dca

Department for Constitutional Affairs
Justice, rights and democracy

Return to Practice by Former Salaried Judges

Consultation Paper
CP15/06
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This consultation will end on 8 December 2006

Contents

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Executive summary

- 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.
- The Lord Chancellor is committed to increasing the overall diversity of the judiciary and there is evidence that removing the prohibition on return to practice will have a positive impact on diversity.
- 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.
- The change in policy will apply to all levels of the judiciary provided that restrictions are placed on the provision of advocacy services by former judges and other necessary conditions and safeguards being applied.
- This paper consults on the conditions and safeguards that need to be put in place before the prohibition on return to practice is lifted, including:
    - The length of restriction on the provision of advocacy services by former judges;
    - Whether a quarantine period might be necessary before a former judge takes up employment with a firm or individual who has appeared before him as a litigant or legal representative;
    - The minimum period of judicial service before return to practice;
    - How any agreed safeguards should be publicised and enforced.

Introduction

This paper sets out for consultation the conditions and safeguards to be put into place to allow former holders of a salaried judicial appointment to return to practice upon ceasing to hold office. The consultation is aimed primarily at judicial office holders within England and Wales and at professional bodies with possible responsibility for enforcing safeguards.

This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The Consultation Criteria, which are set out on page 17, have been followed.

This paper does not contain a Partial Regulatory Impact Assessment because the proposals outlined here are at an early stage. If you disagree with this conclusion you are invited to send your reasons as part of your overall response to this paper.

We are looking to gather stakeholder views to develop these proposals in more depth. Following this consultation we will prepare a RIA to understand the impact on stakeholders affected. Copies of the consultation paper are being sent to:

- The Lord Chief Justice
- The Judges' Council
- Lord Justice Thomas
- Mrs Justice Dobbs
- Baroness Prashar and the Judicial Appointments Commissioners
- Lord Justice Carnwath
- The Senior District Judge (Chief Magistrate)
- Council of Immigration Judges
- Council of HM Commissioners
- Council of Employment Tribunal Chairman
- HM Council of Circuit Judges
- The Association of District Judges

- UK Association of Women Judges
- Association of Women Barristers
- The Law Society
- General Council of the Bar
- The Institute of Legal Executives (ILEX)
- The Chartered Institute of Patent Agents (CIPA)
- The Institute of Trade Mark Attorneys (ITMA)
- Society of Black Lawyers
- Association of Women Solicitors
- Group for Solicitors with Disabilities
- Government Legal Service
- The Bar Association for Commerce and Finance
- The Equal Opportunities Commission
- The Commission for Racial Equality
- HM Courts Service
- The Crown Prosecution Service
- Justice
- Liberty
- Tribunal Presidents Group
- Council on Tribunals

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

The proposals

Former holders of salaried judicial office are currently prohibited from returning to legal practice. This is reflected in the terms and conditions of service on appointment to judicial service. These state that candidates accept appointment on the understanding that it is "intended for the remainder of a person's professional life" and that "following termination of their appointment they will not return to private practice as a barrister or a solicitor". The policy includes a prohibition on providing 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. It also prevents them from providing legal advice to any person in return for remuneration of any kind. Former judges are however allowed to provide services as an independent arbitrator or mediator and may receive remuneration for lectures, talks or articles.

As part of his programme of work to increase the diversity of the judiciary, the Lord Chancellor has announced his intention to lift the prohibition on holders of salaried judicial appointments returning to legal practice on ceasing to hold judicial office. He has made this decision in the light of a public consultation exercise carried out in 2004/05 on judicial diversity and subsequent research, which suggests that a change of policy on return to practice would have some positive impact on the diversity of the judiciary.[1]

The current prohibition can act as a deterrent to applicants from groups under-represented in the judiciary concerned that they will be unable to progress through the judicial ranks and have no route back into legal practice. Such applicants can feel that they risk giving up potentially rewarding careers in legal practice for a judicial career that might not allow them to reach their full potential. The prohibition can also act as a major obstacle for younger applicants who wish to serve in a salaried judicial capacity in mid, rather than late career, but do not want to close off career options.

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[1] See Opinion Leader Research – Judicial Diversity: findings of a Consultation with Barristers, Solicitors and Judges January 2006 (www.dca.gov.uk/publications/reports/jdcbs06.pdf) and Summary of responses to the Increasing Diversity in the Judiciary Consultation Paper (DCA CP 25/04); and an unpublished annual survey conducted by the Law Society.

The arguments that have underpinned the current prohibition on return to practice are as follows:

- Former salaried judges might exert or be perceived as more likely to exert, undue influence on their former colleagues on the bench, or would be perceived to enjoy an unfair advantage in presenting cases.

- Serving judges would favour or be perceived to favour a party because of the identity of the legal representatives out of a desire to pursue career interests in the legal profession once their judicial appointment ceases.

The Lord Chancellor believes that permitting return to practice will not have a detrimental effect on judicial independence, real or perceived, because;

- Judicial Office holders are appointed on the basis of their integrity and impartiality and are required to perform their duties in accordance with the judicial oath.

- There is inconsistent treatment between salaried and fee-paid (part-time) judiciary. Fee- paid judges can and do routinely divide their time between sitting judicially and practising as barristers or solicitors, including as advocates, and there is no suggestion of bias or impartiality.

- Any risk to judicial independence can be fully mitigated by introducing conditions and safeguards to deal with the risk of bias.

Having already consulted the Judges' Council on some of the issues which might arise from a change of policy, the Lord Chancellor has decided to remove the prohibition on return to practice on the basis that:

- the new policy will be applied consistently at all levels of the judiciary;

- restrictions should be placed on the provision of advocacy services (oral or written) by former judges: these restrictions might take the form of a quarantine period, and/or a bar on practice in certain courts;

- in addition to a restriction on advocacy, certain other conditions or safeguards might need to be applied to return to practice by former judicial office-holders;

- in order to ensure a reasonable return on the public funds spent on the selection, appointment and training of a judge, it might be appropriate to require a minimum period of judicial service prior to return to practice.

The Lord Chancellor now wishes to consult a wider range of stakeholders on what conditions and safeguards need to be put in place. In particular, he invites responses to the questions set out in boxes in the remainder of this paper.

Principles upon which return to practice would be permitted

1. Consistent application to all levels of the judiciary

The Lord Chancellor has decided in principle that those who have served at any level of the judiciary should be permitted to return to practice after leaving the Bench. He does not consider that any distinction should be drawn in this respect between different levels of the judicial hierarchy, since there will be no risk to the administration of justice or the independence of the judiciary if the right conditions and safeguards are in place. The purpose of this consultation paper is to develop those conditions and safeguards.

2. Restrictions on the provision of advocacy services

Perhaps the most significant argument against permitting return to practice concerns the possibility that former judges might go on to conduct advocacy (whether oral or in writing), either in the courts in which they formerly sat, or before judges of a lower judicial rank. If an advocate who was formerly a senior judge appeared before a judge of a more junior rank or the same status, that judge's conduct of the case and eventual decision might be, or be perceived to be, unduly influenced by the status of the ex-judge. Likewise if a former judge were to appear as an advocate before a former judicial colleague of the same status, any decision in favour of the former judge might be perceived as favouritism. Conversely if a judge decided against a client of a former judicial colleague it might appear that he had over-compensated to avoid being suspected of favouritism.

The Lord Chancellor regards the risk of actual or perceived bias as minimal. Judicial office holders are appointed on the basis of their integrity and impartiality and are required to perform their duties in accordance with the judicial oath. In addition a bar on providing advocacy services, at least for a minimum period and/or in certain courts, would help to meet these concerns; but it will be necessary to strike the right balance between excessively relaxed conditions (which might provide inadequate safeguards), and excessively restrictive ones (which would tend to erode the effectiveness of the policy change).

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.

3. Other conditions or safeguards which might be applied to former judicial office-holders who return to practice

(a) Quarantine period before taking up employment with a firm or individual who has appeared before a former judge as a litigant or a legal representative. Another of the objections raised to the principle of return to practice is the risk of actual or perceived conflict of interest, were suspicions to arise that a judge had decided a case with an eye to his or her future employment prospects with, say, a party or a party's legal representative. The Lord Chancellor regards this risk as small: judges determine cases in accordance with their judicial oath, and a judge who was shown to have allowed concern about employment prospects to influence a judicial decision would be liable to serious disciplinary action. Moreover, it could be said that since judges can already take up some kinds of occupational activities after retirement, this is already a theoretical risk that does not materialise in practice. However, requiring a former judge who returns to practice not to take up employment within a specified period with any firm or individual who has appeared before him or her as a litigant, an advocate or a legal adviser might provide additional assurance.

Question 3: Would you agree that a former judge should not take up employment with any firm or individual who, in the preceding <u>two years</u>, 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.

(b) Other conditions and safeguards. Consultees may consider that additional conditions and safeguards are required to safeguard the administration of justice and the independence of the judiciary. We are considering if advocacy should be restricted: to a particular jurisdiction (for example a former tribunal chairman might be barred from appearing before that tribunal or tribunals exercising similar jurisdiction); or from a particular geographical area.

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?

4. Minimum period of judicial service before return to practice

Taking into account the costs of a rigorous selection process, specialist judicial training and in many cases the provision of robes and other equipment, the appointment of a judge represents a significant investment of public money. It is already usual (for example, in the case of candidates who are approaching the statutory judicial retirement age) to require that a new appointee will be able to give a minimum period of judicial service before leaving office. There is no absolute time requirement in that case, because much will depend on the circumstances of the individual candidate. However, it may be relevant that, for example, five years is the minimum length of service required to qualify a judge to receive an immediate pension at the age of 65, or to receive an actuarially reduced pension if retiring between 60 and 65. (On the other hand, an office-holder qualifies for deferred pension benefits after serving for at least 2 years.)

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

5. Publicising and enforcing the conditions and safeguards

(a) We envisage that the conditions and safeguards, once agreed, will be incorporated into the terms and conditions of serving and new judges. Letters would be sent to all serving salaried judges to ensure that they were aware of the change of policy. As they approached retirement, judges would be reminded of the new policy in the correspondence routinely sent to them around that time.

(b) In the light of previous legal advice, we are confident that it is legitimate for the Lord Chancellor to restrain the activities of former judges so as to protect the administration of justice. We are also aware, however, that since the individuals concerned will no longer be judicial office-holders, the monitoring and observance of the agreed conditions and safeguards will fall to the relevant legal professional bodies. Since the Bar Council removed its prohibition on former judges returning to practice at the Bar from its Code of Conduct in or around 1991 - and The Law Society never had any corresponding restriction - this will represent substantially new work for them.

Question 7: We would particularly appreciate the views of The Bar and The Law Society (and ILEX, CIPA and ITMA as the professional bodies for those who it is intended will become eligible for judicial appointment in the future) on the following:

(a) What aspects of the enforcement of the new policy, if any, would you regard as properly belonging to your professional body?

(b) Are you satisfied that the proposed conditions and safeguards are adequate and workable?

(c) How would you envisage your professional body enforcing the conditions and safeguards?

(d) When would you expect your professional body to be able to implement the conditions and safeguards?

(e) What would be the impact on your professional body of any enforcement responsibilities that properly belong to it?

(f) What problems do you foresee with implementation (if any)?

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

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.

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.

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?

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?

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(c) How would you envisage your professional body enforcing the conditions and safeguards?

(d) When would you expect your professional body to be able to implement the conditions and safeguards?

(e) What would be the impact on your professional body of any enforcement responsibilities that properly belong to it?

(f) What problems do you foresee with implementation (if any)?

Thank you for participating in this consultation exercise

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (eg. Member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	☐ (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

How to respond

Please send your response by Friday 8 December 2006 to:

Lisa Jones
Department for Constitutional Affairs
Judicial Diversity Team
2nd Floor
Selborne House
54-60 Victoria Street
London
SW1E 6QW

Tel: 020 7210 1833
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Email: returntopractice@dca.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at http://www.dca.gov.uk/index.htm

Publication of response

A paper summarising the responses to this consultation will be published within three months of the closing date of the consultation. The response paper will be available on-line at http://www.dca.gov.uk/index.htm

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

The Consultation Criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.

2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.

3. Ensure that your consultation is clear, concise and widely accessible.

4. Give feedback regarding the responses received and how the consultation process influenced the policy.

5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.

6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact the Department for Constitutional Affairs Consultation Co-ordinator, Laurence Fiddler, on 020 7210 2622, or email him at consultation@dca.gsi.gov.uk

Alternatively, you may wish to write to the address below:

Laurence Fiddler
Consultation Co-ordinator
Department for Constitutional Affairs
5th Floor Selborne House
54-60 Victoria Street
London
SW1E 6QW

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under **the How to respond** section of this paper at page 15.

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