



Standing Committee on the Model Code of Professional Conduct
Federation of Law Societies of Canada
c/- Frederica Wilson
Senior Director
Regulatory and Public Affairs

BY EMAIL: fwilson@flsc.ca

6 September 2016

Dear Ms Wilson

Submission: Post-Judicial Return to Practice Discussion Paper

We congratulate the Standing Committee for engaging in an inquiry into post-judicial return to practice. Across the common law world, the regulation of former judges is an area to which insufficient attention has been paid: by the judiciary, the legal profession and the academy. There is, nonetheless, a growing sense that the current regulatory framework that applies to former judges is in need of review.¹ We thank the Committee for the opportunity to make a submission on this issue.

The question of post-judicial return to practice is an important dimension of the appropriate ethical regulatory framework that ought to govern former judges. However, we think it is also apposite to note there are other aspects of this framework that also require attention, including:

- the engagement of former judges in roles, other than return to practice, that might be incompatible with their position as former judicial officers, or would impair public

¹ See, for example, letter from 25 Canadian legal academics to the Federation of Law Societies of Canada, dated March 21, 2011; Stephen G A Pitel and Will Bortolin, 'Revising Canada's Ethical Rules for Judges Returning to Practice' (2011) 34 *Dalhousie Law Journal* 483; Gabrielle Appleby and Alysia Blackham, 'The Shadow of the Court: Ethics for Former Judges' (paper presented at International Legal Ethics Conference, New York 2016, on file with authors).

confidence in the judiciary as an institution (for example, the appointment of former judicial officers to certain Royal Commissions);²

- the engagement in public debate by former judicial officers, particularly where that engagement involves the judge criticising other judges who may still be on the bench, or where it involves information about the workings of a court that the former judge was only privy to because of his or her time on the bench;
- responses to criminal conduct by former judges, particularly in relation to offences that involve dishonesty; and
- the extension of the jurisdiction of judicial complaints-handling/judicial discipline system to encompass the conduct of former judicial officers that occurred while they were on the bench.

While we appreciate these additional aspects are largely beyond the scope of the Committee's Discussion Paper (although we do note that the Discussion Paper is seeking views on the question of public comment), we flag them for possible future inquiry and reform.

This submission will commence with an explanation and overview of the particular ethical concerns that return to practice by former judicial officers might raise, before turning to address the specific questions raised by the Commission.

The ethical questions around post-judicial return to practice

For sitting judges, there has been a general trend towards more formal, independent, institutionalised and transparent regulatory regimes. This trend is said to promote public confidence in the judicial institution, and reflects the evolution of traditional judicial values of independence and impartiality towards the inclusion of values such as accountability and transparency.³ When judges retire or resign from the bench, however, this regulatory framework largely falls away. When the prevailing norm was judicial appointment for life, or even when judicial retirement ages were introduced but life expectancy or quality of life into older age was lower, the question of the regulation of retired judges raised less cause for concern. Today, however, the retired judge, usually, although not always, somewhere in their late sixties or early to mid seventies, will have fruitful decades ahead of them. The rising numbers of retired, healthy and active – professionally and socially – judges raise complex ethical regulation questions.

If the objective underpinning the ethical regulation of sitting judges is maintaining confidence in the integrity of the judiciary, there are strong arguments that the conduct of retired judges might also affect this confidence, and that regulation therefore ought to extend beyond judicial tenure. Relevant to the Committee's Discussion Paper, confidence might be harmed by judges seeking to take up legal practice following retirement, giving rise to perceptions of unfair advantage gained by reason of their former judicial office, or perhaps currying favour with legal firms prior to retirement. Confidence might also be affected by

² See further Grant R Hoole, 'The Forms and Limits of Judicial Inquiry: Judges as Inquiry Commissioners in Canada and Australia' (2014) 37 *Dalhousie Law Journal* 431, 445.

³ Adam Dodek and Richard Devlin (eds), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar, 2016).

the reappointment of retired judges to ‘acting’ judicial positions post-retirement, particularly if their behaviour or other activities while sitting as a temporary judge do not accord with the standards expected of other, ‘permanent’ judges.

The phenomenon of the ‘resigned’ judge raises many of the same concerns, but often introduces additional complexity. Resignation might occur for health or family reasons. It might occur because the judge is dissatisfied with the judicial role; is seeking new, more diverse or different professional challenges; or for financial reasons. Where a judge resigns for such reasons, it might be thought that there is a good argument to allow them to return to practice or other work. Resigned judges may not qualify for a judicial pension, meaning they need to find other work to support themselves financially. Lack of flexibility post-resignation might undermine the government’s capacity to entice high-quality appointees to the bench, as judicial appointment will close off all other career paths.

Once no longer sitting, should judges be entirely free from the strictures of judicial ethical regulation that apply to sitting judges? It might seem that the only fair answer to this question must be yes, that no person should be subjected to a code of professional conduct or potential professional disciplinary proceedings *for life*. But this answer is more complicated for the judiciary than that for other professions. The conduct of former judges has the capacity to undermine public confidence in the judicial institution. The public often makes little distinction between a former judge and a sitting judge; such confusion is compounded by the nature of media reporting, which may emphasise the individual’s former judicial status. Such confusion might be further compounded by the fact that judges retain the title ‘the Honourable’, and the practice of legal practitioners to continue to call the individual ‘judge’.

Or, if the public do draw a distinction, they may still consider that the conduct reflects poorly on the judiciary as an *institution*, in that it speaks more generally to the character of judges appointed to the bench. Further, former judges often continue to benefit from their former positions. They often remain publicly funded, drawing government-funded pensions. They will often be appointed to roles – such as to head Royal Commissions – not only based on their experience and expertise as legal practitioners but because they hold the status of a *former judge*.

Recognising these risks, international codes of conduct make provision for ethical restrictions on former judges. For example, the Bologna Milano Global Code of Judicial Ethics 2015, which was approved at the International Conference of Judicial Independence held at the University of Bologna and at Bocconi University of Milano in June 2015,⁴ covers post-judicial activities in clause 9. The clause covers: professional and commercial activities;⁵ professional legal activities; commercial activities; political activity; participation in public debate; and community and social activities.

⁴ International Association of Judicial Independence and World Peace, *Bologna and Milan Global Code of Judicial Ethics* (2015) The JIWP Association <<http://www.jiwp.org/>>.

⁵ Though there is no particular restriction on these activities: clause 9.1 merely says ‘Judges may avoid the sometimes difficult and controversial decisions that have to be taken by those who seek a more active and remunerative role.’

The clause imposes a number of limitations where those activities have the potential to impact on the reputation of the judiciary. However, the obligations imposed by the code are fairly loose in nature: judges ‘should consider’ the impact of their activities, and there is unlikely to be any means of effectively enforcing a soft-law code of this nature. Thus, this code, while highlighting the *potential* for the conduct of former judges to impact on the public reputation of the judiciary, serves more to alert judges to the potential implications of their activities and conduct for the judicial institution.

Responses to Discussion Questions

The Return to Practice of a Retired Judge:

In summary, we submit that return to practice of former judges be restricted but not prohibited. We submit that the following restrictions strike the necessary balance:

- (a) former judges may return to practice (with the exception of appearing in court) in the jurisdiction in which they were a judge only after a specified time period of five years;*
- (b) former judges may not appear before the court in which they were a judge, or any court (or tribunal) that was subject to the appellate jurisdiction of that court;*
- (c) former judges’ entitlement to their judicial pension should be reduced during the time that they engage in private practice for which they receive remuneration – either by suspending all pension entitlements or by reducing the entitlement by the amount, or a percentage of the amount, of remuneration earned in private practice.*

Each of these restrictions ought to be subject to the exercise of the discretion of the local regulatory authority to waive the restriction in limited and defined ‘extraordinary circumstances’.

The one area of conduct for former judges that has been relatively strongly regulated across the common law world is return to legal practice. In most common law jurisdictions there are conventions restricting return to practice, and in some jurisdictions this is now formalised in professional rules.

Our submission is informed predominantly by the practice in Australia, and England and Wales, where jurisdictional frameworks around appointment and judicial salaries and pensions are most similar to those operating in the Canadian jurisdictions.

England and Wales

The restriction on return to practice is particularly strong in England and Wales, where the ‘no return to practice’ rule represents the primary limitation on former judges. In judicial letters of appointment for the higher courts, there is an ‘expectation’ that judges will not return to private practice.⁶ For example, the terms and conditions of appointment for District Judges specify:

⁶ Graham Gee et al, *The Politics of Judicial Independence in the UK’s Changing Constitution* (Cambridge University Press, 2015) 82.

The Lord Chancellor also regards a judgeship as a lifetime appointment. Any offer of appointment is therefore made on the understanding that appointees will not return to practice.⁷

This condition is not replicated in the terms and conditions for judges in lower courts.⁸ Indeed, given many fee-paid judges continue to practice while sitting, it would be somewhat contradictory to impose the no return to practice rule upon retirement for these judges.

Where imposed, this rule reflects the ‘English ideal’ that judges will not return to private practice, and should not provide services as an advocate or provide legal advice.⁹ This is explicitly laid out in the *Guide to Judicial Conduct* for judges in England and Wales:

The conditions of appointment to judicial office provide that judges accept appointment 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 provide services, on whatever basis, as an advocate in any court or tribunal in England and Wales or elsewhere, including any international court or tribunal, in return for remuneration of any kind, or offer or provide legal advice to any person. The terms of appointment accept that a former judge may provide services as an independent arbitrator/ mediator and may receive remuneration for lectures, talks or articles.

Even in retirement a former judge may still be regarded by the general public as a representative of the judiciary and any activity that might tarnish the reputation of the judiciary should be avoided.¹⁰

This ‘expectation’ in the *Guide to Judicial Conduct* is unenforceable, being of ‘assistance to judges’ only.¹¹

In 2006, the UK government conducted a consultation process to consider whether the return to practice rule should be removed in the interests of increasing judicial diversity. At the time, Lord Falconer argued that removing the rule would encourage judicial diversity:

This is about encouraging more applicants. There is evidence to suggest that prohibition on return to practice is a significant barrier for many potential candidates. In particular solicitors and barristers can be deterred by the realisation that taking up a salaried judicial post would close off future career options.¹²

⁷ Judicial Appointments Commission, *981 Terms and Conditions* (April 2015) <<https://jac.judiciary.gov.uk/981-terms-and-conditions>>.

⁸ See, for example, Ministry of Justice, *Conditions of Appointment and Terms of Service Deputy Chancery Master, Deputy Costs Judge or Deputy Bankruptcy Registrar* (July 2015); Ministry of Justice, *Conditions of Appointment and Terms of Service Deputy District Judge* (December 2014).

⁹ Fred Phillips, *The Modern Judiciary: Challenges, Stresses and Strains* (Wildy, Simmonds & Hill, 2010) 259.

¹⁰ Judiciary of England and Wales, ‘Guide to Judicial Conduct 2013’ (March 2013) 28.

¹¹ Gee et al, above n 6, 82.

¹² Lord Falconer, ‘2007 Speech on Judicial Diversity’ <<http://www.ukpol.co.uk/2015/11/25/lord-falconer-2007-speech-on-judicial-diversity/>>.

Following the consultation process, it was decided to retain the rule, as there was no evidence that removing the rule would actually promote diversity,¹³ and judges and the legal profession were strongly opposed to the change.

While the no return to practice rule has been retained in the UK, this may no longer have the support of many in the judiciary. There are increasing instances where the rule is not complied with: for example, Professor Sir Hugh Laddie resigned from the High Court in 2005 – citing isolation, a lack of stimulation and the strain of adjudicating cases beyond his expertise – to become a consultant to the law firm Willoughby and Partners (now Rouse).¹⁴

Laddie's experience does not appear to be isolated. The 2014 UK Judicial Attitudes Survey found that many judges would consider leaving the judiciary to return to practice if the rule did not exist. Only 56 per cent of circuit judges and 54 per cent of district judges said that they would not consider going back to some kind of legal practice.¹⁵ Thus, if the no return to practice rule were removed, this could lead to a significant influx of former judges at the bar and in practice; that said, such an outflow might be balanced by an increased flow of individuals inclined to accept appointment to the bench. Even if the rule is retained, judges are increasingly considering leaving the bench before retirement age: in the same survey, 31 per cent of respondents (or 400 judges) said they would consider early retirement in the next five years,¹⁶ largely due to low pay and reductions in pension entitlements.¹⁷ Those who would consider this option were aged between 41 and 68, with a mean age of 57.9. Any expansion of the number of early-leavers could raise significant issues for the ethical regulation of former judges.

Australia

Like in England and Wales, there is a loose convention in Australia that judges will not return to private practice upon retirement – or, at least, that former judges will not appear before the court over which they presided. According to Alan Blow, now Chief Justice of Tasmania:

The convention that retired judges do not appear before courts of which they were members is an important one. If that convention were not in place, and ex-judges appeared as counsel in their former courts, any decision or ruling in favour of an ex-judge's client would be likely to foster, at least in the mind of the unsuccessful party, an apprehension that the presiding judge was biased in favour of his or her former colleague. The greater the turnover of judges, and the more they retire to resume private practice, the more likely it is that this important convention will be eroded.¹⁸

¹³ Ministry of Justice, *Return to Legal Practice* (5 November 2007) Wired-gov <<http://www.wired-gov.net/wg/wg-news-1.nsf/print/Return+to+legal+practice+05112007102000>>.

¹⁴ 'Professor Sir Hugh Laddie' *The Telegraph* (London), 12 March 2008 <<http://www.telegraph.co.uk/news/obituaries/3546410/Professor-Sir-Hugh-Laddie.html>>.

¹⁵ Cheryl A Thomas, '2014 UK Judicial Attitude Survey: Report of Findings Covering Salaried Judges in England & Wales Courts and UK Tribunals' (4 February 2015) 30.

¹⁶ *Ibid* 43.

¹⁷ *Ibid* 46.

¹⁸ Alan Blow, 'Judicial Pensions and Superannuation' (Paper presented at Judicial Conference of Australia Colloquium, Adelaide, October 2004) 3 <<http://jca.asn.au/wp-content/uploads/2013/11/2004-blow.pdf>>.

In Australia, the Australasian Institute of Judicial Administration *Guide to Judicial Conduct*, adopted by the Council of Chief Justices of Australia, states that practice at the Bar is regulated by the Australian Bar Association, the local Bar Association or Law Society, though ‘all ... proscribe appearance as counsel in a court of which the judge was formerly a member, for various periods ranging from two to five years’ (clause 7.2.1); practice as a solicitor is allowed, though ‘preferably not sooner than a year or so after retirement’, and care should be taken ‘to ensure that the firm does not take active steps to promote itself by overt reference to the judge’s former judicial status’ (clause 7.2.2); and there is no legal or professional restraint on acting as a mediator or arbitrator (clause 7.2.3).

The Legal Profession Uniform Law regulates return to practice in both Victoria and New South Wales. Under the *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015* rule 38, former judges may not appear as a solicitor in:

- (i) any court if the solicitor has been a member thereof or presided therein, or
- (ii) any court from which appeals to any court of which the solicitor was formerly a member may be made or brought,

for a period of two years after ceasing to hold that office unless permitted by the relevant court.

Similarly, under the *Legal Profession Uniform Conduct (Barristers) Rules 2015* rule 101(n), barristers must refuse to accept a brief or instructions where:

the brief is to appear before a court of which the barrister was formerly a member or judicial registrar, or before a court from which appeals lay to a court of which the barrister was formerly a member (except the Federal Court of Australia in case of appeals from the Supreme Court of any State or Territory), and the appearance would occur within 5 years after the barrister ceased to be a member of the court in question where the barrister ceased to be a judge or judicial registrar after the commencement date of this rule.

While adherence to the convention that in Australia has eroded, we nonetheless submit that there is an important distinction, as explained by Blow, between return to practice generally, and appearing before the court in which the former judge was a member, or courts which were subject to the appellate review of that court.

In Victoria, post-retirement activities are likely to also be limited in practice by the operation of s 83(4) of the *Constitution Act 1975* (Vic), which provides:

Unless the Governor in Council by Order otherwise determines in any particular case the right of a Judge to a pension under this section ... (ii) shall be suspended while—

he holds any office or place of profit under the Crown in right of the Commonwealth or of a State; or

he is engaged in legal practice in any State or Territory of the Commonwealth or is employed by any legal practitioner in connexion with his practice in any such State or Territory:

Provided that this subsection does not apply to or in relation to a Judge who resigned or retired before the 15th day of February, 1970.

Thus, judges may be deterred from re-entering practice by financial considerations, and the threat of having their pension entitlements suspended. This financial provision is likely to be an effective way of influencing judicial behaviour, and indirectly upholding the convention against return to practice.

High levels of judicial satisfaction in Australia may also make early-leavers less of a challenge for ethical regulation. Kathy Mack and Sharon Roach Anleu have found high levels of satisfaction with overall work (92.0 per cent), intellectual challenge (89.3 per cent) and diversity of work (81.7% per cent) among Australian judges. Judges were also satisfied with their working conditions, particularly benefits (76.3 per cent) and compatibility with lifestyle (75.4 per cent): it is therefore unsurprising that, with hindsight, 86.1 per cent would become judges again.¹⁹ This may mean that return to practice is less of a consideration for the regulation of retired judges in Australia.

Even so, the return to practice convention in Australia has not stopped judges from openly pursuing further professional work after their judicial careers are over. In August 2015, an Australian Federal Court judge, Annabelle Bennett, announced her retirement from the Federal Court of Australia, in what was described in the media as a ‘bold, uncommon move’. She was explicit in her decision to pursue future work in the area of technology, including, but not limited to, arbitration and advisory work.²⁰

Many former judges return to practice at the bar or as consultants to solicitors firms. Some turn to the delivery of ‘private justice’ in the form of arbitration, mediation services and private investigations. Former judges, it has been said, ‘have been extraordinarily successful in settling some of the most difficult and contentious civil litigation in the country.’²¹ However, in many aspects of these roles, the decisions of former judges become appealable in the courts, which can give rise to integrity concerns, particularly when lower court judges are asked to review the decisions of former, more senior members of the judiciary. The potential for return to practice may therefore cause problems for the judicial image. Indeed, in Australia the adoption of a written code of judicial ethics was preceded by concerns regarding retired judges returning to practice while drawing the judicial pension. This was seen as ‘posing the most controversial ethical issue.’²²

New Zealand

In New Zealand, while there is a convention that judges will not return to practice, this has come under increasing strain since judges appointed after 1992 were moved to a defined contribution pension plan, where the judges themselves bear the risk of investment

¹⁹ Kathy Mack and Sharyn Roach Anleu, ‘The National Survey of Australian Judges: An Overview of Findings’ (2008) 18 *Journal of Judicial Administration* 5, 17.

²⁰ Katie Walsh, ‘Blending it like Justice Bennett: Federal Court judge leaves bench early’ *Australian Financial Review* 20 August 2015.

²¹ Marilyn Warren, ‘Should Judges be Mediators’ The Supreme Court and Federal Court Judges’ Conference, Canberra, 27 January 2010.

²² Enid Campbell and H P Lee, *The Australian Judiciary* (Cambridge University Press, 2001) 158, referring to C Milbourn, ‘Judges face sweeping new rules on ethics’ *The Age* 13 August 1998, 2.

performance.²³ In 2004, Chief Justice Sian Elias emphasised the significance of these concerns in an address to the International Bar Association Conference:

[W]e are now getting judges nearing retirement who are very anxious indeed about their positions. Some are considering early retirement in order to re-establish themselves in practice. ... Post retirement earnings are now a significant preoccupation. A judge who has retired and who does not want to go into practice, because he thinks it is incompatible with his acceptance of judicial appointment, may have no choice.²⁴

These changing circumstances have thus led to significant erosion of the no return to practice rule in New Zealand. It demonstrates the importance of the link between the availability of an adequate pension, and the level of restrictions that can be reasonably imposed upon former judges.

United States of America

In the USA, Article III federal judges have life tenure with no fixed retirement age. Thus, careers post-retirement should, at least in theory, be less of a concern from an ethical perspective: many judges would likely treat their position as a final career. However, in a survey of retired Article III judges who served between 1789 and 1992, Clark found that at least 3.65 per cent (or 96 judges) returned to practice.²⁵ Surveying judges who served between 1993 and 2010, the figure was even higher: 47.15 per cent of judges who resigned or retired during this period returned to practice.²⁶ The relatively low judicial salaries paid in the US may be a partial explanation for this trend.

Where federal judges return to practice, this will largely be governed by state-based regulation of legal practice: the *Code of Conduct for United States Judges* makes no mention of post-retirement activity, except where judges are subject to recall. State-based rules are likely to be lenient on this point, as they also regulate the return to practice of state-based judges, many of whom are elected.²⁷ Thus, US regulation on this point is state-specific and less stringent than that in other jurisdictions.

This is also reflected in the American Bar Rules, which contain a far narrower restriction on judicial return to practice than in England and Wales or Australia. Rule 1.12 specifies:

(a) ... a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person ... , unless all parties to the proceeding give informed consent, confirmed in writing.

²³ See *Judicial Superannuation Determination 2006 Amendment Determination 2015* (NZ). Cf *The Government Superannuation Fund Act 1956* (NZ), Parts 4, 5A and 5B, s 72, which relates to judges appointed before 1992. A similar reform was introduced in Tasmania, which may raise similar tensions: see further Blow, above n 18.

²⁴ Sian Elias, *Address Given at the IBA Conference at a Session Entitled 'The Next Generation Judge'*, International Bar Association Conference, 28 October 2004, Auckland <<http://www.scoop.co.nz/stories/PO0410/S00289/cj-sian-elias-address-04-intl-bar-assoc-conf.htm>>.

²⁵ Mary L Clark, 'Judicial Retirement and Return to Practice' (2010) 60 *Cath. UL Rev.* 841, 866.

²⁶ Ibid 867.

²⁷ Ibid 868.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer ...

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

This is significantly broader in what it allows than the rules in most other countries: not only does the rule allow judges to return to practice immediately, and to appear in the court in which they previously sat but, with party consent, judges can even act for parties in cases on which they previously presided. This broad licence to former judges must be considered in the unique context of the US state judiciary. It reflects the challenges of regulating conduct where high (state) judicial turnover is expected. Further, it may be a partial response to low judicial salaries, reducing barriers to judicial appointment. The US position thus further confirms the importance of jurisdictional contextualisation of the regulation of return to practice.

Conclusions and recommendations

Current practice across the surveyed common law jurisdictions demonstrates that where judges are paid sufficiently; appointed and not elected; and receive generous, non-contributory government pensions, the regulation of return to practice by former judges is informed by concerns about bias, advantage or conflict of interest, or at least the perception of these. But even in these jurisdictions, regulation does not amount to prohibition. These concerns are balanced against an understanding that it is unreasonable to place blanket bans on return to practice for former judges, and that such bans may discourage individuals, and particularly those from less privileged socio-economic backgrounds, from seeking judicial appointment at all.

It is our submission to the Standing Committee that, consistently with this practice, return to practice by former judges in Canadian jurisdictions be restricted but not prohibited. We feel that imposing a limitation on practice for a period of time and a permanent restriction on appearing before the court in which the judge used to sit (or courts or tribunals that are subject to the appellate review of that court) represents an appropriate balance that recognises the legitimate concerns on both sides of the argument. We suggest the limitation on practice be set at a period that is sufficient to allay concerns that judges may seek favour for future employment but also not so long so as to operate as an unreasonable restriction on the former judge's freedom to pursue a further career. We suggest this period be five years.

Given that what motivates these restrictions is the possibility or possible appearance of favourable treatment, conflict of interest or bias in court, what constitutes 'appearance' before a court can be appropriately limited to written and oral submissions or attendance in the restricted court. While a former judge may still draw on knowledge obtained during his

or her term as a judge, this is addressed by the temporal restriction on general return to practice. Further, a limited definition of ‘appearance’ also goes some way to ameliorating the effect of the strictness of our proposed rule.

Further, we submit that, consistent with the practice in the Australian State of Victoria, former judges’ entitlement to their judicial pension should be reduced during the time that they engage in private practice for which they receive remuneration – either by suspending all pension entitlements (see, eg, *Constitution Act 1975* (Vic) s 83(4)), or by reducing the entitlement by the amount, or a percentage of the amount, of remuneration earned in private practice.

We have also submitted that each of these restrictions ought to be subject to the exercise of the discretion of the local regulatory authority to waive the restriction in limited and defined ‘extraordinary circumstances’. This would allow for some – albeit limited – flexibility for former judges to return to practice where it would otherwise be an unreasonable restriction on the individual, and posed no or little threat to the proper and impartial administration of justice and public confidence in the integrity of the judiciary. We agree with the Select Committee that the circumstances in which the restrictions should be waived ought to relate to the *time* and *nature* of the former judge’s judicial service, rather than the circumstances of the matter in which the former judge is seeking to be involved. We would suggest that any power to waive the restriction be expressed in language that captures this, and list examples, including:

- (a) the short tenure of the judge on the bench (less than one year);
- (b) the isolated nature of the judge’s tenure (for example, as a regional circuit judge), and limited interaction with colleagues;
- (c) the specialised nature of the judge’s practice within a wider court.

In relation to (b) and (c), we would suggest that restrictions should be placed on any waiver so as to prevent the former judge from practising in the circuit or specialised area in which he or she sat.

Discussion of Post-Judicial Employment

In our submission, it is not appropriate for judges to discuss post-judicial employment while they remain on the bench. It is appropriate that such negotiations occur only after the judge has retired or resigned.

We make this submission for two reasons. First, if judges were able to discuss and negotiate post-judicial employment while still on the bench, this may give rise to a perception that judges, while on the bench, are acting in a way that is favourable to the potential future employer with whom they are negotiating.

Second, if negotiations between the judge and the potential employer are unsuccessful, there is a danger that the judge is no longer able to sit and hear matters involving that entity. For example, Mr Justice Peter Smith of the United Kingdom High Court of Justice was approached by law firm Addleshaw Goddard in 2006, with a view to his employment by the

firm after taking early retirement.²⁸ The negotiations ended sourly, and Mr Justice Smith did not resign to join the firm.²⁹ In 2007, these negotiations were the subject of a highly controversial apprehended bias application, in a matter where Addleshaw Goddard was involved in the proceedings. Mr Justice Smith refused to recuse himself from the matter, a decision which was later overturned on appeal, and there were calls for him to resign over the incident.³⁰

While a prudent judge could simply recuse in matters involving firms with which they are negotiating future employment, or they have attempted to negotiate future employment, restricting any negotiations while on the bench reduces this need, and the potentially large administrative inconvenience, not to mention the burden it would place on other judges.

Indeed it is these concerns about post-judicial employment that partly motivated our submission in relation to return to practice, above, that judges should not be permitted to return to practice in any capacity immediately. By requiring a period of time – and we suggest five years – this alleviates concerns that judges, even if they may not be involved in direct negotiations with future employers, are nonetheless seeking to impress possible future employers.

Marketing the Skills and Experience of a Former Judge

It is our view that Model Code Rule 4-2-1 is currently insufficient to govern the marketing of former judges' skills and experiences. There should be a blanket ban on the commercial advertising of an individual's former judicial status.

We submit that there should be a blanket ban on the commercial advertising of an individual's former judicial status, as the advertisement of this alone, even though factual, is likely to give rise to the perception that the individual has a superior status or influence from which the client is likely to benefit.

While we accept that indirect advertising of a former judge's status is likely to occur, for example in speaker biographies at conferences and other events, the *commercial* advertising of the former judge's status by firms or other employers on their official documentation, including webpages, should be absolutely prohibited.

Comment on Case Law by a Former Judge

We submit that former judges ought to be permitted to comment on case law from their former court, but we recommend that a soft code of conduct governing former judicial officers be developed that extends to explain what is appropriate engagement in public debate by retired judicial officers, particularly where that engagement involves the judge criticising other judges who may still be on the bench, or where it involves information about the workings of a court that the former judge was only privy to because of his or her time on the bench.

²⁸ Joshua Rozenberg, *Law: Mr Justice Peter Smith Loses His Judgment* (7 December 2007) <<http://www.telegraph.co.uk/news/uknews/1557197/Law-Mr-Justice-Peter-Smith-loses-his-judgment.html>>.

²⁹ *Howell v Lees Millais* [2007] EWCA Civ 720

³⁰ Rozenberg, above n 28.

There is no hard law based regulation of sitting judges about speaking out in public, and potentially revealing information about and – more alarmingly – even *criticising*, their colleagues. However, there is a strong reticence for judges to speak out at all, let alone speak out against their colleagues in a way that might damage the reputation of the judicial branch.

This general reluctance to speak to the public is usually traced back to the statements of Lord Kilmuir of 1955, which have become known as the ‘Kilmuir Rules’.³¹ Lord Kilmuir strongly discouraged the practice of judges speaking to the public beyond official statements, such as through their public reasons. He said:

So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public, except in the course of his official duties, must necessarily bring him within the focus of criticism.³²

Australian constitutional law expert Professor John Williams has remarked that the Kilmuir Rules are the ‘high watermark’ on the question of judges speaking out,³³ although he acknowledges they have influenced judicial culture on the matter.

There has been an increasingly relaxed attitude to public statements by the judiciary. In Australia, it has been suggested that this can be traced back to the Attorney-General eschewing his or her traditional role of coming to the public defence of the judiciary (a role played by the Lord Chancellor in the United Kingdom).³⁴ Administrative Law expert, Professor Matthew Groves has also suggested that it is a response to the more strident public criticism of judicial decisions in the media.³⁵ Today, the *Guide to Judicial Conduct* in Australia states that ‘appropriate judicial contribution’ to debate about ‘the administration of justice and of the functioning of the judiciary’, ‘is desirable’. It goes on:

It may contribute to the public’s understanding of the administration of justice and to public confidence in the judiciary. At the least, it may help to dispose of misunderstandings, and to correct false impressions.

The Guide notes that judges must be particularly cautious in speaking out on politically controversial issues, where it might give rise to questions of prejudgment or where it might result in a public conflict of views between judges.³⁶

Once a judge has retired or resigned, the soft law and conventional restrictions on his or her speaking out in public fall away. However, there have been a number of instances that have occurred in Australia that demonstrate that the public words of former judges about their time on the bench might have serious repercussions for public confidence in the judicial branch.

³¹ See Lord Kilmuir’s statement reproduced in AWB Bradley, ‘Judges and the Media: The Kilmuir Rules’ [1986] *Public Law* 384.

³² Ibid.

³³ John Williams, ‘Judges’ freedom of speech: Australia’ in HP Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 153, 158.

³⁴ Matthew Groves, ‘Public Comments by Judges of their Colleagues: An Unhappy Australian Episode’ (2016) *Journal of Media Law* 1, 4.

³⁵ Ibid 3.

³⁶ *Guide to Judicial Conduct* [5.61], 23.

Upon the retirement of Justice Dyson Heydon of the High Court of Australia, a speech he had delivered to the Cambridge Law Faculty, and then to the Inner Temple and Herbert Smith & Co was published in the *Law Quarterly Review*.³⁷ The piece, entitled ‘Threats to Judicial Independence: The Enemy Within’, was highly critical of the threats to judicial independence posed by the strong personalities of other judges: pressures to participate in joint judgments, and the elevation of consensus as a judicial value. He said ‘Judicial independence can be threatened when judicial majorities attempt to muzzle minorities.’³⁸ He also spoke of weaknesses of judges to adopt a ‘herd instinct’, where judges adopt what they think will be the majority position.³⁹ The piece came with a disclaimer that it must ‘not be taken to be speaking about the actual behaviour of any particular court of which the author has been a member, but to tendencies or possibilities in courts in general.’ However, it was widely surmised that he was speaking specifically about the dynamics of the Australian High Court during his tenure and the dominating personalities of a number of his colleagues who, at that time, were still sitting on the Court.

In 2014, following the highly controversial appointment of Tim Carmody as Chief Justice of Queensland over the objections of the legal profession and judges of the Court itself, a number of public statements were made by sitting, retiring and retired judges. Of these, the speech of Justice Alan Wilson was the most controversial. On 26 March 2016, on the eve of his retirement, Justice Wilson gave his valedictory address. In it, he criticised the appointment and short tenure of the Chief Justice as an experiment that was ‘not working—and there is no reason to think that it ever will’.⁴⁰ He revealed a deep unhappiness on the Court with the Chief Justice, an alleged failure of the Chief Justice to fulfil his court duties, and outlined a number of episodes where the Chief Justice allegedly acted improperly, including in the attempted sacking of the Senior Judge Administrator and interference with the constitution of the Court of Disputed Returns following a close State election.⁴¹ This was information that Wilson – on the very cusp of retirement – was only privy to because of his time as a sitting judge of the Supreme Court. The address was hugely damaging to the reputation of the Chief Justice and the Court more generally. It would, together with a number of other events, ultimately lead to the resignation of the Chief Justice.⁴²

These examples illustrate serious concerns with former judges speaking out, not necessarily about case law from their former court, but in criticism of other judges who may still be on the bench, or where it involves information about the workings of a court that the former judge was only privy to because of his or her time on the bench. As such, we recommend the development of a soft code of conduct for former judges that includes, *inter alia*, guidance as to appropriate comment on such matters.

³⁷ J D Heydon, ‘Threats to Judicial Independence: The Enemy Within’ (2013) 129 *Law Quarterly Review* 205.

³⁸ Ibid 208-9.

³⁹ Ibid 216.

⁴⁰ Alan Wilson, ‘Notes’, paper presented at the valedictory ceremony to mark his retirement, Banco Court, Brisbane, 26 March 2015, < <http://www.sclqld.org.au/judicial-papers/judicial-profiles/profiles/amwilson/papers/1>>.

⁴¹ Ibid.

⁴² See further Rebecca Ananian-Welsh, Gabrielle Appleby and Andrew Lynch, *The Tim Carmody Affair: Australia’s Greatest Judicial Crisis* (NewSouth Publishing, 2016); Groves, above n 34.

This is not to say that former judges should be counselled against speaking out, even about individuals and practices on the bench when they were members. However, we believe some guidance should be offered as to when such public comment is appropriate. In some cases, it may be that such comments are ‘regrettable but necessary’ because of the situation on the court.⁴³ Nonetheless, just as with sitting judges, there should be some guidance to assist individual former judges determine whether certain public statements are justified or advisable.

Former Judges Working Pro Bono

It is our submission that the same restrictions on return to practice should apply to former judges working pro bono with one exception: that there should be no reduction in the pension received by the former judge.

Part Time Judges and Other Judicial Officers

While we appreciate the importance of the issues raised in the final questions of the discussion paper, these matters are beyond the scope of our current research and as such we refrain from making submissions on them.

Thank you again for the opportunity to provide this submission to the Committee.

Yours sincerely



DR GABRIELLE APPLEBY
Associate Professor, UNSW Law
Co-Director, The Judiciary Project
Gilbert + Tobin Centre of Public Law



DR ALYSIA BLACKHAM
Senior Lecturer
Melbourne Law School
University of Melbourne

⁴³ As Matthew Groves described the comments of Justice Alan Wilson: Groves, above n 34, 24.