



The South East Circuit Response to the Consultation Entitled 'Modernising Judicial Terms & Conditions' (29/11/16)

*Questions pertaining to this response, to, Aaron Dolan
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Introduction

1. The South Eastern Circuit (SEC) represents over 2,000 employed and self-employed members of the Bar with experience in all areas of practice and across England and Wales. It is the largest Circuit in the country. The high international reputation enjoyed by our justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners.

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.

The SEC opposes in principle any proposal for a fixed term and/or a non-renewable term for the reasons below. In essence, the SEC believes that such proposals would:

- be wholly ineffective and in fact counter-productive as a tool for expanding diversity in recruitment;*
- reduce substantially the listing and cost flexibility in the courts system that is currently achieved via the wide-ranging availability of a pool of competent and experienced part-time judges; and would furthermore lead to a significant escalation in the costs of recruitment;*
- remove much of the incentive for competent advocates and lawyers with relevant expertise to contribute part-time to judicial sitting;*
- diminish the quality of fee-paid judges by terminating their service at the very point where the combination of training and experience has potential to render them most effective;*
- appear to encourage a move to a purely professional judiciary deprived of the experience and symbiosis gained via the long-term contribution of part-time judges;*

- risk rendering fee-paid judges with fixed tenure susceptible to - or at least having the appearance of being susceptible to - pressure from the executive, thus offending against the fundamental principle of providing an impartial tribunal;

- be mistaken in their suggestion that at the end of any term a fee-paid judge, expert in specialist skills in one area (for instance, managing jury trials) could or would easily apply for and obtain a full-time or 'another' fee-paid position; it is not realistic to assert that there would be any incentive to apply for 'another' position, as the consultation implies.

The said concerns are expanded hereunder:

1) The expense and effort now required to gain appointment as a fee-paid judge have grown considerably. Non-renewable, single terms would significantly inhibit many highly competent and eligible candidates from applying, for the simple reason that the rewards for undergoing the application process would not justify that investment of time, money and emotion. The prospect of a fixed term is likely to deter many good candidates, and thus defeat at least one of the objectives this consultation purports to seek – a wider field of entrants to the position. These concerns will be felt disproportionately by those candidates with more onerous family and/or financial commitments and burdens, thereby adversely affecting the recruitment of those candidates the JAC most wishes to encourage.

2) By effectively forcing candidates after a fixed term to consider applying for a different or a full-time position or ending their service, the system loses a precious resource that the post of fee-paid judge has always provided: that is, a pool of highly experienced part-time judges who have developed expertise that they can impart and use, thus providing invaluable service to the judicial system, without their being required to become full-time judges (an avenue some of them may not wish to pursue.)

The Impact Assessment accepts the likely loss of this pool, but purports to negate its loss by suggesting that HMCTS reforms (not specified) would reduce the need for that pool: the SEC would contend that:

i) currently the pool, far from being able to bear reduction, urgently needs expansion, as illustrated by the continuous shortage of Recorders on all circuits; and

ii) extreme scepticism should be applied when suggestions of future 'reform' becomes the basis for removing what has been - and continues to be - a real boon to the courts and judicial system.

Regarding item (i) above, it would be useful to note that if tenure of six years were introduced now insofar as Recorders are concerned, and those appointed in 2009 or before thus terminated, the result would be that only at most 200 Recorders would remain - a figure so absurdly low that no

discussion of its effect is necessary herein. The cost of recruitment alone to make good that loss would outweigh any purported benefit of such an exercise, and the cost of continual recruitment rounds would remain as a financial burden in the longer term. Moreover, the commercial impact notwithstanding, the loss of the large pool of experienced Recorders would be incalculable.

The value of experienced part-time judges to the judicial system is enormous, allowing great flexibility in cost control and court listing, a flexibility that would be significantly diminished. The post of Recorder and other fee-paid positions should not in any event be designed only as paths to the full-time judiciary.

3) The effect of the proposals would be to terminate the service of any fee-paid judge at that very point where she/he has potential to achieve an optimum level of performance based on the combination of acquired confidence, experience and training, effectively gained by sitting for about 4-6 weeks a year for a number of years. The SEC could not agree any suggestion that that optimum level of performance could be reached within 6, 8 or even necessarily 10 years' service (depending upon the judge and her/his background and qualities.) For instance, a Recorder sitting on average 5

weeks a year for 10 years would in temporal terms have reached the equivalent of a full-time judge sitting for barely a single year; no judge, having sat full-time for only one year, could possibly be said to have reached her optimum level of performance. The result of the proposals would, insofar as its effect on the quality of the fee-paid judiciary is concerned, be wholly counter-productive, and may actually lack sound commercial sense, given the additional costs of continual recruitment thereby incurred.

4) Regarding the stated objective of increasing diversity: the SEC would observe that the last two Recorder recruitment exercises in 2012 and 2015, carefully designed by the JAC and made more competitive, were conducted with criteria pertinent to that objective at front and centre of those exercises, and realised the achievement of highly successful outcomes with regard to that objective. Given, therefore, that the last two Recorder recruitment rounds have made significant steps towards the aim of greater diversity, and given that no doubt those in future will similarly perform, it is clear that this objective is already steadily being met without the need for the introduction of measures that would actually be detrimental to the judicial and courts systems, would be financially burdensome, and may well have a negative effect on diversity. Should there be any concerns – though none are stipulated in the consultation – as to the quality of some fee-paid judges of long

standing, the proper manner in which to address quality should be to utilise the ongoing appraisal process to which new Recorders (as well as many other fee-paid judges) are already subject.

5) There would be a real danger that 'fixed tenure' judges would not be sufficiently independent of the government because their appointment would be subject to renewal, or applying for and obtaining another fee-paid position, or applying for and obtaining a full-time judicial position. That may potentially render them insufficiently the impartial tribunals required by, *inter alia*, article 6 of the Human Rights Convention. The Scottish decision in *Starrs v Ruxton* may have relevance in this regard.

6) The SEC believes that the consultation is not realistic, perhaps disingenuous, in its suggestion that at the end of any fixed term a fee-paid judge could or would obtain a full-time position, or in the alternative, 'another' fee-paid position. It implies that a specific path would exist by which either of the said options could be pursued - outwith that of simply applying as and when recruitment exercises are commenced - when no such path is identified. As far as can be discerned regarding end of tenure, no specific proposals are made for cross-ticketing (with accompanying retraining) or for appropriate fast-tracking to other posts. The consultation is

thus disingenuous in its implied assertion that the obvious disincentives (as particularised above at sub-paragraphs [1] and [2] above) to apply for a short fixed term position could be ameliorated by the prospect of some other future 'position'; no such counter-incentive is specified by the consultation.

Moreover, in its focus on applying for a full-time position subsequent to any short fixed term, the consultation downplays the invaluable service and resource that part-time, experienced judges provide to the courts system, for all the reasons stated above, and fails properly to account for the fact that many lawyers of appropriate quality and expertise, who can contribute as part-time judges, may not wish to become full-time. That resource would largely be lost, to the enormous detriment of the judicial system.

The SEC also believes that a specific problem arises in respect of many part-time judges, most obviously Recorders, who sit as experts in their field, and bring that expertise to the forum. (For example, a criminal Recorder, expert in managing jury trials, may not be in the best position after a 6 year fixed term to apply in open competition to sit as a family judge.) By excluding such candidates from providing their invaluable service beyond a short fixed term, the proposals fail to recognise the fact that, and extent to which, the judicial system would be deprived of their contribution.

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.

No to Q1.

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.

No to Q1.

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

No.

The SEC first refers the consultation to the full answer to Q1, and the arguments therein against 'the' or any 'new fixed term'. However, the SEC also believes that existing fee-paid judges have been taken on with a clear, firm and balanced understanding that involves both obligations and commitments on the part of both the judge and the MoJ. Those judges have understood and agreed that provided they attend ongoing training, make themselves available and/or are booked for 6 or 4 weeks a year, and do not fail any ongoing or other appraisal process, they will be able to serve as judges. This was the basis upon which they applied for the position, upon which they underwent a time-consuming, costly and rigorous selection

process, and upon which they accepted the position. Radically to revise only one party's set of corresponding obligations and commitments would be contrary to any sense of natural justice, and would unbalance the arrangement.

Were this proposal to apply to future Recorders, then at least in their cases they would not be applying under a false understanding of what the arrangement is to be. To impose it on applicants who applied, as stated above, under a very different impression of the obligations and benefits that applied, would be patently unfair.

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 SEC's primary position, as stated above, is that fixed terms are inappropriate for a number of reasons detrimental to the best interests and administration of the judicial system generally, and detrimental to the stated objectives of the proposal. That position remains unchanged, be that in respect of new or existing judges.

In the event that fixed terms were introduced, in order to have the least effect upon existing judges, and to reduce the various detrimental impacts already detailed above, it would be at least logical and rational to introduce any fixed terms on a staggered basis.

Furthermore, given the highly detrimental effects upon cost control and recruitment also detailed above, it is probably imperative that the introduction of fixed terms be staggered to a considerable extent, if only to ameliorate the damage done.

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.

For all of the reasons already stated above, any fixed tenure would be wholly counterproductive to obtaining the best candidates and to achieving the purported objectives. However, drawing upon those reasons, the SEC believes that the brevity of the periods proposed would have detrimental effects, in particular:

- the amount of effort required to become a part-time judge is now so great that in some cases potential applicants (especially those with financial and family constraints) would consider that the burden of the application process would outweigh any benefit if a short period of 6 or 8 years were stipulated, and even 10 years would prove an inhibition;
- the effect of the proposals would be to terminate the service of any given fee-paid judge at that very point where she/he has potential to achieve an optimum level of performance based on the combination of acquired confidence, experience and training, effectively gained by sitting for about 4-6 weeks a year for a number of years. The outcome of the proposals would be,

therefore, insofar as its effect on the quality of the fee-paid judiciary is concerned, entirely negative;

- regarding existing part-time judges, the nature of the agreed arrangement that sets down expectations and commitments on both sides would be seriously undermined, and the extent of this damage would directly proportional to how short the new fixed term were to be.

In view of all of the above, the SEC cannot stipulate any period as being appropriate, as none is.

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?

The SEC believes that 'the' or any fee-paid tenure would be undesirable for the reasons stated above. And for those very same reasons, already stipulated, it would have a direct effect detrimental to the objective here expressed as retaining 'the necessary level of expertise'.

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

The SEC takes the view that as a general proposition there should be, as proposed, some standardisation of leadership roles, and that such roles might be subject to fixed term. The principles of good governance also require timely changes in leadership. A current example is the position of Resident

Judge, a fixed term. It is however renewable. There would seem to be little reason why all such positions should not be renewable to some extent.

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

As per Q8.

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

See Qs 8 and 9 above as to fixed terms. However, the SEC would add that any elevation in responsibility/required workload of such significance as to require the creation of a new position or role must be accompanied by a concomitant uplift in remuneration – a principle that, it is presumed, will now be generally applied by the MoJ in any event.

It is therefore anticipated that the creation of any and all leadership roles, be that Resident Judge or any other such role, will, under the auspices of this new scheme, carry with it proper and additional remuneration.

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.

The SEC believes that there should be a range of agreed and understood commitments and benefits for both sides of any arrangement. One has to query why any practitioner should enter into any commitment where the MoJ does not enter into any concomitant commitment. Any fee-paid judge will

have another position, employment or practice to maintain and balance with her/his fee-paid position. The proper position should be that the office holder should agree to make themselves available for a number of days but also that the MOJ should at least guarantee a minimum number of sittings. It is moreover imperative that proper and reasonable notice periods for cancellation of sittings be specified. Some fee-paid positions (tribunals) already operate under a condition of 48 hours' notice of cancellation of sitting. In order to provide fair outcomes, and to provide a standard across the board, this should be extended across all fee-paid positions.

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 SEC would draw close attention to the fact that many fee-paid judges sit at courts a long distance from their place of residence, often because they are required to sit at a wide variety of courts; indeed, that is very much part of the invaluable, flexible service they provide to the courts system. In the case of Recorders, many have been specifically instructed to sit on a circuit far from their own geographical area of practice and/or home; in their case, there will not be any 'primary base' to nominate, as any court meeting that definition would not and could not exist. Travel in that context will always be expensive and will often necessitate overnight stays. The SEC does not recognise how this proposal is compatible with the situation of Recorders, in

particular those instructed to sit 'off-circuit'. (The contrast with salaried office-holders could not be more stark, in that they are offered a long-term appointment at a stipulated base, and thus have the opportunity to relocate without fear of then being variously deployed elsewhere.) So far as Recorders are concerned, the SEC believes that there is what appears to be a fundamental misunderstanding of their position on the part of this consultation.

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

It is conducive to the efficient running of the judicial system that some notice of such plans should be given.

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.

In view of the fact that retirement decisions are often made owing to problems ranging from personal health to the well-being of other family members, an unduly long period of notice may well be impractical. Three months would be appropriate and not unduly burdensome on the MoJ.

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 SEC notes that there are a number of various proposed changes upon which consultation is sought. The period of notice would depend upon which, if any, of the proposals were implemented.

With regard to fee-paid judges, however, many have accepted the position on a given understanding, and many will have agreed to sit and/or arranged their diaries over at least a 12-month period, then any period less than 12 months would be unfair. Two years notice would be more rational, depending on the extent of changes, if any, decided upon. It is accepted that if the proposal were to apply only to new appointments hereafter, in itself notice becomes less problematic (the many other problems with these proposals notwithstanding.)

However, in respect of the overall effect on the courts and judicial system of the loss of the pool of experienced part-time judges - as detailed variously above - the effects would be so deleterious that in order to ameliorate them the introduction of any of the fixed term proposal would realistically require notice of their introduction far beyond two years.

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

No.

For the reasons already stated above.

Question 17: Are there any proposals, other than those in this consultation, that you consider would improve the judicial career path, help modernise the judiciary in line with wider reform, or improve judicial diversity? Please give reasons and supply evidence as appropriate.

The SEC believes that the proposals in the consultation will not serve to achieve the stated aims.

On-the-job appraisal, in combination with continuing training and professional development, is a far more subtle and useful tool for maintaining and retaining the necessary level of expertise and standards for fee-paid judges. Diversity is being achieved by the steady progress being made in recent recruitment competitions, and no doubt will continue to progress.

It should be noted that the proposals in this consultation would have directly adverse effects, particularly in discouraging entry into a judicial career at all, and in their disproportionate effect upon those very applicants for a judicial career path that the proposals purport to encourage.

The SEC would further observe that reference to 'career path' is an indication of the rather too narrow approach that this consultation adopts, in particular in its failure to recognise that fee-paid judges offer a valuable, flexible contribution to judicial workload, which complements that made by the full-time 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.

See those issues and matters already cited by the SEC above.