Judicial Retirement Benefits: Superannuation

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Introduction

In New Zealand, judicial pensions were replaced for all judges appointed after 1992 with a contributory superannuation system, with no defined benefits.

The contributory system introduced in 1992 provided for a government contribution of 20% and a judge contribution of 8%. Following the Higher Salary Commission determination a few years ago a judge may now opt to contribute just 5%. The government contribution ends when the judge reaches the statutory retirement age or 16 years of service (whichever is earlier). This mirrors the achievement of maximum benefit after 16 years service under the defined benefit system. The contributions can be paid into any registered superannuation scheme.

The proposal was opposed by the judiciary at the time. With hindsight, it is clear that the arguments against the change were not well-made. That I think was because at the same time the government moved to reduce the dollar value of pensions to offset the gain from their becoming tax free. Huge energy went into fighting that battle, unsuccessfully. As a result, the powerful arguments against depriving future judges of a defined benefit system on retirement were not properly confronted. It is good to see that the same mistake is not being made in Australia. The Judicial Conference of Australia is to be congratulated on the efforts it is making to ensure that the proposals current in your jurisdictions are subjected to principled analysis.

The New Zealand experience suggests three issues are critical.

1. First, the changes are based on a questionable assumption: that for the purposes of retirement benefits the judiciary can be treated in the same way as other state and private sector employees. I want to suggest that gaining acceptance that the judiciary occupies a special place prompting a different system is the key challenge.

   It is key because a major purpose of superannuation reform has been to transfer risk from the Treasury and from private employers to the person benefiting. The risk assumed in relation to judges is not what is of most concern. In seeking to have the government reinstate a defined benefits system for judges in New Zealand, on the recommendation of the Solicitor-General, the response of the Minister of Finance has been that if the government acceded to the request it would be faced by similar pressure from other groups, such as the police. It is critical to establish why the position of the judges is different from all other groups and why the community interest in an independent judiciary requires a distinct response.

   It needs to be acknowledged that the distinct place of the judiciary is not a popular notion. Politicians in my country tend to become indignant at the idea, pointing to their own meager retirement benefits and there is no widespread understanding that there is public interest in the separate treatment of judges. Indeed such notions tend to be resented as elitist.

2. Secondly, the advantages of a contributory system (portability; empowerment of those benefited to invest the contributions themselves; the ability to restructure the total employment package between superannuation contribution and income for tax and lifestyle reasons) may be irrelevant, undesirable or unachievable for judges. This is not a distinct argument, but rather a subset of the reasons why judges are in a different position from others. It is important to be clear about the limitations for judges in the benefits achieved by a contributory system when considering what system should be put in place if pensions are to be restructured.

3. Thirdly, change is extremely difficult to manage fairly within the judiciary.

Our experience is that different remuneration packages now apply to the different classes of judge - those appointed before 1992 and those afterwards. Part of the difficulty is that there was no clear statement of what was being achieved. The judges assumed that, while the investment risk of the eventual yield would pass to the judges, the nominal benefits would be comparable: no different salary was put in place to reflect any difference in value. The actuarial assessments available to the government suggested that the difference in value of post-retirement benefits would require the government contribution to be set at 36% of salary. (As there is no copy of this assessment on the files in the Chief Justice's office, it seems that this assessment was not supplied to the judges). In fact, the government contribution was set at 20%, apparently because 20% was at the top range of contributions found in private superannuation schemes. No one seems to have had the opportunity to point out that such comparison was clearly wrong and that a proper comparison with the defined benefits system for the pre-1992 judges required a much lower multiple of years service than in the private sector schemes.

Adjusting for this initial flaw is extremely difficult to achieve fairly. The Remuneration Authority in New Zealand operates on the basis of its assessment of overall remuneration. In setting what it considers fair remuneration, it has worked on the packages of the post-1992 judges. While acknowledging a need to address the disparity identified by the judges, it is clear that it considered it politically unthinkable to make up the discrepancy immediately, much less to address the shortfall in preceding years. Last year it moved the Government contribution to 25% and indicated that there would be further movements. How far it will go remains unclear.

In the meantime, it may well be creating further disparities. Although the remuneration of comparator groups moved 5-7% last year, the salaries of the judges moved only 3%. Judges appointed before 1992 feel that the superannuation contribution lift was at their expense.

For us, the disparity argument will run out when the last judge appointed before 1992 retires. In jurisdictions where pensions are linked to the salaries of serving judges, the adoption of the New Zealand approach could lead to conflicts of interest between serving judges and retired judges which could last some considerable time.

In addition to concerns about disparity between the two classes of serving judge, the changes failed to address the position of Acting Judges. There is no provision for the newly created category of Part-time judge to receive superannuation benefits. This has come about because the Judicature Act and the District Courts Act refer only to the salaries of the judges. They had no need to refer to pensions under the old system because entitlement to those was conferred in the Government Superannuation Fund Act. Today, the only mention of superannuation entitlements is in the Remuneration Authority Act which simply empowers the Remuneration Authority to set salaries and superannuation entitlements for Judges, who are not apparently defined to include Acting Judges or the new part-time judges. The legislation is not clear on this point.

In addition, the category of Temporary Judge (a full-time judge who may be a retired judge) is also not mentioned in the legislation but has in the past received the superannuation contribution. This shambolic state of affairs has only just come to light after I asked the Solicitor-General to investigate the position of Acting Judges. Since the Remuneration Authority approaches its tasks on the basis of the total package, there may be a good argument that Acting Judges are not receiving commensurate compensation for the work they do. That may not have been a concern when they were eligible for a pension, but does not seem justifiable under the new arrangements at least to the extent that the superannuation contribution represents remuneration. The moral is that if you do attempt reform, make sure that the position of all Judges is covered and that the legislation is clear as to entitlement.

What happened in New Zealand

Most judges opted to use the registered superannuation scheme which had taken over public service contributory schemes. In the District Court and increasingly in other courts it seems that some judges have been more creative. In particular, those who have structured their affairs to invest in their own registered schemes and who have invested in property are said to have done well. The managed funds and some of the private schemes have done very badly. There will be reversals of fortune over time. In the meantime, we 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. Judges nearing retirement at the current statutory age of 68 are anxious to establish what work they can expect to get under Acting warrants or through government appointments. I am spending a great deal of time canvassing options for them.

I am alarmed about the implications for judicial independence if judges have such incentives to stay on the right side of the government or keep in with influential members of the profession who may be expected to provide them with work after retirement. The absence of the security of the pension has impacted upon recruitment: Several senior members of the profession who have turned down appointment have referred to the lack of security and certainly recruitment has been very difficult, particularly from the ranks of the senior barristers.

Prompted by concerns about recruitment and retention, we decided to look more closely at options. That led to a realisation that the discrepancy in the benefits obtained by the two classes of judge was more than that produced by the transfer of risk to the judge and the poor performance of equities.

On the basis that the design was flawed from the outset as well as the problems which arose through the transfer of risk to the judges, we attempted to get the question of a defined benefit system reconsidered. We have also asked the government to raise the age of retirement. The age of retirement is likely to be politically contentious and will have to find a legislative vehicle, even if the government is prepared to run with it.

The Attorney referred the defined benefit reinstatement proposal to the Solicitor-General. He expressed the opinion that

> *The defined contribution scheme creates undesirable incentives and . . . exposes judges to financial pressure, both before and after retirement, in a way that is inconsistent with the requirements of judicial independence.*

In June 2003, the Minister of Finance turned down the recommendation of reconsideration, partly on the basis that it would cause other groups, such as the police, to seek to reinstate a defined benefit system. The Minister took the view that the Remuneration Authority had authority to address any disparity in setting the contributions. That is as far as we have got.

Why the judiciary should be treated differently

It is very important to be clear why a defined benefit system is better protection for judicial independence and why passing the investment risk to judges through a defined contribution system is destructive of the institution. It is also important to acknowledge that the contributory system does have benefits for judges over the pension. That these benefits to the individuals do not outweigh the institutional risk is a proposition that may not appeal to all judges. Finally, I think we need to come up with solutions which are defensible on a principled basis: that may require us to grasp the nettles of post-retirement activities and management of investments while on the bench.

The benefits of the defined contribution system which need to be acknowledged are the certainty of

entitlement to the contribution (there is no minimum service to qualify and the contribution becomes the property of the judge, available to his estate in the event of death) and the ability to tailor investments to meet the lifestyle requirements of the judge and his family (as in investment in a house property) and the opportunity to do better than the pension value.

Here is my list of reasons why judges are in a unique position which makes application of the defined contribution benefit system to them dangerous to judicial independence and unfair to the judges themselves.

1. In New Zealand compulsory retirement ages are now generally prohibited by Human Rights legislation. Judges however must retire at the comparatively young age of 68. Given modern life expectancies, uncertainty of income from that age is a disincentive to recruitment, an incentive to early retirement and an incentive to obtain remunerative employment upon retirement in whatever way the judge can - it is not feasible or fair to take the view that some employment may be inappropriate for former judicial officers.
2. Other groups benefit from freedoms which judges relinquish on taking office - to move on to other positions taking their superannuation entitlements with them, to take control of the management of their own investments through selection of an approved fund, and to structure their remuneration package between salary and superannuation for tax efficiency.

   It is important for judicial independence that judges do not move in and out of the judiciary.

   It undermines that independence if judges are distracted from their responsibilities by the need to pay attention to their future finances. Worse, it risks conflict of interest which undermines impartiality in judging if judges are concerned about the risks of the investments which underlie their future security. Blind trusts do not seem to me to be a complete answer and in any event to require judges to use them is to deny to judges the ability to make their own investment decisions, a freedom available to others in defined contribution systems.

   It does not look right for judges to be structuring their packages for tax effectiveness. Again, it is another distraction and potential conflict that judges should not have.
3. There are insidious pressures on judges who want to return to remunerative employment after retirement. They include maintaining a degree of popularity with those who might provide such employment - principally, the government and large firms. That is inconsistent with judicial independence.

As I have indicated, however, if these arguments are valid, they have implications for post-retirement activities and for the conduct of investments while the judge is on the bench which need to be addressed. These are existing issues and apply to those who have retired on pensions in New Zealand. If we do not tackle the problems for judicial independence in such conduct, we undermine the case for resisting the defined contribution superannuation system.

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Footnotes

1. The Rt. Hon. Dame Sian Elias, Chief Justice of New Zealand