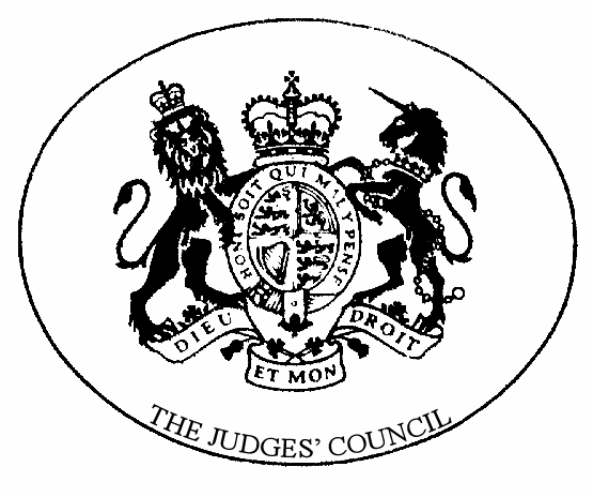

Response of the Judges' Council to the Right Honourable Lord Falconer of Thoroton

Judicial Diversity: Return to Practice by Former Judges

Report of the Judges' Council Working Party to the Secretary of State and Lord Chancellor on his questions concerning Judicial Diversity: Return to Practice by Former Judges.

1. On 21 October 2005 the Secretary of State and Lord Chancellor informed the Lord Chief Justice that he had decided that judges below High Court level should be able to return to practice. He told the Lord Chief Justice that he intended to announce his decision on 2 November 2005 and that, at the same time, there would also be announced a consultation exercise, to be completed within the month of November, on the following two matters:

    1. The conditions upon which the return to practice should be permitted for those who have held judicial office below High Court level, and the safeguards to be put in place.

    2. Whether those who have held judicial office at the level of High Court judge or above should also be permitted to return to practice and, if so, on what conditions and with what safeguards.

2. By letter of 24 October 2005 the Lord Chief Justice urged the Lord Chancellor to consult the Judges' Council on the principle of permitting former judges to return to practice. By letter of 1 November 2005 the Lord Chancellor agreed so to do, and indicated that he would write formally seeking the views of the Judges' Council on the issues involved.

3. In anticipation of this formal request the Judges' Council set up a Working Party.[1]

4. The Working Party first met on 9 November 2005.We understood that the central question to be addressed was what are the objections of principle to removing the current prohibition on return to practice by former judges, i.e. judges at all levels of the judiciary and not simply at a level below that of the High Court. We further understood that the Lord Chancellor would be likely to seek the views of the Council on two further questions:

    1. Which of these objections of principle cannot be overcome by posing safeguards or conditions – whether those set out in the Department's draft Options paper and questionnaire dated October 2005, or others? If any further safeguards or conditions would be required, what are they?

[1] Lord Justice Pill, Lord Justice Gage, Chairman, Mr Justice Tomlinson, Mr Justice Patten, Mrs Justice Macur, Judge Keith Cutler, Hon Sec Council of Circuit Judges, District Judge Michael Walker, Hon Sec Association of District Judges and Senior District Judge Timothy Workman. The Working Party was asked to report to the Judges' Council at its next meeting on 13 December 2005 with a view to the Council responding to the Lord Chancellor before the end of the year.

2. The comparisons between salaried and fee-paid judges so far as return to practice is concerned. Specifically, are the roles and functions of a holder of fee-paid judicial office so different from those of a salaried judge as to justify prohibiting the salaried judge from ever returning to legal practice, while a fee-paid office-holder is able?

5. The members of the Working Party accordingly sought the views of their respective constituencies on this basis. On 14 November 2005 the Lord Chancellor wrote formally to the Lord Chief Justice seeking the views of the Judges' Council on the proposal that former judges below the level of the High Court should in future be permitted to return to legal practice after they cease to hold judicial office. It was in that context that the Lord Chancellor now posed the three questions upon which the Working Party had understood it was likely that the Council would be consulted.

6. It will be appreciated therefore that the members of the Working Party consulted their constituencies on a broader question than that on which the Judges' Council has now been asked for its views. That consultation exercise revealed virtual unanimity of view amongst the judiciary at all levels that in this matter there can be no justification for drawing any distinction between judges at different levels of the judicial hierarchy. Given the strength of feeling on this point the Working Party proposes to give its views on the broader questions on which it originally understood the Council was to be consulted. It should perhaps be added that the Circuit Bench is plainly considerably disillusioned by the increasing number of initiatives or projects which are of application only to judges at their level. There is a strong and in the view of the Working Party understandable feeling that that which is demeaning to the office of High Court Judge is equally demeaning to the office of Circuit Judge. As it happens this consideration is of particular relevance to the question in hand because of the predominately local jurisdiction habitually exercised by Circuit Judges and District Judges. We refer to this point later.

7. The topic on which we have been asked to comment is a broad one with wide ramifications. The time-scale within which we have been asked to respond is extremely short. We propose to respond in short order. We do not in this paper attempt to analyse the issues in the detail attempted in the draft Options paper "Increasing Diversity in the Judiciary – Return to Practice." We are not in a position to say whether there are arguments to be considered in addition to those set out in that paper and we are not attempting to respond to the questions raised in it.

8. **What are the objections of principle to removing the current prohibition[2] on return to practice by former judges?**

9. Before addressing this question we must make three preliminary points.

(i) We do not accept that there is any current prohibition on return to practice by former judges, although some consider that there should be such a prohibition. We do accept that currently there is an unwritten convention by which many perhaps most full time judges regard themselves as bound, subject to what we say at sub-paragraph (ii) below. We do not however accept that that convention represents an enforceable obligation. There is of course a recent high profile instance of a High Court Judge who left the bench in order to join a firm of solicitors as a consultant. So far as we know the Department did not in that case attempt to suggest that any existing prohibition represented an impediment to the judge's plans. It may be said of course that the judge in question had no intention to engage in work which falls within the legal profession's statutory monopolies. We doubt if that point is or would be widely understood by the public whose confidence in the judiciary is at stake. However we need not take time on this point and the details of a particular case do not matter. In general return to legal practice involves a return to the legal market, where work is done for reward for a cause.

Paragraph 72 of the current Terms and Conditions of Service of a High Court Judge, in the 9th edition issued in January 2004, provides: -

> "Appointments to judicial office are intended to be for the remainder of a person's professional life. Judges who accept appointment do so on the understanding that following the termination of their appointment they will not return to private practice as a barrister or a solicitor and will not
>
> (a) provide services, on whatever basis, as an advocate (whether by way of oral submissions or written submissions) in any court or tribunal in England or Wales;
>
> (b) In return for remuneration of any kind, offer or provide legal advice to any person."

Paragraph 74 of the 8th edition issued in October 2000 is in identical terms and the same wording is used in the terms and

[2] We use the language of prohibition because that is the manner in which the Lord Chancellor's question is posed in his letter of 14 November 2005 to the Lord Chief Justice.

conditions of appointment and service relevant to Circuit Judges and to District Judges. The language of an "understanding" seems deliberately to have been adopted in recognition that the language of enforceable obligation would be inappropriate.

(ii) Insofar as there is, as we believe, an unwritten convention, it exists in the context of the terms and conditions of service advised and offered on appointment. Many judges are likely to think that, by analogy with the process of dissolution of contract brought about either by frustration or by accepted repudiatory breach, they are not bound by any such convention or understanding which they may have acknowledged on appointment in the event that their terms and conditions of service are fundamentally altered to their detriment. Many judges will regard the provisions of the Finance Act 2004 so far as it impacts upon the real value of the judicial pension offered to them on appointment as having that effect. We propose to put that issue, which is we hope a one-off short-term consideration, to one side and to consider the issue as a matter of broad principle.

(iii) In our view it is vitally important to distinguish two issues. A differently constituted Working Party of the Council has already supported the need for increasing diversity in the ranks of the judiciary – see its Response to the Consultation Paper – Increasing Diversity in the Judiciary (CP 25/04). That Working Party said, at paragraph 31 of its Response: -

> "It is universally agreed that members of the full-time judiciary should be precluded from returning to practice. If this were not so, it might be seen seriously to undermine judicial independence. At present, those who have not finally committed themselves to giving up practice can always take part-time posts."

Those observations were made in the context of the existing nature of our judiciary, i.e. that it is a judiciary which traditionally has been appointed from amongst the ranks of those who have demonstrated their suitability by their achievements in other fields. We put it in that broad way so as to acknowledge that appointment has in recent times been extended to embrace, for example, those who have demonstrated their suitability by, for the most part, their achievements in academic rather than professional life. But the point is that we do not have a career judiciary on the continental model. If we are to have one, it should be a considered move, undertaken against the backdrop of wide public consultation and parliamentary discussion. The introduction of a career judiciary would represent a fundamental departure from our tradition. Some might think that, the judiciary being one of the three arms of government, so radical an alteration to its traditional structure would have constitutional implications. It would in our view be

> wholly wrong to sidle towards something more closely resembling a career judiciary under the guise of adopting measures apparently designed to bring greater diversity to the judiciary as currently structured. If it is thought that we cannot have a sufficiently diverse judiciary without that judiciary being a career judiciary, a view with which we profoundly disagree, that should be the starting point for a wide and explicit debate on the structure of the judiciary, not the unstated pretext for tinkering with the existing structure.

10. Subject to those preliminary observations the major objection of principle to removing the current prohibition is that if return to practice became the norm or even something which was overtly permitted or encouraged it would inevitably diminish the standing of the judiciary and seriously weaken its independence. We found overwhelming support for this view amongst the judiciary below High Court level and amongst the judges of the Court of Appeal. It is the view of a clear majority of Queen's Bench Judges and amongst the judges of the Family Division who responded there was only one dissentient. Some judges of the Chancery Division also take a different view. They consider that judges of all ranks should be allowed to return to practice if they so wish and that no specific safeguards are necessary.

11. The underlying rationale for the very strongly held majority view requires little elaboration. It is a matter of perception, as always so important to the maintenance of confidence in the standing and integrity of an institution. It may be the case that ex-judges, soon to be ex-judges or possibly to be ex-judges can be relied upon not to abuse their position or to allow considerations related to their future or possible future employment to compromise their independence of the parties and their legal advisors with whose cases they deal. But if the public in general or litigants in particular know that judges may be returning to the legal marketplace, the perception of possible bias will be a constant threat. That perception will be present whenever a former judge appears as advocate before a former judicial colleague. In the commercial market too much can turn on the client's perception of increasing his chances by the use of a respectable, reputable and well-connected representation. The track record of being a judge is commercially saleable, but should not be on the market. It has similarities with the saleability of being a former minister or senior civil servant, the exploitation of which has not enhanced the standing of the relevant arms of public service. The perception of bias will also arise where a litigant appears before a Judge who, say, three months after the conclusion of the case, joins the firm of solicitors which represented the litigant's opponent party. It is also worth adding that a situation in which return to practice became the norm or even something which was overtly permitted or encouraged would we think inevitably impair the trust and confidence which judges at all levels habitually place in one another and which traditionally informs the frankness and openness of their discussions.

12. We recognise that there is here a danger of pomposity or excessive self-importance. We hope that we have borne it well in mind. However we consider that the office of judge and the job of judging is different from any other. On a formal level the taking of the judicial oath alone is a feature which marks out the office as occupying a special position in our society. The job is conducted very largely in public, and usually involves dispute resolution by a person who the disputant parties have not chosen and over whose (a) appointment and (b) allocation to their case they have no influence.

13. We do not consider that this objection of principle can be overcome by imposing safeguards or conditions. The nature of the objection is such that it remains the same whenever return to practice becomes even something which, whilst not the norm, is nonetheless overtly permitted or encouraged. That is because return to practice means a return to the legal market, where work is done for reward for a cause and for a litigant. In that regard we would draw a sharp distinction between a return to arbitrate, to mediate, or to give expert evidence in a foreign court as to the law of England and Wales. Although all those tasks are routinely carried out by those in private legal practice, the tasks involved all require the exercise of independence, objectivity and authority, these being the hallmarks of a judge. It seems to us that the conduct of those tasks for reward by a former judge is quite different in character from a return to private legal practice. We are also conscious that this is capable of being attacked as special pleading on behalf of those who are well-placed to exploit this particular and lucrative post judicial career opportunity. It goes without saying that if it became the norm for judges to accept appointment and to act in that capacity only for so long as was necessary to give themselves a reputation to exploit as an arbitrator or a mediator in the commercial market that would bring the judiciary into disrepute. It would not however, we consider, strike at the standing and integrity of the judiciary in quite the same way as would a permitted or encouraged return to private legal practice. It would be more a commentary on the individuals prepared to act in this way than a perception of a systemic opportunity for bias and a systemic lack of independence. As it is, these considerations do not apply where the relevant activity is undertaken after completion of a full judicial career and retirement at an age acknowledged to be normal in society as a whole.

14. We would add that our firm adherence to these views is underscored by our scepticism that the existing convention is in fact a serious obstacle to diversity amongst the judiciary. We can well understand that it may sometimes be an obstacle to appointment at an earlier age than is currently the norm. That however is a different point, to which we have already adverted in our general observations. Given the current structure of the judiciary, the only reason for allowing a return to practice seems to be to enable candidates to feel that they can return to practice if they realise post-appointment that they have made a mistake and that a judge's life is not for them. This problem is however addressed by the now almost universal practice of undertaking fee-paid part-time judicial work before consideration for full-time appointment. Moreover the present system requires a commitment from the putative appointee which

is, we think, likely to result for the most part in the appointment of candidates of the right quality, having the appropriate determination and future aspirations. If judicial appointment could be accepted on a more opportunistic basis, without the need for a commitment of the sort presently required, we could not be confident that the present quality of the bench at all levels would be maintained. This is a comment not just on those who might apply for the wrong reasons but also on those who might be discouraged from applying because of the altered nature of the bench, lacking the universal commitment which they would be prepared to give. The short point, however, is that we are wholly unconvinced that the present convention is of any real relevance to the diversity of the judiciary. Moreover very few of those who believe that judges should be allowed to return to practice believe that the existing convention has any real relevance to diversity.

15. We have looked, of necessity only briefly, at the experience in other jurisdictions. We are not aware of any jurisdiction in which there has been adopted the approach of overtly relaxing the existing convention with the aim of increasing diversity of appointment. Such information as we have largely concerns the management of the acknowledged problem which arises in the abnormal event of a return to practice. It seems to be a common approach that at the very least what must be avoided, either by direction or by self-denying ordinance, is a return to advocacy, whether oral or written, in the court in which a judge formally sat. This would we think be an irreducible minimum of any safeguards or conditions which might be considered. However a safeguard such as this does not begin to address the problem of perception involved where a judge has appearing before him a party represented by, say, a firm of solicitors in which he might be seeking or hoping to secure a post-judicial office appointment. The strength of feeling from those on our Working Party from the levels of the judiciary below the High Court bear out, in our view, that the problem becomes the more acute when one is concerned with judges operating on a relatively localised geographical basis within a necessarily relatively restricted local legal environment.

16. Finally we comment specifically on the Lord Chancellor's third question, which for ease of reference we repeat: -

> "I would particularly welcome the Council's views and advice on the comparisons between salaried and fee-paid judges so far as return to practice is concerned. Specifically, are the roles and functions of a holder of fee-paid judicial office so different from those of a salaried judge as to justify prohibiting the salaried judge from ever returning to legal practice, while a fee-paid office holder is able to move between judicial sittings and legal practice practically on a daily basis?

17. We can state our views on this very shortly. A fee-paid office-holder such as a Recorder or Deputy Judge is not and never has been a full-time salaried judge who has accepted appointment as such. The fee-paid office holder is the anomalous exception in our system which creates considerable problems

which we overcome, accommodate or as the case may be tolerate because of the benefits to the system which the part-time appointments bring. Broadly these benefits are flexibility in listing and the opportunity, to which we have already referred, to use part-time appointment as a testing ground for full-time appointment. The manner in which we resolve these problems is not always satisfactory. The use of fee-paid judges is not damaging to the integrity of the system as a whole precisely because it is acknowledged to be the anomalous exception, not the general case. Moreover there is for the most part a difference in kind between the work done by the part-timer and the work done by the full-time judge. In general it will be the full-time judge who does the more serious, complex and high profile work. This does not justify the exception – it merely explains why it may less often cause difficulty than otherwise it might. It is to us overwhelmingly clear that the need to deal with the inevitable difficulties arising out of part-time fee-paid judicial work done by a practitioner should be minimised not extended. It is precisely because of the difference in role between a salaried and a fee-paid judge and the fact that the problems thrown up are exceptional rather than the norm that effective strategies can usually be devised to overcome them.

18. Summary of main conclusions

1. The Working Party does not believe that at present any member of the judiciary is legally prohibited from returning to practice after retirement.

2. The Working Party is unanimous in its opinion that the whole of the judiciary should be treated in the same way on this issue. There is no justification for treating any level of the judicial hierarchy differently from any other level.

3. The Working Party is unanimous in its opinion that the current convention against returning to practice after retirement should be adhered to by all members of the judiciary.

4. The Working Party is not persuaded that adequate safeguards or conditions can be put in place which will overcome the objections of principle to departing from the current convention.

William Gage
Chairman of the Working Group
January 2006