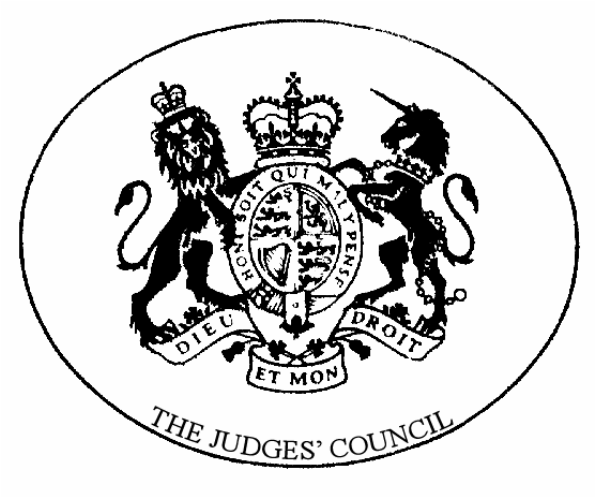


Report of the Judges' Council Working Group on the Consultation Paper CP15/06

"Return to Practice by Former Salaried Judges"

CONTENTS

1. Background and General

1.1. The Working Group has been appointed to consider a response to a consultation paper issued by the DCA on 12 September 2006 entitled Return to Practice by Former Salaried Judges (CP15/06). The first paragraph of the executive summary in the document states:

> *"The Lord Chancellor and Secretary of State for Constitutional Affairs has decided to remove the current prohibition on all holders of salaried judicial office returning to legal practice on ceasing to hold judicial office."*

1.2. In response to an earlier proposal by the Lord Chancellor and Secretary of State for Constitutional Affairs, the Judges' Council referred the same issue to a Working Party chaired by Lord Justice Gage. Several members of the present Working Group were also members of that Working Party. In a summary of main conclusions, the Working Party stated, in their response of January 2006

> *"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."*

1.3. The current Working Group takes the same view, equally firmly and for the same reasons. We cite and adopt extracts from the response:

> *"If return to practice becomes the norm or even something which was overly permitted or encouraged it would inevitably diminish the standing of the judiciary and seriously weaken its independence (paragraph 10)."*
>
> *"The track record of being a judge is commercially saleable but should not be on the market … If the public in general or*

litigants in particular know that judges may be returning to the legal marketplace, perception of possible bias will be a constant threat".

"[It] 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 (paragraph 11)."

The Working Party used the expression when making a distinction between the present proposal and a return to conduct arbitrations or mediations:

"A perception of a systemic opportunity for bias and a systemic lack of independence" (paragraph 13).

"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. 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. (Paragraph 14)"

1.4. As has already been made clear to the Lord Chancellor and Secretary of State for Constitutional Affairs, objection is taken to paragraph 3 of the executive summary in the Consultation Paper (page 3) which provides:

"The decision to remove this prohibition from the terms and conditions of judicial office has been taken following a major public consultation exercise carried out in October 2004 on

> *"Increasing Diversity in the Judiciary" (DCA CP25/04) and subsequent discussions with the Judges' Council."*

At page 7 of the Consultation Paper (and also in the Press Release) it is stated:

> *"Having already consulted the Judges' Council on some of the issues which might arise from a change of policy, the Lord Chancellor is now minded to remove the prohibition on return to practice …"*

As the Lord Chief Justice stated in his letter of 23 October 2006, the impression was thereby given to consultees that: "The [judges'] council had agreed to your proposals that judges should return to legal practice".

1.5. In his letter, the Lord Chief Justice also referred to the "fundamental nature of the judges' objection to the proposal that judges should be permitted to return to practice". He added that, at their meeting on 17 October 2006, the Judges' Council "wished it to be made clear that it supported this Response", that is the Working Party Response.

2. <u>The Fundamental Objection</u>

2.1. It would in our view be contrary to proper constitutional practice and to the new relationship between executive and judiciary, for the Lord Chancellor and Secretary of State unilaterally to change policy on this issue. The Lord Chancellor and Secretary of State has chosen to be head of the judiciary no longer and, consequent upon that decision, the relationship between his powers and those of the judiciary have fundamentally changed. This has been acknowledged in the negotiations which led to the transfer of the Lord Chancellor's judiciary-related functions set out in the document of January 2004 agreed between him and the then Lord Chief Justice and now known as the Concordat.

2.2. By virtue of section 3 of the Constitutional Reform Act 2005, the Lord Chancellor must uphold the continued independence of the judiciary. Along with that duty goes a requirement, in our view, that he respects the standing of the judiciary and the views of judiciary on a fundamental issue such as this one.

2.3. The Lord Chancellor and Secretary of State's "responsibility for the pay, pensions and terms and conditions of the judiciary" (paragraph 21 of the Concordat) does not extend to a power to dictate policy on a matter which goes to the heart of judicial conduct and commitment. The Constitutional Reform Act 2005 makes detailed provisions, in Part 4, for judicial appointments and in an area analogous to the present one, that of discipline. These provisions carefully define the role of the Lord Chancellor in both respects. In disciplinary matters the requirement of judicial involvement, and indeed concurrence, in decisions, is expressly recognised.

2.4. The Judicial Discipline (Prescribed Procedures) Regulations 2006 (SI 2006 No.676) give effect to paragraph 73 and following of the Concordat. The Regulations require joint responsibility for determining complaints against the personal conduct of the judiciary. A judicial office holder may only be removed from office by the Secretary of State with the agreement of the Lord Chief Justice (subject, in the case of High Court judges and above to an address from both Houses of Parliament) (Paragraph 74).

2.5. While the question of judges returning to practice is not strictly a disciplinary issue, it is analogous in that the high standing of the judiciary and the reality and public perception of judicial independence are involved. Judicial views must, in our view, be taken into account on a basic issue concerning the functioning of the judiciary. Decisions about the judiciary's policy and practice on this important subject require its concurrence and cannot be imposed by the executive. The questions posed in the Consultation Paper themselves demonstrate that the issue involves the standing and independence of the judiciary and this is considered in more detail in section 4 of this report.

2.6. The issue is not a political one which comes within the exclusive jurisdiction of a Secretary of State. The language of the consultation paper (CP15/06), in stating that the Lord Chancellor and the Secretary of State for Constitutional Affairs "has decided to remove the current prohibition" and that "the change of policy will apply …" is in our view quite inappropriate. It is unfortunate that the public were not informed, in the consultation paper, of the views of the judiciary. It is much more unfortunate, in our view, that the Lord Chancellor has, on this subject, purported to make a policy decision entirely contrary to the views expressed by the judiciary

3. Further Comment on justification for the proposals

3.1. We add brief comment on the justification for the proposal put forward. We are quite unpersuaded, as was the earlier Working Party, that "a change of policy on return to practice would have some positive impact on the diversity of the judiciary". Of course any full time judicial appointment involves "giving up potentially rewarding careers in legal practice", as the Consultation Paper states (page 6), but this applies no more to groups under-represented in the judiciary than to others. The suggestion that applicants from under-represented groups may be "unable to progress through the judicial ranks" suggests that discriminatory practices may affect their progression, a suggestion we consider to be unwarranted and indeed offensive.

3.2. We do not repeat in detail the response of the Working Party to the suggestion that different treatment of salaried and fee-paid (part-time) judiciary is unacceptable. Part-time appointments provide an opportunity to assess the suitability of the part-time judge for full-time appointment and an opportunity for part-time judges to consider whether they like the work. That is a valuable function. Arrangements have for generations been made for the deployment of the part-time judiciary which enable it to function in the public interest and without damaging the standing of the judiciary.

4. The Questions in the Consultation Paper demonstrate the nature and unworkability of the proposals.

4.1. We are of the view that the questions posed in the Consultation Paper demonstrate that the policy proposed by the Lord Chancellor to allow judges to return to practice is not in the public interest, is unworkable, and is unenforceable.

4.2. The underlying premise of the questions 1 to 6 posed in the Paper is that there must be restrictions on return to practice in order to try to meet the risk of perceived bias (questions 1 and 2), and the perceived risk of conflict of interest (question 3). Questions 4 and 5 ask consultees for suggestions as to "other conditions and safeguards". Question 6 suggests that a judge should not normally be expected to return to practice for a minimum of 5 years after appointment as a judge.

4.3. The very fact that the Paper proposes "restrictions" is recognition that a) the status and independence of the judiciary is being put at risk and b) that the policy of permitting judges to return to practice is fraught with difficulty. Question 6 "Minimum period of judicial service before return to practice" is, as far as the reasons go, of some importance. But it masks a critical matter i.e. no judge should be permitted, in the absence of any minimum period, to bring into disrepute the standing of the judiciary by accepting an appointment and then, say after a year, resigns and return to practice. That we suggest is and should be the true basis of Question 6. Administrative and financial considerations are important but cannot be the fundamental reason why there should be a minimum period of service. For there to be no minimum period would plainly not be in the public interest.

4.4. But, it must then be asked, why should any minimum period, whether 2, 5, 7, 10, or more years, be permissible in the public interest and why would one particular minimum do less harm to the standing of the judiciary than any other? Whatever period is set can only be arbitrary.

4.5. Questions 1 and 2 in the Paper recognise the clear risk of perceived bias but seek to meet it by suggesting restrictions i.e. a) a time embargo and b) a court or tier embargo. But the questions fail to understand the perceptions of litigants (in particular, litigants in person) where one side is represented by a former judge. The perception of bias is very likely to exist for however long the former judge has ceased to be a judge. Put in its starkest form, why is there no perceived bias after 2 years and 1 month whereas there is at 1 year and 11 months, or none after 5 years and 1 month but there is at 4 years and 11 months?

4.6. As to b), there is, we believe, just as much perception of bias in the eyes of litigants whether, for instance, a former High Court Judge appears before a Circuit Judge or the Court of Appeal. The litigant who has retained a former judge as his advocate is likely, either by himself or through his solicitors, to make such abundantly plain to the other side with the clear implication that he has an unassailable, in-built advantage thereby which is not linked to the judge's skills as an advocate.

4.7. Similar considerations apply to Questions 3, 4, and 5.

4.8. We believe that enforcement of the policy will be very problematical. It should be pointed out that, in so far as serving judges are concerned, any "conditions and safeguards" can only be incorporated into an individual judge's terms and conditions with the express agreement of each judge. Conditions cannot be unilaterally imposed by the Lord Chancellor. Notifying judges of a "change in policy" is not a means by which a judge can be lawfully bound.

4.9. Even if conditions and safeguards could lawfully be incorporated into either serving and/or new judges' appointments, it seems that no consideration has been given as to how such conditions are to be enforced by the Lord Chancellor or the Crown. It is the Crown or Lord Chancellor who seek to impose these new conditions. Then they must be enforced by the Crown and/or the Lord Chancellor. How is the breach to be stopped? By injunction? It can then be envisaged that the former judge may raise the issue of restraint of trade.

5. Response to the Questions

5.1. What follows must be read in the light of what has gone before. We are fundamentally opposed to the proposal. We do, however, as invited, express views on the questions posed.

6. Responses to Questions 1, 2, 3 & 6

Question 1: How long do you think a former judicial office-holder should be prohibited from conducting oral and/or written advocacy after returning to practice? Would 2 years be sufficient; if not how long should this prohibition last?

Question 2: We would like to propose a prohibition for five years on the provision of advocacy services by former judicial office holders upon return to legal practice. This would cover oral and written advocacy before judges at the same or at a lower tier. Please say whether you agree with this time period. If you disagree with this proposal please set out your reasons.

6.1. If there is not to be a permanent bar on a judge returning to practice which remains the preferred option of the Judges' Council, then the prohibition should be for a minimum of five years from resignation for all judges regardless of status. Questions 1 & 2 seem to suggest a general two year ban on advocacy but with a five year ban on advocacy in the same tier of court as the judge sat or in any lower tier of court. We think this distinction is unjustified and impractical.

6.2. We cannot see why (e g) a former circuit judge would not be perceived to have an unfair advantage before a high court judge or the Court of Appeal but would be perceived to have disproportionate influence either before a former colleague on the Circuit Bench or before a district judge. The same would apply to a high court judge who could practice after two years in the Court of Appeal or the House of Lords but not in the High Court. We think that allegations or perceptions of unfair advantage are just as likely to occur in relation to the

higher courts as they are in relation to the same or a lower tier court. No distinction should be made. The five year ban should apply uniformly in all courts to all former judges.

Question 3: Would you agree that a former judge should not take up employment with any firm or individual who, in the preceding two years, has appeared before him or her for a final decision in a matter? This would apply to those who have appeared as litigant, advocate or legal adviser. Please give your reasons with your response.

6.3. We agree that a bar on employment by a firm which has appeared before the judge in the last two years should be imposed as an additional safeguard for the reasons set out in the consultation paper.

Question 6: Would you agree that a judge should normally be expected to have served in salaried judicial office for a minimum period of five years before leaving the Bench to return to legal practice? If not, what period should this be?

6.4. We support the argument that the acceptance of judicial office should carry with it a commitment to that office. This is one of the considerations which underlie the opposition of most of the judiciary to any relaxation of the current convention that judges should not return to practice. If, therefore, there is to be a relaxation of the current rule we would support a requirement that a judge should ordinarily serve at least five years in office.

6.5. But as explained elsewhere in this response the question raises a number of issues which we think make the proposal unworkable as formulated in the consultation paper. What appears to be suggested is that unless a judge has served at least five years in office he will not be eligible to return to practice at all. It is not clear from the consultation paper how this is to be achieved. Clearly, a judge could not be legally compelled to serve for five years or for any minimum period of time and the analogy with pensionable service seems to suggest a model under which the current restriction on returning to practice

would continue to apply in its absolute form to judges who retired or resigned after less than five years.

6.6. It is also unclear from the consultation paper precisely how the minimum five year period of service is intended to operate in relation to the other suggested restrictions. We have assumed that after five years' service the judge would no longer be bound by the convention that he should not return to practice at all, but would then become subject to (e g) the five year bar on advocacy following retirement (Q.2). The acceptance of a judicial appointment would therefore lead to a prohibition on returning to practice as an advocate for a minimum period of ten years.

6.7. If a return to practice is to be permitted at all a degree of flexibility might be permitted where resignation short of that period could be justified by the judge's personal circumstances. The desire to encourage judges to serve for a minimum period of five years could be achieved by simply specifying a minimum period from appointment before a judge who retires or resigns becomes eligible to return to practice. After the five years has expired, the other restrictions (e.g. the five year moratorium on advocacy) would then apply from the date of resignation or retirement.

7. Responses to Questions 4 & 5

Question 4: Please suggest any further conditions or safeguards which you consider should apply to former judges who return to legal practice. Please show how these will help to ensure that any risks to the administration of justice or judicial independence are minimised or removed.

Question 5: Should there be a restriction on the courts or tribunals in which a former salaried judge is permitted to appear as an advocate? If so how long should this restriction last?

7.1. We consider that there should be an additional geographical restriction to prevent judges who may have been based in a particular court centre from practising at that location or in that area. We think that there would be perceptions of unfair advantage if the former Resident judge or Recorder of a city returned to practice whether as an advocate or not, in the city where the judge had been sitting and we would support a lifetime restriction in such a case. It would apply to any judge who had sat for any substantial period in the relevant HMCS area.

7.2. Where high court judges have had a particular association with an area, similar considerations may apply. We doubt whether sitting in the Royal Courts of Justice need involve the additional restriction but a need to impose additional restrictions may arise where a specialist jurisdiction is involved.

7.3. The geographical restriction could be tailored to the areas relevant to judicial office holders who sit in specialist courts or tribunals.

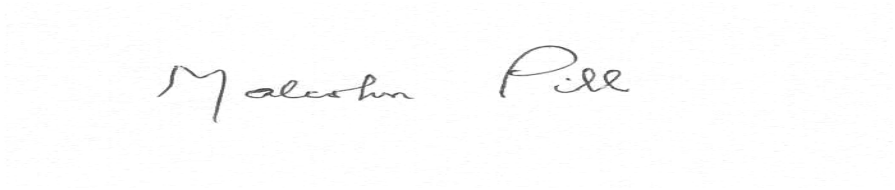
8. Conclusions

8.1. We agree with conclusions 3 and 4 of the Working Party Response of January 2006 repeated in this report at paragraph 1.2.

8.2. Our objection to the proposal that salaried judges should be permitted to return to practice is a fundamental one.

8.3. The Lord Chancellor and Secretary of State for Constitutional Affairs cannot unilaterally impose this proposed change in judicial practice.

8.4. Detailed consideration of the questions posed by the Lord Chancellor and Secretary of State demonstrates the undesirability and unworkability of his proposals.



Chairman of the Working Group

30.11.06

Appendix A: Membership of the Working Group

Lord Justice Pill **Chairman**
Mr Justice Bennett
Mr Justice Patten
Mrs Justice Macur DBE
His Honour Judge Keith Cutler
Senior District Judge Tim **Workman**
District Judge Michael Walker
Paul Shaerf **President of the Council of Immigration Judges**