Judicial Conference of Australia

Position Paper

Judicial Officers' Retirement Benefits

July 2012

[1] In 2004 the Governing Council of the Judicial Conference of Australia adopted a position paper, which was entitled Preliminary Response of the Judicial Conference of Australia to Proposed Changes in Pension Arrangements. The paper was prepared as a response to a proposal of the then leader of the Federal Opposition, the Hon M Latham, MP, that a Labor government would "close down the superannuation schemes for Federal MPs, Judges and the Governor General", although not with retrospective effect. At its meeting held on 26 June 2004, the Governing Council adopted the contents of that paper by resolving to distribute it to the Attorneys-General of the Commonwealth, States and Territories as well as to members of the JCA.

[2] That position paper, written as it was to address a challenge to judges' pensions, did not deal with the subject of appropriate retirement benefits for magistrates. At its meeting held on 12 March 2011, the Governing Council appointed a sub-committee to develop a position statement upon the broader subject of judicial retirement benefits.

[3] At the outset it is desirable to focus upon what is the proper role of the JCA on this subject. Its responsibility is in the promotion and maintenance of a strong, independent and productive judiciary in Australia. It is not the role of the JCA simply to lobby for more money or improved benefits for serving or retired judicial officers. It is likely that some commentators would seek to describe any position put forward by the JCA on this subject as an exercise of that kind. Realistically, that is probably an unavoidable consequence of a public discussion in which some participants might not feel confined to a fair, informed and rational debate. From the JCA's perspective however, the focus must be upon matters of principle. In particular, it must be upon the ways in which the nature and level of judicial remuneration has the potential to affect the quality of and the public confidence in the service provided by the judiciary.

[4] The position paper adopted by the Governing Council in 2004 set out these principles:[1]

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1 Pages 16-17.

"(i) Changes to pension arrangements should never be retrospective, both for constitutional and other reasons. However, if new arrangements are introduced, serving judges should have the option of participating in them should they choose to do so.

(ii) New arrangements should not be introduced otherwise than on the basis of recommendations made by a genuinely independent and properly resourced body. Such a body should have terms of reference that leave it open to recommend the retention of existing pension arrangements and allow for the impartial assessment of those arrangements. The body should also be required to consult with interested persons, including judges and the JCA.

(iii) Any changes to judicial pension arrangements should accept that the pension constitutes an integral part of judicial remuneration. To consider changes to one element of judicial remuneration, in isolation from the total 'package', invites reduction of judicial remuneration with consequential adverse affects on the ability of courts to recruit qualified persons.

(iv) Any changes to pension arrangements should not result in diminution of the total remuneration of judges. Otherwise, difficulties would be created not only for recruitment of judges, but for courts whose members are differently remunerated for performing the same tasks.

(v) Any scheme must provide adequate benefits where retirement is occasioned through disability or illness. If it does not, there is unacceptable danger of incapacitated judges remaining in office for want of security in their retirement.

(vi) Any changes to federal pension arrangements should be broadly consistent with the position in the Australian States. If there are marked differentials, the consequences for recruitment to the federal judiciary are obvious. At present, with the exception of Tasmania, the arrangements in the States are similar to those applying to federal judges.

(vii) Any pension or superannuation arrangements should provide for defined benefits. If the risk of investment performance falls on judges, the perceived independence of the judiciary may be impaired and other practical disadvantages referred to in this report are likely to become apparent."

[5] As was stated in (iii), it must be accepted that a judge's pension is an integral part of his or her judicial remuneration. It would be artificial to regard a judge's salary and other allowances paid during his or her term of office as the only financial reward for judicial service. In each jurisdiction, the entitlement to the judicial pension derives from a statute which quantifies the pension by reference to the salary of a serving judge.[2]

[6] Accordingly, the substantial financial benefit represented by a judge's pension has affected the determination of judicial salaries. In its Major Review of Judicial and Related Officers' Remuneration, published in 2002, the (Commonwealth) Remuneration Tribunal stated that:

> "The Tribunal considers that the judicial pension plays an important role in terms of overall remuneration and its significance should not be dismissed. The Tribunal considers that reference to the salary component alone does not provide an accurate picture of the true level of judicial remuneration."

[7] In the same publication, the Remuneration Tribunal said this:

> "**6.4 Pensions**
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> The key elements of the judges' pension scheme were outlined in the Review's 2001 Discussion Paper. While the Judges' Pensions Act 1968 (the Pensions Act) falls outside the Tribunal's direct responsibilities, a number of issues regarding the Pensions Act and superannuation matters were raised with the Tribunal.
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> **6.4.1 Value of the Judges' Pension Scheme**
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> A number of the submitting parties noted the significance of the judges' pension scheme and the value it has in contributing to the attraction and retention of judges. There were differing views as to whether or not it should be included in the context of discussions on judicial remuneration. The Tribunal notes that the nominal contribution rates for all Federal Courts, with the exception of the [Federal Magistrates Courts] which does not have access to the Scheme, have been valued by the Australian Government Actuary (AGA) at 51.7% of salary component. That figure was calculated in the Report on the long-term costs of the judges' pension scheme prepared by the AGA, at 30 June 1999. Based on this figure, the current notional value of the [total remuneration] package of a Federal Court judge increases to $336,016 (exclusive of other benefits), although the actual monetary value will vary according to individual circumstances such as age and length of service."

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[2] With the proviso that in South Australia, the pension is a percentage of the judge's salary upon his or her leaving office (adjusted according to the Consumer Price Index), rather than a percentage of the salary which he or she would receive if still in office.

> The Tribunal thereby made it clear that the substantial benefit of a judicial pension is brought into account in its assessment of an appropriate level of salary for federal judges.

[8] Since that review in 2002, the Remuneration Tribunal has not specifically revisited the relevance of a pension entitlement to the determination of the salary and allowances of a federal judge and it must be inferred that the Tribunal has continued to fix the levels of judicial salaries with the remunerative benefit of the judicial pension in mind.

[9] The Remuneration Tribunal, which is established under the Remuneration Tribunal Act 1973 (Cth), is responsible for the determination of the remuneration of (relevantly here) judicial officers of federal courts and tribunals. But the effect of its determinations is more extensive. By legislation in Victoria, Queensland, the Northern Territory and the Australian Capital Territory the remuneration of serving judges and magistrates in those jurisdictions is quantified by reference to the salary of a judge of the Federal Court. And in practice, remuneration tribunals in New South Wales, Western Australia and South Australia have also seen fit to fix judicial remuneration by reference to that of federal judges. This is the result of an informal agreement since 1990 between Attorneys-General that the rate of base salary for a Supreme Court judge should be no more than that paid to a Federal Court judge, which should be no more than 85 per cent of the salary of a High Court judge.[3] In turn the salaries of Tasmanian judges are quantified by reference to those in South Australia and Western Australia.

[10] Therefore in general, the entitlement to a judicial pension has been a factor in determining the level of a judge's salary. There are, however, two anomalous cases. The first involves some judges of the Federal Court, the Family Court and the Supreme Court of the Northern Territory, who remain subjected to the unfair burden of the superannuation surcharge, which by a Commonwealth statute, has been made applicable to a judge's pension by the statutory fiction of deeming the pension to be instead a superannuation entitlement. This applies to only some judges from those courts, and its application depends entirely upon the fact that the judge was appointed to office within a certain period from 1997 to 2005. The case for the statutory removal of this anomaly has been made by the JCA and others, and it is unnecessary to set it out here.

[11] Secondly, there is the position of judges of the Supreme Court of Tasmania. Judges appointed to that court since 1999 have no entitlement to a pension. The circumstances which produced this anomaly are recorded in a paper presented by Justice Blow of that court at the Eighth Colloquium of the JCA in 2004. The salary of the Chief Justice of Tasmania is determined by reference to the salaries payable to the Chief Justices of South Australia and Western Australia, and the salary of the other judges of the court is fixed at 90 per cent of the Chief Justice's salary.[4] In consequence, the true remuneration of Tasmanian judges appointed after 1999 is substantially less than that of judges of Federal and Supreme Courts throughout the Commonwealth. Judges of comparable ability

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3 The Remuneration Tribunal's *Major Review* at [5.4.5].

4 *Supreme Court Act 1887* (Tas) s 7.

and experience and undertaking work of the same public importance and complexity, are thereby remunerated in Tasmania at effectively a much lower level than that which has been determined as appropriate by the various independent remuneration tribunals in their jurisdictions. No circumstance can be identified which should distinguish the Supreme Court of Tasmania from other superior courts throughout the Commonwealth. This difference has become yet more difficult to justify with the progression towards a national judicial system and a national legal profession.

[12] The cost of the judicial pension schemes is substantial although it has not been suggested that to date, it has impeded the proper resourcing of courts. However, Professor Brian Opeskin of Macquarie University has examined the impact of the demographic change of an ageing population upon the cost of judicial pensions. In an article published last year,[5] he suggested possible reforms to the existing pension schemes by increasing the maximum retirement age of judges, increasing the minimum age at which judges qualify for the judicial pension and increasing the minimum years of service required to qualify for that pension. In making those suggestions, Professor Opeskin was not suggesting that judges were over-remunerated. Rather the challenge, as he saw it, was to deal with a possible imbalance between the total paid to a judge during office and that paid in retirement, arising from the increased life expectancy of the Australian population.

[13] In the same publication, Professor Opeskin identified a number of principles which, the JCA agrees, must necessarily constrain any consideration of a change to judicial pensions. The first is that "judicial office must continue to be attractive to the most meritorious barristers and solicitors, nearly all of whom have lucrative alternatives in the legal profession. A pension is not a gratuity; it is "simply part of the price" of making judicial office attractive".[6] He wrote that "if the opportunity cost of accepting a judicial appointment is too high, it will become more difficult to recruit judges and the quality of appointees may fall. That would impose other costs on the judicial system which should be avoided – costs such as erroneous decisions, unnecessary appeals, declining public confidence in the judiciary, and the destabilisation of the rule of law. A well-functioning judicial system is not a cheap attribute of a liberal democracy, yet few could doubt the importance of maintaining it".[7] Secondly, "the remuneration of judges should reflect the status of their office". Thirdly, "judicial remuneration must be sufficient to ensure the high degree of judicial independence necessary for judges to discharge their responsibilities without fear or favour, according to law".[8] He quoted Professor George Winterton, who has written that the remuneration of judges must not be "so low that they are tempted either to compromise their integrity or undertake remunerated extra judicial activities. Moreover their status and morale or self-esteem must be

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5 *The High Cost of Judges: Reconsidering Judicial Pensions and Retirement in an Ageing Population*, 39 Federal Law Review 33.

6 39 Federal Law Review at p 62.

7 Ibid.

8 Ibid.

sufficiently high that they enjoy community respect and feel able to resist pressure from any quarter".[9]

[14] In the position paper adopted by the Governing Council of the JCA in 2004,[10] the public benefits of an adequate judicial pension scheme were identified as the following:

(1) The pension is an important element in attracting the best candidates for appointment as judges; it was noted that whilst judges do have a commitment to public service (otherwise they would not be judges) that did not mean that candidates for judicial office considered that remuneration is irrelevant to their decision. The paper referred to the experience in New Zealand where a change in 1992 from judicial pensions to a defined benefit scheme was said to have produced significant problems, including difficulties in judicial recruitment.

(2) A pension scheme promotes the reality and appearance of judicial independence by eliminating what might otherwise be seen to be a temptation for judges to tailor their approach to their post-retirement interests.

(3) An adequate pension which provides appropriate disability benefits avoids the risk that judges who are no longer up to the job may be tempted to stay on in order to avoid the insecurity and loss of income associated with retirement.

(4) In the absence of an appropriate pension arrangement, there is a substantial risk of lawyers accepting appointment to the bench with the intention of remaining only for a short period in order to enhance their earning power by trading on their position as former judges, thereby impairing independence and leading also to a reduction in the quality and experience of the Bench.

(5) Inadequate pension arrangements would be likely to act as a disincentive to many capable judges remaining on the Bench and instead would provide an incentive for them to return to more remunerative employment.

[15] As far as judicial pensions are concerned, they remain valid and powerful considerations. There has been no change in any relevant circumstance since those views were endorsed by the JCA eight years ago. Writing in The Australian newspaper on 13 May 2011, the President of the Law Society of New South Wales made many of the same points. He wrote that whilst "there is a case for some minor amendments to the pensions scheme … it would be a gross exaggeration to state that the judicial pension scheme rests on outdated concepts. In fact, the main concept, on which the scheme rightly continues to

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9 George Winterton, *Judicial Remuneration in Australia* (Australian Institute of Judicial Administration), (1995) at p 28.

10 Referred to above at [1] to [4].

rest, is to preserve judicial independence and impartiality, and the perception of independence and impartiality".

[16] It can be seen then that there are several powerful justifications for the judicial pension schemes. One is the need to attract appointees to judicial office who have the necessary skill, standing and experience. Others exist because of the nature of judicial office for which there is a singular need for actual and apparent independence. It is the particular nature of judicial office which makes it unrealistic to compare judicial remuneration, and in particular what should be an appropriate retirement benefit, with what is provided in the private sector or elsewhere in the public sector.

[17] These considerations are relevant to the remuneration of all judicial officers. But although judges have long been remunerated by the inclusion of a pension entitlement, this is not the position for magistrates. This is largely a consequence of what used to be the structure and nature of magistrates courts in the States and Territories, before they became in all respects independent courts performing the functions of the judicial arm of government. Formerly, those magistrates courts were not so distinctly removed from the functions of the executive arm of government, as should have been and is now the case. As Professor Winterton has written:

> "Until quite recent times, Australian magistrates were members of State public services and legally subject to the regulation and discipline inherent in that position."

The Federal Magistrates Court has not undergone that development, having always been an independent court in all respects, created under Chapter III of the Constitution.

[18] The remuneration of magistrates, whilst they are in office, has changed to accord with the modern role of magistrates courts. However, the proper provision for retirement benefits for magistrates seems to have been overlooked. Any assessment of what is an appropriate retirement benefit for magistrates must proceed upon a proper understanding of the constitutional role and importance of all branches of the judiciary. The notion that adequate provision can be made simply by the relevant government making the minimum statutory contribution to a magistrate's superannuation misconceives the singular nature of judicial service.

[19] It is appropriate then to formulate principles of more general application to all judicial officers. To a substantial extent they correspond with those endorsed by the Governing Council in 2004. They are as follows:

(1) As part of the remuneration of every judicial officer, there should be a provision for retirement and death benefits which is designed to maintain a judiciary of the highest quality, preserve judicial independence and uphold public confidence in the judicial system.[11]

[11] cf the "core values" set out by Professor Opeskin at 39 Federal Law Review p 69-70.

(2) The remuneration of a judicial officer should not be diminished by, in particular, a diminution in his or her retirement or death benefits, either before or after that person leaves judicial office.

(3) Between courts of comparable jurisdiction or among members of the same court, there should be no significant difference in the value of judicial remuneration, inclusive of retirement and death benefits.

(4) It is desirable that all judicial officers be remunerated on terms which include a pension or a superannuation arrangement which provides for adequate and defined benefits.

(5) There must be provision of adequate benefits where retirement is occasioned through disability or illness, so as to avoid the unacceptable prospect that a judicial officer, who has become incapable of fully discharging his or her duties, would remain in office for want of a secure retirement.

(6) If there is a change to arrangements for retirement and death benefits and which accords with these principles, serving judicial officers should have the option of participating in the new arrangements should they choose to do so.

(7) It is desirable that any change to existing pension schemes be as recommended by a genuinely independent and properly resourced body which is required to consult with all interested persons, including judicial officers and the JCA.

[20] When assessed against these principles, the various pension schemes, despite the differences between them, must be acknowledged as satisfactory and as serving the purposes of the promotion and maintenance of a strong, independent and productive judiciary. That is not to say that there is no scope for some appropriate change to the detail of any of the various schemes. The position of those judges who are subject to the surcharge legislation offends particularly the principle in (3). The position of Tasmanian judges offends particularly (1), (3) and (5).

[21] The present arrangements for magistrates are far from satisfactory, when measured against those principles, especially in those jurisdictions where the magistrate has only the minimum employer contribution of 9 per cent. In some State courts, magistrates who have been in office for very many years enjoy higher benefits from superseded superannuation schemes, and in particular co-contributory schemes. The diminution in the value of superannuation for more recently appointed magistrates, by the abandonment of co-contributory schemes, has occurred at the same time as the profound change in the recognised status of magistrates, representing a substantial and serious oversight on the part of governments.

[22] There must be a search for solutions which enhance the prospects of attracting and maintaining a strong bench in magistrates courts. This need not be a substantial financial burden for governments. The real risks to the strength and

independence of courts, from the present arrangements, should not be dismissed for the fact that, fortunately, courts without adequate retirement benefits continue, overall, to well discharge their duties. Sound policy requires the issue to be addressed.