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Ministry of Justice,  
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1 December 2016

**Re: Modernising Judicial Terms and Conditions and Transforming our Justice system consultations**  
**Response to the consultation documents of September 2016 by the Tax Law Review Committee ("TLRC") of the Institute for Fiscal Studies<sup>1</sup>**

## Introduction

- (1) The Modernising Judicial Terms and Conditions Consultation Document sets out proposals to introduce a new tenure for fee paid office holders, provide for fixed term leadership positions, and modernise judicial terms and conditions. The TLRC is responding to the proposals regarding the introduction of new tenures to newly appointed and possibly existing fee paid judges. It is responding from the perspective of expertise in tax and with particular regard to the impact of the proposals on the Tax Chamber. Although many of the comments may apply to other Chambers, practitioners in those areas will be able to offer better informed insight.
- (2) The Transforming our Justice System consultation put forward proposals regarding panel composition. We realise the consultation closed on 24 November 2016 and apologise for commenting late, but given the considerable involvement of this Committee in the tax tribunal reform in the 1990s and early 2000s, plus the considerable effort put into the reform process up to 2009 by both the consultative group and the steering committee (with which TLRC members were heavily involved), we felt it incumbent upon the TLRC to comment on these proposals.
- (3) In summary, the TLRC considers that the fee paid tenure proposals risk undermining the expertise of the tax tribunals, (both the First-tier Tribunal (Tax Chamber) and the Upper Tribunal (Tax and Chancery Chamber)) and as a result the quality of decision making in

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<sup>1</sup> The Tax Law Review Committee was set up by the IFS in autumn 1994 to ask whether the tax system was working as intended, efficiently and without imposing unnecessary burdens. Its role is to keep under review the state and operation of tax law in the UK. It does not seek to question Government policy as such but to look at whether existing arrangements or particular proposals achieve the policy in a satisfactory and efficient way. The current membership of the TLRC is annexed to this submission.

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them; and are likely to deter high quality candidates from applying for new fee paid roles. We welcome steps to increase diversity in the judiciary, but we are concerned that the proposals will have the opposite effect.

- (4) In relation to the panel composition proposals, the TLRC would ask that account is taken of the fact that the current arrangements for the tax tribunals were the result of a huge amount of work to get them right. It was not the case of importing what had happened before. Panel composition was an element given considerable thought and the ability to have tribunal panels with the appropriate expertise for the case is vital to the proper administration of justice. Determining whether specialist panel members are required should therefore remain a matter for the Tax Chamber President and the budget process should recognise the need for the members, not prevent their use.

### **Modernising Judicial Terms and Conditions**

**Questions 1 and 4: Should new fee-paid judges in both the courts and tribunals be on a single non-renewable fixed term; and should existing fee-paid judges also move onto the new fixed term? Answer: No, for the following reasons.**

- (5) The UK tax system is notoriously complex, relying upon volumes of highly technical legislation as well as caselaw. As well as finding facts the tax tribunal judges need to determine and apply the highly technical tax law. It is vital that those judges possess the necessary technical knowledge in order to understand the legal arguments involved so that appropriate fact finding can take place. The judges' role is not necessarily limited to addressing issues raised by the parties. In particular, in cases which often arise where the taxpayer is not represented, or is not well represented, the Tribunal frequently has to reach its own view on the correct amount of tax. This is not a jurisdiction (unlike many others) where the necessary technical knowledge can be imparted through a few days' training. That means that, unlike other jurisdictions, it is not possible to ticket judges across with judicial experience simply because of their judicial experience. Therefore the pool of potential judges in the tax tribunals is smaller than in other jurisdictions. The proposals risk reducing the size of that pool and risk deterring people from a range of backgrounds, including women and BAME individuals, from applying for tax tribunal roles for the following reasons.
- (6) Many applicants for the role of judges in the tax tribunals seek to combine that role with other commitments. Where these are work commitments their employer may be prepared to countenance a judicial commitment, despite the impact on existing work and colleagues, because of the potential for personal development of the individual involved and for the experience that can be shared with colleagues. However, if employers were to perceive that the individual would be expected to move into a salaried role there would be a disincentive to risking the loss of a talented individual in a few years. Individuals we have spoken to who

were appointed to the tax tribunal have said that they would not have applied if the expectation was to move onto a salaried role. Therefore the proposal is likely to reduce the available pool of tax tribunal judges.

- (7) Moving between jurisdictions requires significant investment of time by the judges involved. That time is unpaid. The judge will need to spend their own personal time learning about the new jurisdiction. While some are prepared to do that, not all have the ability to do so given other work commitments and many simply will not want to move out of the area in which they have expertise. Assuming salaried roles are on offer (and we do not see how this would regularly be the case without fundamentally changing the fee paid/salaried profile of the tax tribunals and also requiring salaried judges to regularly move on), the alternative of taking on a salaried role may not appeal to the tribunal judge who wishes to continue in their current work, whether because of wishing to maintain elements of that work such as client interaction, or because of the financial penalty that will arise from moving onto a judicial salaried role and giving up their main work. The idea of being required to move into another jurisdiction or take on a salaried role will therefore effectively deter potential applicants.
- (8) There are some judges for whom their tribunal role becomes their only one. The advantages of flexible working can be particularly attractive, especially for individuals with commitments outside work such as children or adult dependants. The changes proposed risk deterring those potential applicants from applying to be tribunal judges. They simply do not want the lack of flexibility which comes with a salaried role and may find it more difficult to devote the considerable time to acquiring the knowledge needed for other jurisdiction. The changes will have the opposite effect to that stated as an aim: they will deter some individuals from applying who otherwise would have done.
- (9) If the solution to the reduced numbers of potential applicants was to ticket across judges from other jurisdictions the problems caused by lack of technical knowledge would include the increased likelihood of errors in law. Those errors would result in more appeals, or justice not being done where the losing party cannot afford an appeal.
- (10) Finally, it is clear from those of our Committee who are judges themselves that regardless of the extent of previous technical expertise, the skills involved in the tax tribunal take years to develop. The disruption caused by the routine recruitment and loss of tribunal judges serving only a 5 year term will divert resources within tax tribunals away from judging to training, mentoring and appraisals, and risks the tax tribunals being staffed by a majority of judges who lack the requisite expertise.
- (11) Therefore for all these reasons the answer to both questions 1 (should new fee-paid judges in both the courts and tribunals be on a single non-renewable fixed term) and question 4 (should existing fee-paid judges also move onto the new fixed term) is no.

**Transforming our Justice System: Do you agree that the SPT should be able to determine panel composition based on the changing needs of people using the tribunal system?**

**Answer: No, for the following reasons.**

- (12) The tribunals are not all the same and their needs for operating are not the same. The basis for determining the composition of the tax tribunals was worked out after considerable consultation in order to ensure that “the most appropriate specialist expertise or knowledge for individual cases”<sup>2</sup> is provided. That is the stated aim of the consultation proposals and that is what the existing arrangements are designed to achieve as set out in the Practice Statement on the Composition of tribunals. Panels are not based on historical precedent. It is not the case that all cases of a particular type have a particular panel composition (as is the case currently in the Social Entitlement Chamber). Instead the Chamber President determines the composition of the tribunals.
- (13) The specialist knowledge, whether of accounting practise or of another speciality, is critical to the proper analysis of the transactions undertaken by taxpayers and the resulting tax treatment. For example, accounting and bookkeeping expertise is often relied upon by the tribunals in back duty cases; or surveyors may be used to provide expert insight on cases involving land and buildings. This is in stark contrast to the needs generally in the First-Tier Tribunal (Immigration and Asylum), quoted by the consultation document as an example of a tribunal where only one judge is usually required. However, we note that even in the Immigration Chamber the President of the Chamber or Resident Judge can determine that further panel members are needed in the interests of justice.
- (14) For these reasons the answer to the question of whether the SPT should set the tribunal composition is no. The decision should remain with the Chamber President and the budget process should recognise the need for the members, not prevent their use.

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<sup>2</sup> Paragraph 7.3.4 of the consultation document