession will be catastrophic unless steps are taken to redress it, because BAME, female or lower income candidates are less likely to be in a position to fund their training and early years in practice in these areas. Our very real concern is that it is this that will have the greatest effect upon the future diversity of the judiciary.

Increasing the turnover of fee-paid judges by limiting the term of appointment will only improve diversity if it is combined with initiatives which in themselves promote diversity. The CBA is extremely concerned that the proposals will seriously harm the administration of the criminal courts as a whole, despite its-~~its~~ their perhaps superficial attraction as a way of more rapidly achieving desirable changes in the demographic of the judiciary.

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.

We believe that for the reasons outlined above, fixed term appointments will have a negative effect upon applications generally, and that this will reduce the numbers of BAME and female applicants. We believe that there has been a real increase in the number of female barristers, barristers from the BAME community, and from lower income backgrounds over the last 20 years. However, we do not believe that these proposals are the way to encourage any applicants to apply for part time judicial positions. Furthermore, we do not consider that these proposals are conducive to maintaining standards within either the part time or the full-time judiciary in the long term, which, ultimately, is of the greatest importance.