



COMMONWEALTH OF AUSTRALIA

SENATE

SELECT COMMITTEE ON SUPERANNUATION

Reference: Judicial superannuation

SYDNEY

Thursday, 1 May 1997

OFFICIAL HANSARD REPORT

CANBERRA

SENATE
SELECT COMMITTEE ON SUPERANNUATION

Members

Senator Watson (Chair)

Senator Sherry (Deputy Chair)

Senator Allison
Senator Conroy
Senator Chris Evans

Senator Ferguson
Senator McGauran

For inquiry into and report on:

- (1) The appropriateness of current unfunded defined benefit superannuation schemes' application to judges and parliamentarians, including but not limited to:
 - (a) the equity between members;
 - (b) the cost to the Commonwealth and members;
 - (c) the impact of unfunded liabilities on future budgets;
 - (d) the advantage or otherwise of member choice of fund or investment strategy;
 - (e) the flexibility of existing schemes, including in respect of portability, in the context of their working arrangements and those applying in the general work force;
 - (f) the appropriateness of replacing such schemes with a fully-funded accumulation scheme;
 - (g) the appropriateness of the application of preservation rules and taxation on benefits taken prior to age 55 to such schemes;
 - (h) the capacity for making superannuation arrangements less complex than current arrangement; and
 - (i) the administrative costs of such arrangements and their alternatives.

- (2) That for the purposes of the inquiry the committee take evidence from the public, Government agencies and State, Territory and Federal government departments, and conduct public hearings as appropriate.

WITNESSES

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SENATE SELECT COMMITTEE ON SUPERANNUATION

Judicial superannuation

SYDNEY

Thursday, 1 May 1997

Present

Senator Watson (Chair)

Senator Allison

Senator Sherry

Senator McGauran

The committee met at 9.02 a.m.

Senator Watson took the chair.

CHAIR—I welcome everybody to this public hearing of the Senate Select Committee on Superannuation. On 25 November 1996, the Senate referred the following terms of reference to the committee:

The appropriateness of current unfunded defined benefit superannuation schemes' application to judges and parliamentarians.

This is the committee's first public hearing on this matter.

Today we will be concentrating on the judges pension scheme and will be taking evidence from several prominent members of the judiciary. The committee will also hear from noted academic commentator Professor George Winterton, who is the author of *Judicial Remuneration in Australia*, and the Attorney-General's Department, which administers the federal judicial pension scheme.

Before we commence taking evidence, let me place on record that all witnesses are protected by parliamentary privilege with respect to submissions made to the committee and the evidence which is given to the committee. 'Parliamentary privilege', for those who have not appeared before a committee before, means special rights and immunities attached to parliament, its members and others necessary for the discharge of functions of the parliament without obstruction and without fear of prosecution.

Any act by any person which operates to the disadvantage of a witness on account of evidence given by him or her before a parliamentary committee, a Senate committee or any other committee of the Senate is treated as a breach of privilege. The witnesses are accordingly protected.

It has been agreed by the committee that, in its investigation and evaluation of the remuneration systems applicable to parliamentarians and judges, the committee will make two reports: a separate report in relation to the judiciary and a separate report in relation to parliamentarians.

[9.05 a.m.]

MULLANE, The Hon. Justice Graham Robert, Family Court of Australia, 61 Bolton Street, Newcastle, New South Wales 2300

CHAIR—It is now my pleasure to welcome The Hon. Justice Mullane via teleconference. We do prefer all evidence to the committee to be given in public, but should you at any stage wish to give part of your evidence or answers to specific questions in private you may apply to do so and the committee will consider your request. I now invite you to make an opening statement.

Justice Mullane—The issue I raised in my submission related to equity between members of the judges' pension scheme. The scheme is set out in the Judges' Pensions Act 1968. Section 6 of the act deals with judges who retire and it contains provisions for situations where the retirement is because of permanent disability or incapacity. Subsection 6(1) has provisions which apply to retirement for any other reason, including expiry of the appointment or voluntary retirement. Subsection 6(2D) has special provisions for a judge whose appointment expires after at least six years service and who is not entitled to a pension under subsection 6(1).

Otherwise the provisions of subsection 6(1) impose two conditions on the entitlement of a retiring judge to a pension. One is that he or she has to have served 10 years and the other is that he or she has to be over 60 years of age. If you do not satisfy one of those conditions when you retire, the general position is that you will not qualify for any pension. The act makes no provision for lump sums or any other retirement benefit than a pension.

If you continue in office for further years of service once you have served 10 years and have reached 60 years of age, then those years of service do not increase the benefit you receive. In one sense, you forfeit benefits because the pension that you would receive had you retired at aged 60 is forfeited.

I think the inequities can be highlighted by specific examples. For example, a judge who is appointed at age 49 and retires at age 60 after 10 years service would be entitled to a judicial pension from age 60. If you compare that with a judge who is appointed at age 36, as one of the judges of our court was, and retires at age 70 after 34 years service, then the second judge has provided more than three times the years of service provided by the first judge, but is likely to receive, if their life expectancies are similar, about 10 years less of pension benefits. That does not seem equitable.

A judge appointed at 39 who retires at 59 after 20 years service is not eligible under subsection 6(1) to any pension. That judge would receive no benefit after 20 years service, but the judge who retires at 60 after 10 years service receives a full pension from age 60 onwards. It does not seem equitable when you compare those two members. That

example may seem extreme, but I am aware of one judge of our court who retired at age 53 after more than 10 years service and who was not entitled to any benefit.

I have confirmed with six judges in the Family Court that they were appointed before age 40. The youngest appointment amongst them was 36 years of age. One was appointed at 38 and four were appointed at 39. There are also four fairly recent appointees who I suspect were also under 40 years of age. They were all ladies and I have not had the time or courage to attempt to have them confirm their age at appointment.

All of the people appointed before age 40 have to serve more than 20 years before they become entitled to any retirement benefit under the Judges' Pensions Act. That does not seem equitable compared with the situation of a judge who after 10 years of service retires at 60. It does not seem equitable when one compares it with the special provisions in subsection 6(2D), which would give a part pension to a judge who is, say, 63 when appointed and is appointed to age 70 and who then retires after six years service. That judge under subsection 6(2D) would receive a part pension.

The inequity is further compounded if one looks at the benefits in the act payable to the widow or widower or dependent children where a retired judge dies. There are no benefits payable unless the retired judge himself or herself was at the time of death entitled to a pension under the act. Those provisions are set out in sections 9 and 10. So if a judge retires before age 60, even with 20 years service, that judge is not eligible for a pension under the act, and if that judge dies after retirement leaving a widow or widower or dependent children, no benefits are payable to them.

Again, that compares with the judge who does 10 years service and retires at age 60. He or she is entitled to the full pension and if that judge dies leaving a widow or widower or dependent children, then pensions are payable under sections 9 and 10 for them.

I think the inequities are relevant in respect of career decisions. I would like to mention three aspects of those. The first is a judge who is serving as a judge and decides before age 60 that he or she is not happy with the work and would prefer to do something else. I think there is a discouragement from retiring early and there is an incentive to remain in the judiciary, despite dissatisfaction, for whatever years it takes to achieve the 10 years service and age 60. The decision may also be influenced by the high costs of buying into a barrister's chambers or a solicitor's partnership as part of a change of career and the lack of any superannuation benefits which could be collected on retirement and used to assist in that.

The second aspect is where a person is approached about appointment as a judge and is concerned as to how he or she would adjust to the role. That person, one would expect, might decide to accept the appointment on the basis that if it did not work out the person could retire and do something else. But there is some discouragement from that

approach because if you accept the appointment and it leads to early retirement, there would be no superannuation or other similar benefits provided by the employer for the period of service and if during the appointment the judge personally contributed to superannuation then the effect of the Income Tax Assessment Act is that the contributions are not tax deductible because of the prospective benefits that are provided by the Judges' Pensions Act. Those are matters which I think would dissuade a person from accepting an appointment, particularly at a younger age.

The third aspect has become topical because of publicity about statements by the Law Reform Commission in the last few days. There are many reasons why a government might want to encourage the appointment to the judiciary of some younger people and of people of more diverse backgrounds than the traditional appointments. It is true that the Australian judiciary largely comprises white men of middle or upper class background with private school educations who were at the time of appointment likely to be aged 50 years or over and working as senior barristers.

There have been some appointments of women, black people, solicitors, law professors, lawyers from the Public Service and other areas, but if a government wants to encourage some appointments of younger people and of people of more diverse backgrounds one thing that would provide greater attraction to those people would be the knowledge that if retirement occurred before entitlement to a pension under the existing provisions, subsection 6(1), there would be some entitlement to another appropriate benefit. Of course, it is a matter for a government whether it wants to appoint such people or offer greater encouragement for people to accept offers of appointment.

I think in summary then my view is that the equity considerations alone would justify making some provision for benefits for judges who retire before qualifying under subsection 6(1) of the existing act. I do not have any informed view as to how that could or should be done and I suppose it is probably something that would require actuarial advice and some studied comparison with benefits in the Public Service and commercial enterprises, perhaps even parliamentary entitlements.

CHAIR—Thank you for that presentation. We have a number of questions. I chair the committee and am from the Liberal Party in Tasmania. With me is Senator Nick Sherry, Deputy Leader of the Government in the Senate and the shadow minister responsible for superannuation and finance matters in the Senate. The National Commission of Audit, in its report, suggested the judges and parliamentarians should be regarded more like executives in private enterprise in regard to their superannuation arrangements. Would you like to comment on that suggestion?

Justice Mullane—In terms of the issue that I have raised, I think that a comparison with the entitlements of executives in private enterprise would probably illustrate the inequities that I am talking about. I think you would probably find that in private enterprise the trend is to provide portable benefits that people can take with them

if they retire early.

CHAIR—So you are in favour of the concept of portable benefits. The question is: how are you going to apply them? Would you be in favour of a system, for example, for people who come to the judiciary at an early age and retire before 60 being entitled to a pension as a proportionate part of the 10-year pension calculation at age 60 but allocated or pro rataed over life expectancy type table calculations?

Justice Mullane—When I wrote the submission, I mentioned those alternatives but I do not really have an opinion because I think it is probably something that you would need actuarial advice about. Also, a government would need to consider what sort of benefit would be most useful in terms of attracting appointments and retaining people that they want to retain. Both are considerations.

CHAIR—As you know, the proposed surcharge legislation that is in the Senate at the present time can impact quite severely in terms of the amount that will be deducted and payable to Treasury before the payment of pension—figures of over \$300,000 have been suggested in earlier evidence. Would you like to comment on that and also about, if successful, its likely impact on the recruitment of people to the judiciary?

Justice Mullane—The proposal is that it will not apply to existing appointees.

CHAIR—That is right. I am talking about new appointments to the judiciary.

Justice Mullane—One effect of that would be that there would be two groups of people serving in each court. One group would be receiving higher benefits from their service than the other group. I would think that because the overall remuneration has been reduced by the proposed surcharge that would lessen the attraction of the appointment.

CHAIR—Yes, but will that lesser attraction to the appointment have a significant impact in terms of being able to recruit desirable people to the bench?

Justice Mullane—I do not know that. The government would know what success they have in terms of offers of appointment. One hears hearsay that they do have difficulty having people accept offers of appointment at times. Probably at the moment the legal profession is not as prosperous as it has been at other times. So it may be that judicial salaries are more attractive at the moment. The government would know whether the judicial appointment is attractive to the people they approach.

CHAIR—In your presentation you mentioned some matters arising from the Law Reform Commission's issue paper No. 20. So just by way of background, for the *Hansard* record I will just traverse a number of those issues before I ask you a question. Obviously, you were aware of yesterday's Australian Law Reform Commission release, *Issues Paper No. 20*, and that was to stimulate discussion on the federal, civil litigation system as part

of its broader inquiry into the adversarial system of litigation. That paper raised many questions and matters for comment arising from concerns that legal proceedings in Australia are excessively adversarial and that this procedure results in undue delay, cost and unfairness.

A number of these issues would have implications potentially for judicial superannuation. I therefore ask your opinion about where the issues paper at page 135 asks whether a career judiciary akin to that in European civil law countries would be desirable. In such a system many judges would begin their judicial career immediately following legal studies and they would be promoted then from lower to more senior judicial officers over their career. If this were to be adopted, what would you see as the implications for judicial superannuation in Australia?

Justice Mullane—We already have a situation where some of the European ideas are being used at times in Australia. For example, there are several former magistrates who have been appointed to our court, the Family Court, and other courts are having the same experience. There are people in Europe who move between the private profession and positions as magistrates and also later move into the judiciary and into higher courts.

If that is an approach the government wants to encourage, then you surely have to provide some sort of cumulative entitlements in respect of superannuation. For example, it is not good enough if you accumulate superannuation in service and then in, say, the magistracy, but then if you move into the judiciary you can serve, say, 20 years without being entitled to any accumulation of entitlements.

Senator SHERRY—Good morning, Justice Mullane. Just one correction of Senator Watson's introduction. I am actually the opposition spokesperson on superannuation. I certainly do not want to get loaded with the current mess of legislation we have before us.

You have referred in your opening remarks and your submission to the trend towards younger appointments. I can understand why that situation is more likely to occur in your area, but do you think that is a general trend across all the judiciaries, state and federal?

Justice Mullane—No, I cannot say that I am aware of that generally. The Law Reform Commission discussion paper raises the issue, though, of whether career judges rather than people appointed from the senior private legal profession would perform the role differently. There is the issue raised of the role of the court and whether it is appropriate for a judge to take a purely passive role in the conduct of proceedings and allow the profession and their clients to dictate the length of the hearing and the issues that they traverse, as compared with something more in the inquisitorial approach of the European courts where the court dictates the way the hearing is conducted. It takes a strong role in limiting the length of the hearing and also in identifying the particular issues

that need to be decided.

So I think that is the argument: if you want to have a more effective—in that sense—judiciary, then it is more appropriate that some of them, at least, come from other sources such as from people who are career judges.

Senator SHERRY—I have not seen a published survey of the remuneration of lawyers at a senior level prior to becoming judges, but I would have thought that the remuneration of a judge would be less than the remuneration of a lawyer, and that would be one of the reasons why it is increasingly difficult to recruit judges, despite the fact—and I think you are right from general comments I have had from lawyers—that it is a much tighter commercial climate for them.

Justice Mullane—Yes. I do not know of any recent research. There is research conducted by the Financial Management Research Centre in Armidale, at the University of New England. They do legal comparisons—I think they still do them. When I was appointed, I think the salary of a Family Court judge was below the average salary of the highest-earning third of the solicitors branch.

Senator SHERRY—Do you think, from your experience and knowledge, that judges see the superannuation benefits enhanced, compared to the rest of the community, as some form of compensation for that? There would be other reasons, but do you see it as—

Justice Mullane—I do, yes. And that is certainly so. When Mr Brereton, I think it was, was the Minister for Finance, there was a submission to the Remuneration Tribunal on behalf of the then government, where the government quantified the value of the pension and it was said to be quite substantial. That was based on an entitlement arising after 10 years service, of course the pension is worth less if you are being appointed younger.

Senator SHERRY—Mr Brereton was Minister for Industrial Relations.

Justice Mullane—I am sorry, yes.

Senator SHERRY—I am not sure what kind of Minister for Finance he would have made but I will not reflect on my colleague.

Let us assume that you were simply receiving the superannuation guarantee component, which is currently six per cent of salary, rising to nine per cent. That overcomes at least part of your problem in respect of portability, but it would significantly lower the retirement benefit of judges. Do you think that, if that change was made and there was no adjusting change made to the salary of judges, that would have a significant deterrent effect on attracting people to the judiciary?

Justice Mullane—If that applies, then that addresses one of the problems that I have raised, certainly.

Senator SHERRY—But it lowers your benefit considerably, doesn't it?

Justice Mullane—Yes.

Senator SHERRY—I do not know what the effective average contribution is for judges, but I am—

Justice Mullane—It has only come in for part of my service but I know that at the end of the 1993-94 tax year, I think my entitlement, if I retired then, was \$8,000.

Senator SHERRY—Because of the SGC—

Justice Mullane—Yes. The superannuation productivity thing.

Senator SHERRY—But if that was all you had to rely on in your retirement, that would be a significant reduction in current average entitlements, wouldn't it?

Justice Mullane—Yes. That is why I say that it really needs some actuarial advice and some comparisons with other areas to see what is a reasonable approach to it.

Senator SHERRY—If that were to happen and there was such a significant reduction, do you think that would be a significant deterrent to the appointment of judges?

Justice Mullane—I do not know that it has had an effect as yet because, as I understand it, the application of that legislation to judges was unintentional.

Senator SHERRY—The superannuation guarantee minimum?

Justice Mullane—Yes. The trouble is that in a lot of areas they are not regarded as employees. I think it was accidental that the government was caught by the legislation in relation to judges.

Senator SHERRY—It is an interesting point; I have never had that raised with me before.

Justice Mullane—It has been a limited period that it has applied, in any event, so the serving judges are not affected much by it at all.

Senator SHERRY—Do you see our difficulty with the superannuation guarantee charge? For example, state public servants in New South Wales and Victoria had what

would be regarded as reasonably generous superannuation funds. They have now been ended effectively, except for the public servants who were in the funds at the date of the termination of those funds. New public servants, from whatever the date the funds were ended, only get the superannuation guarantee, which is currently six per cent.

The logic of the argument is that what is good for one is good for all or what is good for the vast majority in the community should apply to everyone. There is considerable resentment in the community—you probably do not feel it as much as we do; in fact, I am sure you don't and I do not necessarily accept that it is validly based—towards people such as us who receive a considerably higher benefit than the community norm.

Justice Mullane—The pension is attractive to potential appointees, particularly someone who is over 50.

Senator SHERRY—I can understand your argument in your case. I think politicians are in a different set of circumstances than appointments to the judiciary. If the judges' scheme was changed—let us put aside the detail, but, effectively, if there was a reduction in benefit—do you believe there would have to be some sort of review of the salary levels to ensure we are able to continue attracting judges?

Justice Mullane—It depends on the employees. For example, I think the pension is a very significant attraction to older appointees. The extreme example is that you could serve six years and get a part pension. You can serve 10 years and get the full pension for life. It is less of an attraction if you have to serve 20-odd years.

Senator SHERRY—Again from your knowledge and experience prior to going into the judiciary, when a lawyer is generally in private practice—obviously there are some who work in the public sector—would they be in a position to build up substantial private superannuation benefits? Certainly some of the lawyers I know who have talked to me have done that before they became judges.

Justice Mullane—Yes, I think they could. There is a dilemma though once you are appointed. As I said, under the Income Tax Assessment Act, because you are eligible under the Judges' Pensions Act, you then cannot get a deduction for a second superannuation provision. So, if you make contributions to other superannuation funds once you are appointed as a judge, my understanding is that you cannot get a tax deduction for those payments.

Senator SHERRY—That is right. I think the surcharge will take care of any particular incentive that exists anyway at that level of income. Thanks for your comments.

Senator WATSON—I refer to subsection 6(1) of the Judges' Pensions Act, which provides that judges are eligible for a pension of 60 per cent of their appropriate salary,

but only after age 60 and after 10 years of service. Given that generally prevailing across the community now people can access superannuation benefits once they reach the age of 55 and are retired and given the fact that there does appear to be a lowering of the age at which people come into the judiciary, do you think we should seek parity with commonly prevailing standards across the community and lower the age of 60 to 55?

Justice Mullane—That would be fairly expensive for government if people took that up. There are different attitudes. A judge who is enjoying the work at 60 will continue on until, in our court, the age of 70, and a lot do. If one has had enough at 60, then one goes. If you reduce the age to 55, then I think you might find there is extra pension to be paid because of people leaving at the earlier age.

CHAIR—Given that in future we may be recruiting people, as you suggested, with added technical skills, in an age of technology may this not be a good thing?

Justice Mullane—I suppose one of the considerations for the government is the purpose of the pension scheme. It may be that the way to handle it is to have a superannuation scheme rather than a pension scheme and to have it preserved for example to a particular age but to accumulate entitlements during service.

CHAIR—To what extent and in what ways did the existence of the judicial pension scheme influence your decision to accept a judicial appointment? Can that affect the age at which you are likely to accept such an appointment?

Justice Mullane—One of the attractions of the act is the benefits that are available to a dependent widow or widower and dependent children in the event of the death of a serving judge. I think that was an attraction for me, because I think it would be fairly expensive to provide that through insurance. It was quite an attraction to know that your spouse and children would be well taken care of if you died during your service.

CHAIR—Your pension scheme has a winner-take-all benefit approach. For example, if a judge and his wife are killed in an aeroplane or car accident and their children were gainfully employed, there is no residual benefit that goes to the estate, is there?

Justice Mullane—No.

CHAIR—So it is possible that within a few days of retirement you could have an accident and receive very little of a pension benefit or a lump sum entitlement, in the event of such a tragedy.

Justice Mullane—Yes. Of course, on the other hand, if you live to a very old age you could die leaving a widow and your widow might live on for some years after you die and basically be fairly financially secure with the pension.

Senator ALLISON—My question is about judicial independence, something that is fairly newsworthy at present. Is judicial independence a factor in suggesting that we require what is a unique form of a pension scheme? Could you comment on that and perhaps tell us what other important elements you think there are which contribute to that judicial independence?

Justice Mullane—I do not know that the particular way the scheme works is necessarily attributable to a desire to maintain judicial independence. I think judicial independence can be served by any scheme that is secure, that is not discretionary, so that the person's entitlements do not depend upon some decision by a bureaucrat or by parliament.

I think one of the motivations behind the particular provisions of the act is that retired judges should be financially secure, and their spouses too. It is perhaps a mark of the society's respect for the position. It would reflect badly on our society, for example, if a judge was retired and was seen to be dependent on part-time work, or something of that nature.

CHAIR—Thank you very much, Justice Mullane, for appearing at this teleconference this morning. The information you have provided by way of your oral presentation and your submission is greatly appreciated.

[10.06 a.m.]

DAVIES, The Hon. Justice Daryl, Judge of the Court, A Committee of Judges of the Federal Court of Australia, Law Courts Building, Queens Square, Sydney, New South Wales 2000

DAWSON, Mr Alan Charles, Deputy Registrar, Federal Court of Australia, Law Courts Building, Queens Square, Sydney, New South Wales 2000

CHAIR—I welcome the Hon. Mr Justice Davies of the Federal Court of Australia, and Mr Alan Dawson, Senior Deputy Registrar. The committee prefers all evidence to be given in public, but, should you at any stage wish to give part of your evidence or answers to specific questions in private, you may apply to the committee to do so and the committee will consider your request. We now invite you to make an opening statement. I understand, Justice Davies, that you would like the opportunity to present a supplementary submission. You might like to cover that in your opening statement. I am sure the committee will be agreeable to your request.

Justice Davies—I have put down in a few points what I think are the principal points in the submission. I thought it might be convenient if I went through those. Do members of the committee have the document entitled ‘Summary of principal points’?

CHAIR—Yes.

Justice Davies—I thought it might be an easy way of getting into the topic. I will start by saying that the pension is regarded by judges as enormously important. It is not just remuneration; it forms a part of the structure of the judiciary—the way in which the judiciary is recruited, how it lives—and part of the principles that guide life on the bench. Any significant change would, I think, have widespread ramifications.

The first point is that the principles of private enterprise, as adumbrated by the National Commission of Audit, are inapplicable. In private enterprise, employees seek the best deal and salary is arrived at by negotiation and consensus. Judges, like parliamentarians, take office for the occupation. We primarily go for the occupation and so, I assume, do parliamentarians. To take the office, you must have a sense of serving in the public interest. We—either you or we—do not take the office for the money. We go because there is a task and we enjoy doing it, but it is the task that attracts the people to the bench and the part they play in community affairs. Our remuneration, then, is fixed not by consensus and money and the best deal. It is fixed by parliament in both cases.

The proposal of the Commission of Audit would be difficult to implement, as my submission and the submission of the Australian Government Actuary demonstrate. As the Australian Government Actuary has pointed out, if there are any major changes in relation to the pension scheme you would have to look at restructuring the whole remuneration

basis. That is a very difficult task. If, for example, we were to have an ordinary superannuation scheme and pay contributions and so our remuneration was in that sense dropped by, say, \$25,000 because we each paid \$25,000 into a superannuation fund, to recompense that drop of \$25,000 the remuneration would have to be increased by double that, \$50,000, because of the 47 per cent tax. We really cannot see that the government would wish to increase the salaries to that extent so as to keep the judges in the same position.

CHAIR—What about the concept of, for example, bringing judges' retirement from age 60 to that which is prevailing generally across the community, to age 55, to be able to access pension benefits? I mention that because of the perhaps lower entry age generally nowadays for many of your colleagues.

Justice Davies—Can I come back to that, Senator? I will certainly come back to that point. I just want to make the point here, because this matter started off with the recommendation of the National Commission of Audit—of course, that was not the only matter but it was the principal matter to look at—that I think their recommendation would be difficult to implement. Also, I have not put it there but since reading the submission of the Australian Government Actuary I make the point that what the Commission of Audit recommends is not required for the purposes of good government finance. As the Australian Government Actuary points out, it is quite feasible to consider the present system provided that you monitor it and you keep checks and you keep a note of what the outstanding liabilities are. The Australian Government Actuary says that really is being done now and the Australian Government Actuary's submission provides no support for this recommendation from a government finance point of view.

The next point is that the security of tenure, adequacy of stipend and adequacy of pension on retirement are essential pillars of the independence of the judiciary. The remuneration is directed to assisting judges to draw apart from the world of moneymaking and to provide the judge with financial independence, both during his term as a judge and on retirement. That is why both the salary and the pension are regarded as essential for true independence. Professor Winterton's book has pointed this out in a number of cases, and so have all the submissions you have received from the chief justices, Chief Justice Nicholson, Chief Justice Malcolm, Chief Justice Phillips, and Chief Justice Cox. The pension scheme is directed to that, to providing for financial independence both during work and on retirement. The salary provides for living during work. The pension provides reasonable and adequate support for the judge and his family on retirement.

But the pension cannot be commuted because it is not there just as a financial reward. It is there to support the judge in his retirement. It is really regarded as a living allowance. It provides no benefit at all to the judge's estate. Again, it is there for living while in retirement. The pension provides reasonable and adequate support for the judge and his family on retirement. It has the feature that it decreases in capital value after entitlement arises at 60 with 10 years service. In fact, most judges serve after age 60 for

an entitlement of diminishing value. The pension is earned in circumstances in which most appointees give up a very profitable practice and other business opportunities.

Point 3 is that we seek to attract highly intelligent, leading lawyers who have proven ability in the work of the court and their incomes tend to be high. The government cannot compensate them by an equal income. The government simply cannot afford to pay judges what they can earn at the bar. It is not feasible from the point of view of government finance or what government can pay, but it does offer security. It offers, in other words, a secure living allowance while they are on the bench and a secure pension on retirement. That is what it puts in place of what barristers could earn. The government offers the pensions, and the lawyers who accept abandon their practice. This is the *quid pro quo*.

I made the point in my submission that, although technically our pension is a non-contributory pension, that is only true in a technical sense. We all give up, on taking appointment, financial rewards which are much greater than we get on the bench. The value of what we would earn if we had remained at the bar would be much more than what we get through salary and pension on retirement. So in that sense, because we have got to give it up, we do give a *quid pro quo*. That is the deal.

On page 2 I have said a judge gives up not only a profitable practice but involvement in commerce and close contact with significant persons in the business world—and we do. We do draw apart. We cannot be seen drinking down the club with significant persons in the business world the affairs of whose companies are going to come before the court. You have to draw apart from the business world, and so judges tend not to be involved in moneymaking activities. If they have any money of their own, they tend to earn it in just very ordinary ways, like ordinary investments.

On taking office judges draw apart from business affairs, and on retirement judges generally are financially dependent upon their pension. I have said the pension exists to ensure the independence of serving judges from government and private interests by providing for their financial security. I just add there that the figures provided by the Attorney-General's submission adequately support the fact that judges appointed to the Federal Court do receive far less by way of remuneration on the court than what they would receive at the bar.

The Attorney-General's submission refers to what the Bureau of Statistics has reported as being the average earnings of 400 senior barristers in the 1992-93 year. Those figures of themselves show that the majority of persons appointed to the bench do lose money on taking up a position as a judge. We do not seek to attract the average of the 400 senior barristers. The Federal Court of Australia is looking for the very top people. Four out of the seven justices of the High Court have been members of the Federal Court. Sir William Deane was, at one time, a member of the Federal Court. We do seek the very top intellects. There is no doubt that the income of many of them is very high indeed

when they are at the bar. They have given up a lot financially.

So the point is that any significant reduction in the pension entitlement would adversely affect recruitment. All courts other than the High Court of Australia have difficulty, from time to time, in attracting members of the quality they wish. The pension has been a recruiting tool. The Chief Justice has informed me how he considers this to be absolutely vital. He knows the difference it makes when he is trying to attract someone to the bench when he can say, 'You have got this security. It is there. That is what you have got on retirement whatever happens.' This is enough to persuade a sufficient number of them to join our bench. It is the certainty and sufficiency of the compensation that is important.

Point 5 is important. The scheme has worked well over a wide spectrum of individual circumstances. There is no persuasive justification for change. I wrote the submission with the support of my committee before I had been able to call a meeting of judges or had an opportunity of speaking widely with the judges. There has since been a meeting. We did not discuss this at any length, but there was no move to take a different approach from that taken in the submission. There is no movement in the Federal Court at least to change the pension arrangements. There is no movement in the submissions that you see from Chief Justice Williams, Chief Justice Malcolm or Chief Justice Cox to change these arrangements. Because in practice they work reasonably well. There are things you can say about them, but we are not having any particular problem with them at the moment.

The criteria of 60 years of age and 10 years service itself seems strange to some. It seems a little low, but some people who have taken appointment really become dissatisfied with life on the bench and the occasional judge is really unsuited to life on the bench. Getting out after 10 years can be quite a good thing. You do not want judges who are dissatisfied or who are unsuited. This going out at age 60 is a nice little gap for some people. I think the fact that it is there enables people to join the bench thinking that if they do not like it they can get out. In fact, most stay on.

I cannot tell you precisely how long every one stays. I think if you were to get an average it would be something like 17½ years. The attorney has said that the vast majority of judges stay on until about 70 or close to 70. Most on retirement would have served an average of 17.5 years. There are many who go on longer. It depends a bit; circumstances change.

In our court, Justice Keely went last year at age 70 after 19 years on the bench. Justice Sheppard will go in May at age 70. He has had over 25 years on the bench. Justice Jenkinson will go at the end of June at age 70 with over 22 years on the bench. I will go next year with 20 years on the bench. Justice Northrop, who is a life member, is 72 and I think he has already had over 20 years on bench. Most judges stay right through to about 70. There are very few really who do not. So we think it works all right and the 60 years

and 10 years criteria simply provide a nice gap for some people who really ought to retire.

The Australian Government Actuary has raised two inequities. One was supported by Justice Mullane—that is, retirement before 60. I think our view is that going on to the bench ought to be regarded as a lifetime commitment. That is the judges' preferred view. They do not want judges coming on and going off. They want judges preferably with a good deal of experience. I do think experience counts. I think judges in their first five years are really not as good as later on.

We would not like to see any arrangements which encourage early retirement. We think that age 60 is young enough. We would not like to see a provision for commutation at age 60 because that may encourage people to retire at age 60 and we really prefer judges to stay on to 70. We like judges to go on knowing they are giving up their practice at the bar, they are taking a judicial office and they are going to stay through until the end.

As to the lack of any increase in pension after 60, I point out that we serve for declining capital value. That is a point that the Australian Government Actuary has raised. It is a valid point, but we have not thought that, at the present time, we are justified in putting forward any proposal for an increase in the pension. That is because most judges go through to 70. Notwithstanding the position most judges go through to 70. We cannot point to anything that is a real problem with retirement at age 60. If it happens that too many judges start retiring at age 60 then we will have to look at the matter and we will say to the Remuneration Tribunal, 'You either have to put up the salary or there ought to be some change to the pension arrangements.' I do not think we can say at the present time, at least in the Federal Court, that there is a problem with early retirements. One or two have retired early, but we do not think it is a problem.

The sixth point is that total judicial remuneration is certainly not in excess of what is fair and reasonable. That is because the salary is fixed by the Remuneration Tribunal, which takes into account the pension entitlement. In its 1993 and 1994 reports, it gave a lot of attention to all of the benefits that you receive—non-monetary, including the pension entitlement. It put figures on them and it said that the figure it fixed for the overall package was reasonable. Of course, its determinations are subject to disallowance by parliament if the parliament disagrees.

The last thing on which I would like to make a comment at this stage is with respect to the superannuation surcharge. It is not known at the present time if the superannuation surcharge on notional contributions will be effective or valid. I have mentioned two matters there in the notes of—

Senator SHERRY—Before you go on, in respect of this issue, is there a typing error in subparagraph 7(a)(i)? It says:

If cl. 34 is removed, the legislation will not without more be applicable to Parliamentary or judicial pensions.

Justice Davies—Could you add the words ‘be applicable to reduce parliamentary or judicial pensions’. That is simply because clause 34—the clause which gave the power to reduce the pension—is now to be removed from the act. So our entitlements will be statutory. There will be no power to reduce the pension under either the parliamentarians’ scheme or the judges’ scheme unless there is some further statutory provision. There could not be any reduction under the superannuation surcharge legislation, as it will exist, if clause 34 is taken out.

Senator SHERRY—So the legislation becomes ineffective?

Justice Davies—On its own, it will not do anything except impose a tax on the superannuation provider, which on the Commonwealth’s case will be the Commonwealth, but it does not do anything about the pensions.

Senator SHERRY—So what you are saying is that, in the case of defined benefit funds that provide pensions, there is still a problem with the legislation, even with the removal of clause 34.

Justice Davies—There is not a problem with it. It will not be reduced.

Senator SHERRY—The aim of the legislation is to reduce people’s pensions.

Justice Davies—I understand that. Obviously it will not serve that purpose unless there is some further statutory provision. I do not know what the government has in mind.

Senator SHERRY—But it is not obvious to the government, because we do not have consequential amendments.

Justice Davies—Senator Sherry, you all have more knowledge of how these affairs than I do. It is clear enough that if clause 34 is taken out there is no flow through to the pension itself, because our pension rights—parliamentarians’ pension rights, judges’ pension rights—are statutory.

Senator SHERRY—So the government will not get its revenue from those areas if it does not flow through?

Justice Davies—That is right. I thought because of matters that I have mentioned—I am not pushing them in any way; it is not for me to say anything about the legislation—that it could be premature to act on the footing that the surcharge will apply to reduce pensions.

Senator SHERRY—But the issue you have raised has raised a serious problem with the application of the surcharge legislation.

Justice Davies—You can see the points as well as I can.

Senator SHERRY—I can see the point.

Justice Davies—I am not here to say anything about it today.

CHAIR—For the purpose of the *Hansard* record, given the importance of this issue and the fact that the matter is still before the Senate, maybe you might like to articulate point 7 a little further. Because, from what has been indicated, there is no power as a result of the removal, as I read it, of clause 34 to actually reduce the pension. Perhaps you might like to articulate that in your own words.

Justice Davies—I do not want to elaborate on this very much because these matters, if they ever come to the court, are as likely to come to my court as any other court. I do not express a view of the court about them. I do not want to put some view about the legislation, but I thought it really fair to the Senate committee to indicate that we do not think this legislation will necessarily apply to reduce the pensions. The removal of clause 34 is one point. I cannot see how the legislation in itself will operate to reduce either parliamentarians' pensions or judges' pensions. It is not there. I do not want to argue about it.

Senator SHERRY—If that were true, the same problem applies to every other fund that has a pension component, which is a very significant number of people.

Justice Davies—That point certainly applies to all statutory pension funds. The government obviously has in mind some arrangements in relation to other funds. I think it had in mind changing the Superannuation Industry (Supervision) Act.

Senator SHERRY—SIS.

Justice Davies—SIS, yes. I do not know what those arrangements are. Whatever those arrangements are, I would not expect that they would be applicable to the statutory schemes, because the statutory schemes are not subject to SIS.

CHAIR—It was certainly the intention of the government to cover parliamentarians, state and federal, and all new appointments to federal courts. The constitutional requirements required an amendment to the original legislation to exclude currently serving judges. You have certainly raised a new issue, which obviously the committee would be interested to pursue at some point in time. We appreciate the sensitivities of your position. No doubt that may have affected a number of your colleagues appearing before the committee that you may be asked to adjudicate on issues

on which we are asking you questions. So we will try not to embarrass you further, but we do thank you for raising these important issues.

Senator SHERRY—There is this comment in subclause 7(a)(ii):

The legislation may be invalid because of lack of subject matter.

That seems to me to be a very serious point.

Justice Davies—Senator, again I really do not want to go into this.

Senator SHERRY—I appreciate your dilemma but here you are representing a committee of Federal Court judges casting some doubt on the government's proposed superannuation surcharge legislation.

Justice Davies—I do not want to cast any doubt on what I thought I should say to you because the 15 per cent surcharge is of course very significant if it does apply. It is of enormous significance if it does apply.

Senator SHERRY—If it applies.

Justice Davies—Yes, if it applies.

Senator SHERRY—You are casting doubt on its application.

Justice Davies—I wanted to make it clear as a starter. I thought that that was fair that I should say, 'We don't know yet that it will apply to reduce them.' I would rather go on to point B, on which I think I can say something without embarrassing my colleagues, and that is that, in our view, the legislative proposal as announced is not equitable. It proposes an effective top rate of tax on judges' pensions of 15 per cent above the top marginal rate. That is, in all, 63.7 per cent at current rates and this is an extremely high rate of tax on retirement income. No such rate of tax is proposed for annuities payable to members of superannuation funds who receive the benefit of the flat 15 per cent rebate of tax available under sections 159SM and 159SU of the Income Tax Assessment Act. Some things are clear and they are that 159SM and 159SU do not apply to either parliamentarians' pensions or to judges' pensions.

It is said that the 15 per cent rebate of tax, which members of ordinary superannuation funds would get, is simply a counterbalance to the 15 per cent rate of tax on contributions, but nevertheless superannuation funds still provide taxation benefits. They are still to some extent a tax shelter—you get some benefits by going into superannuation funds—so when the government announced the 15 per cent surcharge, and that there was equity in putting on this 15 per cent surcharge in relation to top income earners, it was really counteracting the taxation benefits that were obtained by persons

who voluntarily took out superannuation as a way of reducing tax liabilities.

Indeed, many high income earners arranged, too, that their income or salary would be reduced and that their superannuation would be increased. That is because of the tax benefits in it. The government thought of the 15 per cent surcharge as providing equity because, in relation to high income earners, it thought they ought not get this benefit, but parliamentarians and judges do not get this benefit at all. Parliamentarians, in so far as they can take out a lump sum, would not continue to get a benefit and if you look purely at pensions the judges' pensions are purely pensions. They were at all times taxable at the top rate of tax.

CHAIR—You do not have the ability to salary sacrifice?

Justice Davies—That is right. There was no salary sacrificing at all. It is there; it is stipulated by parliament. There is no tax element in it. We pay the top rate of tax on our salary. We pay the top rate of tax on our pension. When you look beyond all the bits of paper in this scheme that was proposed—you have notices and assessments and one thing or another—what was proposed in the end in relation to a matter such as judges' pensions was that they would be reduced by 15 per cent each year. The amount of the pension would be reduced by 15 per cent and that was to be the effect of it. If you add 15 per cent to the top rate of tax, you are putting, effectively, a tax of 63.7 per cent, nearly 64 per cent, on retirement income. I am a little appalled, as are my colleagues who are going to retire this year, at moving from 100 per cent down to 60 per cent, but to have that 60 per cent then taxed at a higher rate of tax—

Senator SHERRY—But we are assured it is a surcharge.

CHAIR—My understanding from discussions with the Commonwealth actuary is that the surcharge will be calculated as at the date of retirement. Effectively, a lump sum will therefore be taken and paid across to the Treasury and the pensions would be reduced commensurately. It would be based upon effective actuarial life tables in terms of the reduction in the life annuity that you would otherwise get—reduced by the lump sum that would be taken out for the contribution tax. The rate of reduction of the pension is related to your age—the older you are, the higher is the effective reduction of the pension benefit, because you have a lower—

Justice Davies—But that is the effect. I do not say it would be exactly 15 per cent. It might not be. There are a couple of variables in there. There is the rate of interest on the notional contributions. There is a notional interest on the annual surcharge. There is a notional rate of interest taken into account on the notional contributions, and these will not necessarily precisely set off against one another.

But the end result, effectively, from a practical point of view is that pensions will be reduced by 15 per cent. You can say, 'That won't be so if you . . .'. I don't know

exactly how they are going to do it—but what they will do is certainly take off a sum and calculate the pension on your life expectancy. Assuming you live out your ordinary life expectancy, you will lose 15 per cent of your pension.

CHAIR—I think if you are over 60, certainly over 65, the reduction in your pension will be in excess of 15 per cent.

Justice Davies—It might be even worse than I thought.

CHAIR—Because of the reduced number of years in the life expectancy tables, the figure must necessarily be somewhat higher because of all the factors you have just mentioned.

Justice Davies—I think there are quite a lot of difficulties with this scheme, but the point I am making is that there is going to be an annual reduction which is a tax. Whatever it is called, it is a tax—

CHAIR—To new appointees.

Justice Davies—To new appointees, and it is going to reduce their pension by about 15 per cent on top of the top marginal rate. That effectively will impose a tax on retirement income at current rates of just under 64 per cent. That is what we thought was not equitable. We felt that what is not being taken into account is the fact that ordinary superannuants from superannuation funds are in a scheme which does get tax concessions.

I should make the point, I am sorry, that if the surcharge were applicable and valid, it would reduce the pension by 15 per cent to 51 per cent—again, those are just general figures—before the top marginal rate was imposed. Such a reduction would seriously inhibit recruitment to the bench. We think a reduction to 51 per cent would be a serious impediment to recruitment. As I say, I myself am not looking forward to moving from 100 per cent income, which never seems to leave me with anything over, to the time when I go down to 60 per cent of it, and to go to 51 per cent would be a very sizeable reduction.

I have made also some comments on the other submissions. I will not take up time at the moment by reading them. I have commented upon the submissions by the chief justices and the submission by the Attorney-General. I have mentioned some specific aspects of Professor Winterton's monograph of judicial remuneration, which I think is a very valuable monograph.

I have pointed out in respect of the Australian Government Actuary that he does not favour the change to a fully funded accumulation scheme from the point of view of government finance. He has put the point of view amongst others that, if you move to a fully funded scheme, you will increase government outlays certainly in the short term because you are paying both into a scheme and existing rights. I thought that that

submission really—

CHAIR—We have to meet that some time or later; we have to face up to the reality of it sooner or later.

Justice Davies—Yes. I thought the Australian Government Actuary made some very telling points. I comment also upon the submission of the Australian Democrats which raised the issue of whether there should be a fully preserved, fully funded accumulation scheme. I have simply pointed out that, in our view, the defined benefits scheme is applicable for judges; it has been a traditional part of their remuneration; it is how they are encouraged onto the bench; and it is not causing anybody problems.

CHAIR—Mr Justice Davies, if it is your wish, the committee would be very happy to incorporate in the *Hansard* record your comments on other submissions which have been lodged with this committee.

Justice Davies—I am very happy for that to be done.

CHAIR—I think those comments are apposite to our inquiry and, since you do not intend to cover them in depth, perhaps should be incorporated in the *Hansard* record.

Justice Davies—Right.

Senator SHERRY—Does that include the minor correction to 7(a)(i)?

CHAIR—As corrected, yes.

Justice Davies—I think the Chair was speaking about the other document called ‘Comments by Justice Davies on other submissions’.

CHAIR—Yes.

Senator SHERRY—Have we already incorporated the summary of principal points? Justice Davies did not comment on all of them.

CHAIR—Yes, perhaps we should incorporate the complete document. Is it the wish of the committee that the document be incorporated in the transcript of evidence? There being no objection, it is so ordered.

The document read as follows -

Justice Davies—I also sent to you a new table of the list of judges and dates of appointment, and so on. That simply corrected some minor errors. There is no significant change in that. However, it turned out to be a very useful exercise as we found that some of our records were not correct. That concludes my presentation.

Senator SHERRY—I just wish to get a clear understanding of this: you are representing an informal committee of your colleagues on these matters?

Justice Davies—Yes. We have a committee of judges called the remuneration committee.

Senator SHERRY—Who are the other members of this committee?

Justice Davies—In Sydney, there is Justice Foster and Justice Einfeld; in Adelaide, there is Justice Von Doussa; in Victoria, there is Justice Herron; and in Brisbane, there is Justice Cooper. They are members of a committee which assists the Chief Justice annually in sending submissions to the Remuneration Tribunal and in dealing with matters concerning remuneration. I recall that Justice Hill was added to the committee particularly to assist on the question of pensions because Justice Hill has a good knowledge of the Income Tax Assessment Act.

Senator SHERRY—So the views that have been outlined today are representative of their collective views?

Justice Davies—Yes. I should say too that all the judges have received the submission that I sent in February, although not the two last documents. That has gone to all the judges, and I have not received any dissent from it.

CHAIR—That applies to clause 34?

Senator SHERRY—When you say ‘all the judges’, do you mean all the judges on the committee or all judges collectively?

Justice Davies—The submission I sent in February to the Senate committee I sent to all the judges of the Federal Court. I sent that in February after I had sent it to them, and I have received no dissent on it.

Senator SHERRY—What about this document that you have tabled today?

Justice Davies—No. The documents I have tabled today, I am afraid, have only just been prepared in the last day, so I have not had an opportunity to. They are my own work. I have not even referred those to other members of the committee.

Senator SHERRY—But have all these matters—including point 7 and the

surcharge comments—been discussed amongst your committee, or is it your particular position?

Justice Davies—No. I do not even like to put it as a particular position. I just thought it fair to say. Indeed, one of the things I have done is deliberately to avoid talking to other judges of the court about the details of the superannuation surcharge. I thought that was proper because I have some views about it and it is probable that problems will come up. I think in the due course of time there is likely to be some sort of litigation, and I did not want to embarrass other judges of the court by speaking to them in detail about that. So anything I have said in that paragraph 7 really is my own words. But you can take it from me that the point I made about the inequity would have the full support of the judges.

Senator SHERRY—I understand. But you have just raised another interesting issue. You have said that it is likely there will be litigation in due course on this matter. Why do you come to that view?

Justice Davies—Perhaps I overstated it. But I just do not know how the legislation is going to turn out, and I do not know what the future holds. But there are real problems from our court's point of view with respect to the superannuation surcharge. For example, our court would be in a terrible position if we were subject to the 15 per cent surcharge and the state judges, being constitutionally excluded by reason of the immunity of state instrumentalities, did not pay it. I can see all sorts of problems with it. I did not want to raise them before the committee hearing.

CHAIR—Do you see those problems extending to other public servants in a state jurisdiction by virtue of section 114, concerning constitutionally exempt superannuation funds?

Justice Davies—I can see all sorts of difficulties. I cannot make any statement on section 114.

Senator SHERRY—I do not think we can put you in the situation of making broader comments. Frankly, I think what you have said to date is fairly significant. I have no other questions.

CHAIR—Mr Justice Davies, you have pointed out that you do not want judges coming on and off the bench. I refer you to the publication yesterday of the Law Reform Commission *Issues Paper No. 20*, which indicates that if some of those recommendations were adopted it would mean specialised people coming on to the benches at fairly early ages, which could have quite significant ramifications for superannuation for federal judges under those circumstances. Would you like to comment on these superannuation ramifications if you have had the opportunity of looking at that Law Reform report?

Justice Davies—I am afraid I have not seen it yet. I have only seen what is reported in the newspapers and I have had a brief discussion with the Chief Justice about it. I do not think so far as the Federal Court is concerned there is going to be any change in the recruitment basis. As I said, we have on the court some of the top lawyers in the land. I have mentioned to you four members of the High Court. His Excellency the Governor-General was a member of the court. I do not think you can take young people on without too much experience.

Some members of the court were appointed at an early age. Justice Robert French is one of them, but Justice Robert French is an exceedingly capable judge. He is an extraordinarily competent person. Those who have been appointed will certainly go through to age 60, and we would hope that they would stay longer. But we would not want on the Federal Court judges appointed at age 45 and leaving at age 55.

Experience is terribly important. Experience is of enormous value. I think that judges are at their best in their late 50s, 60s and even the exceptional one in their early 70s. That is the sort of person we are looking for.

CHAIR—If we compare your presentation with Mr Justice Mullane's, there appears to be a bit of difference. Are you suggesting that there is some difference in the type of people whom perhaps Mr Justice Mullane is referring to, people with particular technical skills in other disciplines, and the Federal Court? If that is the case, should superannuation arrangements reflect those two different groups within the court structure?

Justice Davies—Certainly courts differ. I would not dispute that. I do not think you can say that all courts have the same needs. I would not suggest that they do.

CHAIR—Therefore, with those other courts, should we be looking at different superannuation arrangements, if they are going to be recruiting younger people and people who may not be staying on as long as members, say, of your Federal Court or the High Court?

Justice Davies—It is clear enough from what the chief justices have written that they think pensions are one of the pillars of independence of the judiciary. Part of their own concept is that, when you go on the bench, you do leave private enterprise and you do not spend your time on the bench thinking, 'Well, I might want to go off and join this firm of solicitors or that company or get some favours from the government on my retirement'. The intention is that the judge is provided, both during the time of his service and on retirement, with a living income. That is the idea and that is the view that I think most judges would favour. It is certainly the view of our court and of the chief justices who have put in submissions.

CHAIR—Would you like to comment on the case of early death for a judge without dependents? Should the estate be entitled to an actual commutation of a pension

on death before retirement?

Justice Davies—It is not really consistent with the concept. In a way, we have a very simple scheme. There are all sorts of things you can say about it. Perhaps somebody else might have structured it in a different way if they had set it up in 1968. Someone else might have a different view. But they have set it up in a certain way and it works all right. There is the problem that, if you die without dependents, then that is the end of the matter. There are judges who are on the bench, who are single and have no dependents. If they die, either on the bench or shortly after retirement, that is the end of the matter. The matter has been so tied up with this idea of the independence of the judiciary that it has been structured in this way.

CHAIR—I was introducing the topic through the question of equity or fairness. It is a winner take all type of situation, is it not, if you have a long life expectancy?

Justice Davies—If you have a long life expectancy, you do well. If you have a short life, you do not do well. But the one advantage about it all is that judges are provided through their retirement. Judges are not given the opportunity of putting lump sums into risky business ventures and becoming poor and that is probably a good thing. It is part of the overall structure of remuneration. As I said in my submissions, senior judges get the same remuneration as junior judges. There is no differentiation for quality of work. You do not get any more either if you are a very good judge. And someone else, say, a junior judge, cannot contribute in the same way. You do not get any more remuneration. Everybody is equal. Everybody gets the same salary and everyone on retirement gets the same retirement income. We think that is fair. It is not fair in the sense that persons in private enterprise would think it was fair. That is clear enough. It is the structure of our scheme.

CHAIR—Thank you very much for appearing Justice Davies and Mr Dawson. Do you have any comments that you would like to add?

Mr Dawson—No, I have no comment.

CHAIR—We have exceeded our time. It has been a very interesting presentation and a most useful one for the committee. We look forward to receiving a supplementary submission. Can you give us some indication of the area that submission is likely to cover because we will be starting to write our report?

Justice Davies—I am sorry, I do not think I said that I was going to give you a supplementary submission. I think perhaps Justice Nicholson proposed to do that.

CHAIR—I am sorry, it was Justice Nicholson. Thank you for appearing before the committee today.

[11.14 a.m.]

NICHOLSON, Chief Justice Alastair Bothwick, Family Court of Australia, 570 Bourke Street, Melbourne, Victoria 3000

O'RYAN, Justice Stephen Richard, Family Court of Australia, Goulburn Street, Sydney, New South Wales 2000

CHAIR—It is now my pleasure to welcome the Hon. Chief Justice Nicholson and the Hon. Justice O'Ryan to the committee. As we mentioned to Mr Justice Davies earlier, we prefer all evidence to the committee to be given in public, but should you at any stage wish part of your evidence, all of your evidence or specific questions to be given in private, you may apply to the committee and the committee will consider your request. We now invite each of you, if you wish, to make an opening statement. Following that, members of the committee will ask you a number of questions. Perhaps you might like to indicate in your presentation your further consideration of the issues that have been raised and any request to lodge a supplementary submission.

Chief Justice Nicholson—I should say at the outset that, although in our written submissions we have supported the Federal Court submission, which is basically for the retention of the status quo in relation to pensions, our subsequent consideration of the matter here has led us to believe that, given some uncertainty about issues like the 15 per cent surcharge and the like, if those measures go into effect, there would then be a serious deficiency in the current system which would need to be addressed so far as future appointees are concerned. Indeed, we also detect the possibility of a serious deficiency, which I will come to, in the system relating to reasonable benefit limits which we think may have significant effects on the younger members of our bench.

Because these concerns have arisen as a result of information conveyed to us at a late stage—and I apologise for the fact that we were not anticipating the advice we received from a professional source—I have, in the circumstances, taken the view that it would be desirable to take further and more detailed advice about these matters. It is for that reason that I seek leave to file a supplementary submission.

I should also say that, because of the change, I do not purport to be speaking on behalf of all the judges of the court today—and neither does Justice O'Ryan. The reality is that the original submission of the Federal Court was circulated, together with a copy of the court's brief covering letter to the committee. It has received no criticism from within the court. It does not seem to have produced any particular result, other than that Justice Mullane put in an individual submission himself, which you heard this morning. Given the nature of the advice I have received, I propose to put it before the judges, but that will not delay any further submission we might make, which I would hope to have available within the next two weeks or very shortly thereafter. As I go on, I will develop the areas of concern a bit further.

CHAIR—I will put that request to the committee. Is the committee agreeable to the request by Justice Nicholson for an extension of time to submit a further supplementary submission? There being no objection, leave is granted.

Chief Justice Nicholson—Thank you, Mr Chairman. Subject to what we might say in any further submission, I want to summarise the deficiencies that we see in the existing scheme. We say, firstly, that, on the advice we have received, its value may well have been seriously eroded for all judges under 50 on the relevant date for the calculation of the reasonable benefit limit, which was August of last year. Because of the fixation of that limit at a figure which is in the \$840,000 range, the advice we received was that the capitalised value of any judge's pension, if the judge retired at the age of 60—or you could take various calculations as to when they retire—will be considerably in excess of the reasonable benefit limit.

If that is so, in addition to any effective surcharge, there will be an additional impost in relation to it. That does not apply so much to judges in my position because I have been on the bench for 15 years and I am at an age where I qualify for a transitional RBL, but it certainly affects someone like Justice O'Ryan, who has been on the bench for a much shorter time. We see that as involving a serious potential threat to the value of the pension in the future. It is the detail of that which I would like to include in any further submissions we make.

Secondly, we consider that the value has been further seriously eroded in relation to all future judicial appointments by the 15 per cent surcharge, assuming that that surcharge comes into effect. I certainly agree with the views that Justice Davies expressed on behalf of the Federal Court judges as to the inequity of such a surcharge when it is put on top of the, in effect, 47 per cent—

CHAIR—Marginal tax rate.

Chief Justice Nicholson—Yes, when it is put on the relevant tax figure. It seems to us that, if you took those two facts together, that would throw the value of the existing pension scheme into serious question, so far as some existing judges are concerned and so far as all new judges are concerned. It is the realisation of those facts that has caused us to rethink the way we should be approaching the matter.

There are other existing aspects of the present scheme which we regard as unsatisfactory. I would comment first of all in relation to estate and retirement planning. Most judges—many when they are appointed, at least—have a young family and have to continue to maintain term and/or life insurance so that they have a capital sum which they could provide to their family in the event of death or incapacity because of the complete absence of any lump sum benefit in the existing scheme.

I draw a contrast with the UK, which has introduced a pension act 1993. There are

aspects of it I would not necessarily want to see reproduced here, but one that I thought had some real benefit in this regard was the provision for a retirement or death benefit equivalent to twice the pension. As their pension is 50 per cent, it is, in effect, a retirement or death benefit of a year's salary. It is not a huge amount, but it is better than what we have. That is really the point I am making.

A judge in our system does not have any lump sum or any possibility of getting a lump sum at retirement. So far as death is concerned, it is confined really to the pension payable to the widow and/or children if there are any dependent children. We see that as a significant disadvantage in relation to the existing pension scheme. As Justice Davies pointed out, there were problems in investment for judges. There are limits to what judges can invest in. It is not as if one can amass substantial sums in that way during their working life. Judges, in effect, have to withdraw from commercial investments other than perhaps real estate and shares in public companies. Even that may be constrained to some degree by the nature of the work that the judges are doing or the companies concerned.

The fourth aspect that we regard as unsatisfactory on examination is that there is no vested entitlement to anything until the expiration of 10 years and reaching the age of 60. It gets back in a sense to the previous point I made. If one were to compare it with work in any other area of the community, there would at least be some benefit available in respect of the years of work that had been carried out.

I would like to make one comment about Justice Davies's point about 10 years seeming short. I agree with the answer that he gave to that potential criticism. The reality is, and if one looks at the figures, that not too many judges serve for only 10 years. Some of our judges have served to in excess of 20 years and are still ineligible for any benefit at all because they have not reached the age of 60. That picks up a point you made, Mr Chairman, which I will come back to about the age of appointment.

Let us look at the Western Australian legislation in relation to judges. It provides for a pension entitlement for retirement at age 55 on the basis that it does not attract the same pension. I am looking at section 6(2AA) of the Western Australian judges, salaries and pensions act. It provides in substance that, where a judge attains 55 but not 60 after serving for not less than 10 years, he is entitled to a pension at a rate equal to 50 per cent of the current judicial salary and an additional rate equal to two per cent of current judicial salary for each year by which the age exceeds 55 up to 60. So, in effect, if a judge retires at 57, he or she gets 54 per cent of the pension.

A similar comparison with the United Kingdom is that it provides for a recognition of judicial service for a much lesser period and a limited pension entitlement for each year of service. I think I am correct in saying that in the UK you can serve for as little as two or three years and still have some entitlement, although it is a far from generous one. As I understand it, the purpose of that was to bring the judicial service more in line with the rest of the community, in the sense that there would not be many jobs that one would take

that would not give you some benefit for service which you could roll over into another scheme in due course.

The other problem that we see about having no vested entitlement until the expiration of 10 years and reaching the age of 60 is that, in effect, judges are chained to the job until they reach the age of 60, unless they are particularly wealthy or have some other lucrative offer which they cannot refuse. But, in the normal course of events, a judge would really feel, even though they might want to retire and perhaps should retire, that they cannot afford to retire until the age of 60. They may well have given 20 years service. If you look at our list of judges that accompanied our submission, you will see several in that category. It seems to us that that is an inequitable system and it is not a desirable system from the point of view of the public. In effect, the golden chain of superannuation is used to tie them into a position. Perhaps if they approach the matter differently, they may not wish to continue to pursue that course.

The next matter that I would mention about the existing scheme that we consider is unsatisfactory—it is part of the first in relation to the question of the absence of a death benefit or lump sum retirement benefit—is that there is no capacity to commute all or part of the pension. That, in our view, leads to another inequity because in some cases the pension will be comparatively worthless. In the case of a judge who attains the age of 60 after maybe 20 years service, retires and dies the next year leaving no dependants, there is nothing. It seems to us that that is an inequitable arrangement.

In this sense I differ with Mr Justice Davies's comments. The mere fact that a judge leaves no dependants or no children does not mean that there are not dependants and does not mean that there are not people to whom the judge would wish to leave some part of his or her estate. Without going into the details, I know of several examples of judges in my court who have undertaken quite substantial familial obligations to nieces, nephews or other relatives but who have no children as such. In one case it was someone who was unmarried. I think there is a very real inequity there.

The other inequity, which I again differ with Mr Justice Davies about, is that the continuation of work past the age of 60 reduces the value of the pension entitlement. It seems to me that what you are really doing is paying the judges who have attained the age of 60, if you look at the overall employment package, less than you are paying the ones who have not attained the age of 60 because of that reducing value of their entitlements. It seems to me again that that is something that could be addressed and there would be ways of addressing it.

I left the bar in 1982, but prior to that time people were starting to develop private superannuation funds. I know that they have continued to do so since. But, once you are appointed, you cannot do anything about topping up your own private superannuation fund out of your salary. You certainly get no tax advantage out of doing so and no other advantage out of doing so. Again, one has a situation where you are not able to take the

same sort of advantage as other people have of building up a superannuation fund.

If you take those factors and put them in conjunction with a serious erosion of the pension, which recent steps I believe have led to, then we have a situation which is quite troublesome for all the reasons stated in Mr Justice Davies's submission. It is necessary to be able to attract to the courts people who are competent and who come from in effect the best performers in the private profession. It is becoming increasingly difficult to do that.

One of the attractions was the pension entitlement, and that I think was a very valid attraction, but for the reasons that I have expressed now it seems to me to be becoming less and less attractive. The preliminary advice that we have received is that the position of judges in relation to pensions and superannuation, if you really look at it objectively, is significantly worse than one would expect of similar people who are entitled to similar remuneration in just about every other walk of life. It is for that reason that, while I started off as very much in favour of the preservation of the existing pension arrangements, it seems to me that the changes that have been foreshadowed really bring into question whether that pension is still as valuable as it was and whether it will continue to attract the quality of candidates that I would hope to attract to the courts.

I would like to perhaps, having said that, pick up on one matter that was raised, I think by you, Mr Chairman. It relates to the age at which judges are appointed. There was a time in the history of the Family Court when judges were appointed quite young. I think that was partly—this is my assessment—due to a policy that was adopted at that time, partly due to the fact that there was then a retiring age of 65 instead of 70, as it now is, and partly due to the fact that this was a new court which expanded fairly rapidly because of the pressure of work that it was placed under when the court was set up. The pool of appropriate candidates was not big enough, and in effect it was necessary to recruit further down in the age groups to find suitable people to appoint.

If one looks at the recent appointments to the Family Court, which you can see on the last page of the document attached to our submission, it can be seen that there have been no appointments—certainly on that page, which goes back to 1990—of anyone under the age of 40. The range of appointments has tended to be more in line with the mid-40s type range. It is my personal view that that is an appropriate time to appoint judges. I differ with any comments that the Law Reform Commission may have made in their discussion paper about the desirability of appointing judges at an earlier age.

I think there is a tremendous amount of importance in experience that is gained in various aspects of life, including private practice. I personally think that an appointment in the 40s is a much more appropriate time to make a judicial appointment than earlier. I think one of the many problems that are associated with too early appointments also relates to some of the points I have attempted to make about the scheme, and that is to lock someone from the age of 35 into a scheme where they cannot get any entitlement until they are 60 is a very unsatisfactory way of going.

If that was to change, then it may be that a different approach could be taken. But again I think, as we see it in the family law area, we require people who not only have legal skills but also have human skills and human experience. Again, speaking generally of course—any generalisation could be open to exceptions—we feel that appointments in the 40s is still the appropriate time for judicial appointment.

I would like at this stage to invite Justice O’Ryan to make some comments. I thought it was interesting to get a perspective from him. As you will again see from that document, he is now aged 47 and was appointed to the Family Court in October 1994. He was a leading silk practising family law in Sydney over many years. He is obviously more directly affected, certainly by the RBL matters that I referred to, than older judges. Would you like to add to what I have said?

Justice O’Ryan—Thank you, Chief Justice. What I propose to say is in part simply an emphasis of what the Chief Justice has already said. You can have a situation where potential appointees and/or judges in their mid- to late-40s have had experience in excess of 20 years, including a period of time as senior counsel, and are thus suitable for appointment who may be still considered relatively young and have a dependent family.

As the Chief Justice has pointed out, one of the features of the pension scheme is that there is no commutability and no alienability about it. There are a variety of commercial and estate planning reasons which one would use superannuation for—or did at least historically. It is not available to judges at the present time, thus they are put into the position where they have to continue to maintain other forms of resources in addition to their salary and the ultimate pension they get on attaining the age of 60 with 10 years of service.

They have to retain things such as term life insurance and/or life insurance—and there are variables in relation to those both in cost and duration—and some form of investment. As Justice Davies has pointed out in the submissions on behalf of the Federal Court and as the Chief Justice has adverted to, there are difficulties about the latter because of the necessity of judges to withdraw from commerce, commercial circles. So there are limitations even in relation to the form of investment that they can have to provide for the exigencies of such things as a dependent family.

Thus there are additional costs to them in my opinion which I do not necessarily believe are reflected in the annual reviews of salary by the Remuneration Tribunal. I am not sure whether or not they allow for such things as judges for a period of time having to still make provision for forms of insurance and other investment because they do not have the scheme of retirement benefit that would provide for their heirs the capital sum which may be necessary for any number of reasons—having debt, having capital obligation to support children and the like.

It is true that historically one of the great attractions of the position was the

retirement benefit. It seems to me that what we are seeing is not only an erosion over a period of time in the actual salary received but also an erosion and potential for further erosion in what was one of the most attractive aspects of the job—namely, the ultimate retirement benefit.

CHAIR—Excuse me. The erosions you are referring to are, firstly, reasonable benefit limits and, secondly, the surcharge?

Justice O’Ryan—Yes, 62 per cent. The advice we have been given is—and thus it is one of the reasons why we are seeking to make a further submission—that even the dollar value is not now comparable to what would be available to persons who were deriving in private industry a similar salary.

CHAIR—Because of salary sacrifice?

Justice O’Ryan—A variety of things.

CHAIR—Are there any other matters, apart from salary sacrifice?

Justice O’Ryan—No. What we would seek to do is to have the opportunity to advert to any such further matters when our advice is clarified in the further submission.

In conclusion, I simply want to emphasise that, albeit there is and must be concern about diminution in the level of judicial remuneration—be it the salary received during service or retirement benefit—I am not so sure how attractive it is, both in a salary sense and in a pensions sense, to young appointees. And I anticipate that there will be a difficulty in the future, particularly if in fact, as discussed, they are going to be paying 62 per cent on their retirement benefits.

Chief Justice Nicholson—There is just one matter that I thought I should clarify. When I referred previously to the issue of there being no retirement or death benefit, it could be said that in an indirect way there is such an availability, because if judges forgo taking long service leave, which is forgoing an entitlement, they are entitled to take up to 12 months long service leave on payment on retirement, which is taxed at 33 per cent or whatever that rate is. But it is not really a retirement or death benefit; it is the fact that they have forgone taking leave they probably should have taken from the point of view of preserving not their sanity but their enthusiasm, in order to provide for some capital sum for their family. So, again, it is an inequitable system.

CHAIR—Have either of you gentlemen had the opportunity to discuss the problems of recruitment with the Attorney-General, the Hon. Daryl Williams?

Chief Justice Nicholson—I normally discuss these matters with Mr Williams in relation to each appointment. Without going into matters of confidential detail, we take

great care with each appointment; we take great care about who we should get. It varies a little from state to state, but we have been having more difficulty recently in finding suitable appointees, certainly from the bar, than was the case in the past. I do not say that it is necessarily a bad thing, because we have got some very good appointees from elsewhere, but I still agree that the main source of judicial appointees ought to come from the practising profession at this stage. And the less attractive the remuneration is, both in terms of salary and retirement benefits, then the more difficult it becomes to attract those people.

Senator ALLISON—Are you saying, Justice Nicholson, that the Attorney-General is aware of the problems?

Chief Justice Nicholson—I am sure he is, yes. I have certainly discussed it with him and with successive Attorneys-General.

CHAIR—I was referring to the surcharge because that brings a new dimension of reduced benefits, but His Honour Mr Justice Davies indicated that there may be some problem constitutionally in being able to reduce a pension if you eliminate clause 34.

Chief Justice Nicholson—Like him, I would not want to commit myself on that, and it is not an area in any event that I have given careful examination to. So I would be reluctant to comment without doing so. But I proceeded on the assumption that it would at least be constitutionally valid to impose such a surcharge on newly appointed judges of the Federal and Family Courts—and the High Court, for that matter. I proceeded on the assumption that, as far as new appointees are concerned, it would be constitutionally valid to impose such a surcharge. There may be arguments that I have not considered that would negate that, but that is the basis on which we have approached the matter.

CHAIR—That particular issue was not the question; it was the question of pension reduction as a result of the elimination of clause 34. I refer to the issues paper prepared by the Law Reform Commission, paper No. 20, in which they ask whether establishing a federal magistracy would provide a more accessible forum for smaller matters. If there were federal magistrates, should their superannuation be as it is for federal judges? I ask this question in the light of matters you have raised earlier. And is it constitutionally necessary that federal magistrates' superannuation be as it is for federal judges?

Chief Justice Nicholson—My answer to the second question would be no, it would not be constitutionally necessary. My answer to the first question is that I support a federal magistracy and I would hope to devise a better system of retirement benefits for the reasons I have already stated than the existing one, but I would hope that that would apply to judges as well.

There is perhaps one rider I could add to that, and that is that, if one looks at the English legislation, in 1993 it introduced a new scheme which actually codified a series of

different schemes that applied to different English judges, but the judges had the opportunity of opting into the scheme or remaining with their existing schemes as the case may be. That is always a matter that could be considered in looking at this matter. So, if someone for their own reasons considered that they wished to retain the earlier entitlements, they would be entitled to do so.

CHAIR—Have you a synopsis of the new English arrangements and, if so, could you make those available to the committee?

Chief Justice Nicholson—Yes, I will, certainly.

CHAIR—Thank you very much. I would appreciate that. I think you have covered in your presentation many of the questions that we would otherwise have asked. You have covered the issues very adequately and, of course, that is not surprising coming from a person in your position.

I would like to take this opportunity to thank you very much and invite you to make a concluding remark, if you wish, on the issues that have been raised as a result of the reference to the committee. We will certainly give them due consideration.

Chief Justice Nicholson—I do not think I can add to the remarks I have already made, Mr Chairman. Thank you for the offer. But, as I say, we will endeavour to produce with some speed a supplementary submission.

CHAIR—Thank you very much.

[11.55 a.m.]

WINTERTON, Professor George Graham, 5 Park Parade, Bondi, New South Wales, 2026

CHAIR—Welcome. Do you have anything to add?

Prof. Winterton—I appear in a personal capacity.

CHAIR—We prefer all evidence to the committee to be given in public but should you at any stage wish to give part of your evidence or answers to specific questions in private you may apply to do so and the committee will consider your request. We invite you to make an opening statement and, in doing so, you are at liberty to canvass the issues raised by other witnesses today or submissions that have been placed before the committee.

Prof. Winterton—I have read many of the submissions and, as I have mentioned to the secretary, I do not have any particular view on the policies of this issue, nor do I have any great knowledge on the issue of superannuation. As I understand it, I was invited to attend as someone who has studied issues of judicial independence and judicial remuneration and as someone who generally has some knowledge of constitutional law. In my introductory comments I will make a few obvious points and bring to bear a theoretical perspective, if you like.

Many of the submissions have focused on judicial independence, but there are two primary fundamental issues here. There is judicial competence—attracting competent, highly qualified candidates—and the issue of judicial independence. I understand that one of the issues the committee is looking at is to what degree a uniform governmental superannuation scheme might be appropriate and to what extent the judiciary are in a separate position. As I see it, the first issue, that of attracting competent, highly qualified candidates, is uniformly shared with all governmental appointments. You obviously want to attract the best candidates for all government appointments.

But the issue of judicial independence, which for the federal judiciary is constitutionally based, means that different considerations do apply. I agree with the submissions which have emphasised the need to look at judicial superannuation and judicial remuneration separately. I also agree with the submissions that I heard to the effect that although one hopes that the range of candidates to the judiciary will diversify and some of the people who might be considered in the future will be less well remunerated than those who are leaders of the bar, I agree with Chief Justice Nicholson that the leaders of the bar will inevitably be the primary source of candidates for the higher judiciary. I think that is what the community would want. It is inevitable that the great majority of appointments to the higher judiciary will come from the leading practitioners.

Therefore, the reality is that the level of remuneration, including the pension and the superannuation which are part of the package, will have to be high enough to attract them. This is a great problem. The experience throughout the world is that England, Canada, the United States, New Zealand and Australia all have the same problem. With economic difficulty—which on the whole seems to have left the bar earning quite well—you have the great problem of offering remuneration sufficiently high to attract the best candidates.

I agree also with the comments that have been made to the effect that the total package, including superannuation, is part of that. To diminish the superannuation side of remuneration would mean that you could not attract these quality candidates unless you considerably increased the basic salary, which I think would be politically difficult. That is a topic on which I am sure you are more expert than I. There is always the problem, as you know, that on many occasions when the Remuneration Tribunal has recommended increases the ACTU and others have opposed them. One of the ways in which the Remuneration Tribunal has managed to keep the level of actual salary within reasonable proportions is by taking into account, as other witnesses have mentioned, the reasonably generous pension.

Just two brief comments on specifics, if I may. As I understand it one of the issues you will be looking at is the question of whether asking judges to contribute to their pension, if I can call it that, or superannuation, would be compatible with judicial independence. I think there are several questions. I suppose the first fundamental question is whether one could request existing judges to contribute to their pensions. I think that would contravene section 72(iii) of the constitution; that would be a reduction.

The question could arise in respect of future judges. This issue has arisen in Canada. I mentioned to the secretary that I will give him some photocopies that I brought along. As a matter of interest, in Canada there is a national committee every three years that looks at judicial remuneration—analagous to our Remuneration Tribunal, except here it occurs annually and there it occurs every three years. The latest one, which would have been 1995, would have come out last year. As a matter of interest, the 1986 committee was in favour of asking judges to contribute to pensions, the 1989 one was opposed and the 1992 one was in favour.

Perhaps of more interest is that the Supreme Court of Canada has commented on this in one of the leading cases on the question of judicial independence—because the Canadian charter gives the right to trial by an independent tribunal. Quite often, Canadian courts have to consider whether certain arrangements concerning the judiciary are compatible with that guarantee or whether they impinge upon the constitutional right to trial by an independent tribunal. One of the questions that this case—*Beauregard* against the Queen—considered in 1986 was whether asking judges to contribute to their pension was compatible with judicial independence. Chief Justice Dickson said this:

On the institutional plane, judicial independence means the preservation of the separateness and integrity of the judicial branch and a guarantee of its freedom from unwarranted intrusions by, or even intertwining with, the legislative and executive branches. It is very difficult for me to see any connection between these essential conditions of judicial independence and Parliament's decision to establish a pension scheme for judges and to expect judges to make contributions toward the benefits established by the scheme (at 77).

Whether or not it is wise on the merits, as a matter of interpretation of the question of judicial independence we do have the authority of the Supreme Court of Canada. Asking judges to contribute to their pensions is not, in the view of the Supreme Court of Canada, incompatible with judicial independence. I mention that because Justice Olsson on page 5 of his letter does seem to suggest the opposite. So I think one has to take Justice Olsson's submission with a grain of salt.

The other general point I wanted to mention very briefly is the question of the problem that would arise if a contributory pension scheme were introduced for future judges, so that you would have judges of the same court on different arrangements. Justice Davies did suggest that this might conceivably be contrary to section 72(iii) of the constitution—that the notion of 'fixed remuneration' implied that there should be uniformity among all the judges of the court. With all respect, I would query that. As a matter of fact, in Canada and in New Zealand it does happen because of changes to the pension scheme that judges of the same court appointed before a certain date and after a certain date are on different pension arrangements. So there are precedents for it.

In terms of authority, I should mention that—

CHAIR—Could I just interrupt. In this case it will not be a different pension arrangement. The pension arrangement remains the same. The difference in this case is the taxation arrangements will be different.

Prof. Winterton—Okay. I see.

CHAIR—If you apply that, would your view be different from that which was raised by Justice Davies?

Prof. Winterton—No, my view would be the same as I have indicated. I am not totally familiar with the surcharge but as I understand it, without getting into the politics of whether one would call it a tax, it amounts effectively, probably in constitutional terms, to a general tax on all superannuation schemes. That issue has arisen several times. It arose in *Cooper* and the Commissioner of Taxation in Australia in the High Court in the early years. It has arisen in the Supreme Court of the United States twice with different results, but in the later case in line with *Cooper* and in fact mentioning *Cooper*—and that is to the effect that a non-discriminatory tax across the board without any ulterior motive would not contravene section 72(iii); it would not be seen as reducing remuneration. I know it would reduce the effective take-home pay. But, bearing in mind the purpose of

section 72(iii) and taking a purposive interpretation, I think the view of the High Court would follow the quite strong authority mentioned.

The Privy Council also made comments in the case of Canada but on a somewhat different provision. All those cases would suggest that it would not really contravene the constitution even to impose it now on current judges. As to inequality among the judges, I would think the position would be the same whether it was a tax which resulted in different arrangements or whether it was a contribution. The case I was going to mention is from the Appellate Division of the Prince Edward Island Supreme Court which took the view—again I can give the secretary the reference—that there is nothing inherently contrary to judicial independence—although it may be undesirable of course for reasons of morale and collegiality and so on—for judges of the same court to be on different arrangements. Those were just the introductory points I thought I would mention in relation to some general principles.

CHAIR—Thank you very much. In relation to the surcharge, do you see any difficulties in terms of its collection from constitutionally excluded funds with the states by virtue of section 114 of the constitution?

Prof. Winterton—I am sorry, could you just repeat the second part of the question.

CHAIR—I refer to section 114 of the constitution and the situation of constitutionally protected superannuation funds of the states by virtue of the fact that the states virtually own the property and it could be deemed to be a tax charge on the states. Do you think there will be a difficulty in terms of collecting from all sectors across the community, including certain employees, including public servants as well as judges, of certain constitutionally protected funds within the states?

Prof. Winterton—I do not think so. That provision has been interpreted, section 114, in various ways, but the overall approach, as I understand it—the most recent case being the fringe benefits tax case—is basically that it prohibits taxes where the criterion of liability is some relation between the taxpayer and the property, such as the ownership of property or leasing property. Here I think the criterion would be said to be operating a superannuation fund or a pension fund or something of that nature and not focusing particularly on a relationship to the property. In other words, the effect on the property would be rather incidental to the primary focus of the tax. So, while I think it would raise a legitimate issue and would need to be investigated, on the prevailing authorities I think it probably would not contravene section 114.

Senator SHERRY—On that point, the government is not proposing in its legislation before the federal parliament to tax—surcharge—state funds. It has requested the states to legislate themselves to tax their own funds. I put this position to you: what happens if the states refuse, and does it contravene the theme you have alluded to of

discrimination? We could quite conceivably have a situation where state employees are not taxed, federal Commonwealth public servants except for judges and apparently politicians—I do not agree with that but apparently politicians—are taxed and private sector employees are, and the tax is not applicable to all people earning more than \$70,000 a year.

Prof. Winterton—If the existing federal judges were exempt, there would not really be a problem under section 72, would there, because there is no reduction in their remuneration. I was merely suggesting that, although as I understand it the federal government has accepted that they should not impose this surcharge on existing judges—although I am not commenting on the policy of that—as a matter of constitutional law I think they actually could have. That is what I was really thinking of. As I understand your hypothesis, you are accepting—

Senator SHERRY—Let us accept that, although in his comments this morning Justice Davies was referring to the consequential difficulty of the legislation as currently structured in respect of politicians and judges not being caught by this new surcharge, although I think that can be fixed. But the situation where you have got a tax applying to one class of employees earning more than \$70,000 but not applying to in this case all state government employees around the country who earn more than \$70,000—isn't that discriminatory?

Prof. Winterton—It would be discriminatory against certain people and that would raise issues of policy, of course, and unfairness and equity, but I do not see that it would raise any constitutional issue. There are only two constitutional issues where discrimination in this context I think could raise a problem. One is the question of a discriminatory tax on judicial salaries. That is not raised. The other one could be a discriminatory tax on the states. As you know, the federalism implication of the state banking case and so on is that the Commonwealth cannot discriminate against the states. So I do not think that is affected either.

Now, if we had an equal protection clause or some guarantee of equality in the constitution, then I think that could be raised. As you know, in the High Court in *Leeth* you can count four out of the seven judges in favour of some sort of principle of equality, but it is not yet established, and I personally have great reservations about it. With that limitation in mind, if there is some constitutional guarantee of equality there could be problems with it. Subject to that, I would not have thought there were constitutional problems; but there would be policy and equity problems and that kind of thing, undoubtedly.

Senator SHERRY—But I cannot think of another tax—we raised this in government with Treasury—that applies to one class of employees who earn more than \$70,000 but does not apply to another class of employees, because they are state government employees, who earn more than \$70,000. That is the possibility we face. I

cannot think of a tax that applies in that way.

Prof. Winterton—No.

Senator SHERRY—It would be a somewhat unique outcome.

Prof. Winterton—Yes. From the policy point of view, it would obviously be extremely undesirable because you are concerned with policy as well as with constitutional law—far more with policy, I suppose. Obviously it would be grossly inequitable, and obviously the community would be extremely annoyed about it. But, subject to that equality point, I cannot see an actual constitutional barrier to it.

CHAIR—Would you like to examine the equity issues, particularly the issue of some of the courts appointing people at a younger age than has probably been the practice with the traditional courts? Would you also look at this question of equity in terms of not being able to access benefits before the age of 60?

Prof. Winterton—I think Justice Mullane's points that I read from his submission make a lot of sense. It does seem that it would be more sensible to have entitlements flowing from a certain period of service and subject to issues of disability and illness and that kind of thing rather than artificial years—10, 60 years of age and so on, which seems to be the current position. I must say that it appeared to me to be very sensible.

The other issue—although it is not, of course, a federal issue—is this issue that has arisen in Chief Justice Malcolm's submission. He mentioned that Western Australia was the only state, although I notice that the Connor/Marks report actually mentioned that Victoria was the only state, so I am not sure whether it is both or whether Victoria has changed it. Basically, the limitation in the state pension arrangements—which I realise are not your primary interest—is that if a retired judge practises, the person loses his or her pension. That, I think, is a serious problem that would need to be considered, especially if people are retiring at the earliest age they are able to retire, are still quite young and vigorous, and so on, and want to do something useful. I think that is another issue that has to be considered, but not, perhaps, here.

CHAIR—Does that not compromise the concept of the independence of the judiciary?

Prof. Winterton—To some extent. There is always the fear that if the judge intends to get employment, then this will influence the judge's behaviour towards the end of their term on the bench. They will curry favour, in theory—or it might appear that way—with certain firms or whatever. That is an issue that needs to be addressed. We have the situation where some judges have not joined firms, but have taken quite lucrative practices in mediation and so on. That whole issue does need to be considered.

Senator SHERRY—That is a policy problem, frankly, for all decision makers—private sector or public sector.

Prof. Winterton—It is for parliamentarians too, of course; that is absolutely right.

Senator SHERRY—It relates to executives from companies. I am not saying that it should not be examined, but it is a very broad policy issue that would need to be examined.

Prof. Winterton—Since it is not a limitation in the federal scheme, it is probably something that, mercifully, you do not need to trouble yourselves with, I suppose

CHAIR—In relation to a judge who may die prematurely, before reaching the age of 60 or before 10 years service, would you be in favour of a widow's type pension or a lump sum based on reasonable commercial superannuation provisions relating to completed service?

Prof. Winterton—I think so. I have to say that the details of the pension scheme and of superannuation are not my particular area of expertise but, since you have asked me the question, I would think so. I thought Chief Justice Nicholson's point about dependants who may not actually be children also had a lot of merit. But I must say that this is an issue that I would not profess any expertise on.

CHAIR—Thank you very much, Professor, for appearing before the committee and giving us your views, particularly in relation to court decisions in Canada. We look forward to receiving those supplementary submissions.

Prof. Winterton—Thank you.

Luncheon adjournment

[1.37 p.m.]

JACKSON, Mrs Maggie, Deputy Government Counsel, Civil Law Division, Attorney-General's Department, Robert Garran Offices, Barton, Australian Capital Territory

MOSS, Mr Richard Grant, Deputy Secretary, Attorney-General's Department, Robert Garran Offices, Canberra, Australian Capital Territory

WITYNSKI, Mr George, Acting Chief General Counsel, Attorney-General's Department, Robert Garran Offices, Canberra, Australian Capital Territory

CHAIR—Welcome. You are aware of the rules of evidence, that the evidence that you give to the committee shall be in public but if, at any stage, you wish part of your evidence or answers to specific questions to be in private, you may apply to do so and the committee will consider your request. Thank you for your submission. We invite you to make an opening statement.

Mr Moss—Thank you, Mr Chairman. We do not wish to make an opening statement. We do not wish to add anything to our written submission on the subject but, obviously, we are available to answer, to the best of our ability, any questions the committee might have.

CHAIR—Do your colleagues wish to comment on any of the submissions presented to the committee to date? Nothing on the Commonwealth Actuary, in relation to what he has said concerning to judges or parliamentarians?

Mr Moss—No, Mr Chairman.

CHAIR—It is the intention of the committee to issue two separate reports in relation to this particular inquiry, one relating to judges. The second, which will follow, will relate to parliamentarians. This morning Mr Justice Nicholson asked the committee for additional time to put in a supplementary submission. That request was granted, and it principally relates to taxation in relation to pensions that exceed the reasonable benefit limit.

Thank you very much. You are now in a position to be asked questions. Mr Witynski, I understand you would like to make some comments in relation to some amending legislation that was introduced very late in the parliamentary proceedings and that could have some impact on the surcharge legislation?

Mr Witynski—Yes.

CHAIR—Perhaps that might be useful for us examine because that is an issue that has a big impact in terms of the remuneration of judges. To the extent that it impacts on

them in any way, I would appreciate your explanations.

Mr Witynski—I will try to explain the impact of the legislation on Federal Court judges. Firstly, the legislation is quite complex and I will try to explain it simply. There is a package of four bills at the moment. Two of them deal with the imposition and collection of the surcharge generally and two of them deal specifically with the application of the surcharge to the Commonwealth.

The general acts do not purport to collect any money from the Commonwealth. That is by virtue of an amendment to the collection act. That is in proposed clause 33(a), which says:

Nothing in this Act makes the Commonwealth liable to pay any amount.

That is payment under the general imposition act. The position of the Commonwealth is essentially regulated by the two remaining bills that I referred to: one which deals with the application of the surcharge to the Commonwealth on a notional basis, and a second proposed act that authorises the reduction of benefits to beneficiaries under schemes in relation to which the Commonwealth is a manager or a trustee.

The significant thing in relation to the bill that authorises the reduction of benefits under Commonwealth schemes is that there is a provision which says in clause 4(2) that the reduction of members' benefits shall not apply if its application would or might result in a contravention of the constitution. That would include, in our view, section 72(iii), which prevents the diminution of remuneration of High Court or Federal Court judges.

In our view, there is a significant risk that the application of the legislation to Federal Court judges would be in breach of section 72(iii), at least in relation to existing judges but not in relation to judges that may be appointed in the future. So the effect of this subclause would be to enable the act to be administered consistently with section 72(iii) and, as I have said, the legislation would be administered, on our advice, so that it does not apply to existing judges of the Federal Court but it will apply in relation to future judges.

CHAIR—You say that it would be administered. Do the words of the enabling legislation enable that distinction to be made?

Mr Witynski—Yes. By virtue of this constitutional cap, the legislation will be incapable of applying in those circumstances which would be contrary to the constitution, including because of section 72(iii).

CHAIR—Does that need to be spelt out in the legislation itself?

Mr Witynski—I do not consider that it does. If the legislation were applied

contrary to section 72(iii), someone could seek a declaration from the court that it was not being validly administered. The effect of this is to preserve the validity of the legislation. But there is no intention to apply it in circumstances which would be contrary to section 72(iii).

Mr Moss—I should add that, as I understand it, the government has made it clear that the exposition that Mr Witynski has just given as to the intended effect of the legislation is the government's intention and that it will be so administered.

CHAIR—Yes. I am aware of the government's intention to exclude currently serving judges, but I flag a possible concern I may have that there may be a need to signify that distinction in the amending legislation.

Mr Moss—We would not agree with that, Mr Chairman. Our view, as Mr Witynski has said, is that the legislation currently has the effect we have indicated.

Mr Witynski—I do not see any legal objection to amending the legislation so that it expressly excludes presently serving Federal Court judges, but that is a matter of policy for the—

Mr Moss—That would be a matter for the Treasurer.

Mr Witynski—The essential thing is that the legislation not be struck down.

Senator SHERRY—There are a lot of battles on all fronts on that issue.

CHAIR—Do you think there is a problem associated with the amendment arising from Mr Rose's proposition to remove clause 34?

Mr Witynski—That clause has now been removed or is proposed to be removed but, in any case, that—

CHAIR—Have you got legislation there before you which actually does the removal?

Mr Witynski—Yes. I have a copy of the text of that.

CHAIR—That is one of the four bills you were referring to, is it?

Mr Witynski—The removal of clause 34 is by way of amendments that have been moved by the government. The bills are now in the Senate. They were moved in the House, and they included the removal of clause 34. I might point out that clause 34 is significant in relation to the general position, not including the position of Commonwealth

funds or schemes.

CHAIR—So you believe your amending legislation is sufficient to enable the reduction in parliamentary and judicial pensions for future appointees to the bench?

Mr Witynski—Yes.

Mr Moss—I should say, Mr Chairman, that it is not our legislation; it is the Treasurer's legislation.

CHAIR—What is the difference?

Mr Moss—We are from Attorney-General's Department, Mr Chairman. It is not our legislation; it is legislation moved by—

CHAIR—But don't you oversight the constitutional validity of the legislation which Treasurer might bring up to you?

Mr Moss—We provide advice to the Treasurer, yes, but it is not our legislation. It is legislation of the Treasurer.

CHAIR—But legislation would not be going forward without your assent and approval, would it?

Mr Moss—That is a matter entirely for the government. But there is a difference between the Attorney-General's Department providing advice on legislation, which it does constantly, and legislation which is our legislation. This is the former, not the latter.

CHAIR—But, from a parliamentary perspective, I would expect there to be a collegiate responsibility in terms of legislation that is presented to the parliament. I would be most concerned if, for example, legislation went through to the parliament that did not have your endorsement.

Mr Moss—I apologise, Mr Chairman, if I gave the impression that there was not such a collegiate attitude to government legislation—of course, there is. I was merely making the point that your statement implied that the legislation was legislation of this portfolio, that is, that it was introduced and initiated by the Attorney-General, and that was incorrect. That was all I was intending to do.

CHAIR—The effect of that is essentially one of semantics and, so far as the parliament itself is concerned, we have confidence that the legislation that went forward, that has been prepared by the Treasury, has your endorsement and approval in terms of dotting the i's and crossing the t's.

Mr Moss—With respect, Mr Chairman, it is rather more than a matter of

semantics in that, as far as the policy is concerned, the policy of the superannuation surcharge legislation is for the Treasurer and his department.

CHAIR—Granted.

Mr Moss—We would not seek, in any way, to comment on or be involved in the policy of that legislation because it is not policy for which we have any responsibility.

CHAIR—But in terms of translating that into robust law that can stand the test of time and stand before the courts of the land, you would stand behind the legislation in terms of robustness and its legality.

Mr Witynski—For the benefit of the committee, I wonder whether I can explain what happens in practice in relation to the preparation of legislation. Generally speaking, we are not requested by an administering department to provide a general constitutional clearance of legislation that is being prepared. That may or may not be a good thing, but that is not part of the system as it presently exists. Our advice is sought generally by the Office of Parliamentary Counsel, all of whom are experienced lawyers themselves with a very good working knowledge of the constitution. They very often refer the legislation to us in relation to particular issues or occasionally generally. Our involvement in this legislation has been in relation to particular issues that have been raised by the drafter or elsewhere.

Senator SHERRY—So when the package of legislation was originally prepared and presented to the parliament, at that stage had you provided a general opinion? I don't want to know the opinion.

Mr Witynski—Yes, we had provided several opinions.

Senator SHERRY—You have alluded to clause 34. Was an opinion sought on that following the opinion of Mr Rose five or six weeks ago?

Mr Witynski—Yes, there was.

Senator SHERRY—So you were consulted on the redrafting of the amendments in respect of clause 34?

Mr Moss—Senator, I think the position should be correctly described by saying that we were not consulted on the drafting but that we would have provided advice upon which, presumably, the drafting was based.

Senator SHERRY—I know you cannot disclose to us the advice you gave, but was the issue of clause 34 dealt with in the original consultation when the original

legislation was drafted?

Mr Witynski—Yes, we gave advice on clause 34.

Senator SHERRY—We are going to have two classes of judges, effectively, with different retirement incomes as a consequence of the changes?

Mr Moss—Yes, Senator.

Senator SHERRY—Does this legislation apply to state judges?

Mr Moss—I regret, Senator, that that is a question which you would need to address to the Treasurer.

Senator SHERRY—But my understanding is that this legislation on the surcharge does not apply to any state government employees. Surely you must know whether that is correct or not.

Mr Witynski—I understand that that is an outstanding issue for the government. No decision has been made as to how to address the application of the surcharge to state schemes.

CHAIR—So we are going to have a body of people outside the scope of the legislation, as you see it, at the moment?

Mr Moss—That may or may not be the case, depending on what the government decides.

CHAIR—Would it be equitable if we have federal judges in a worse tax position than state judges? That is the ramification that would develop from such a situation.

Mr Moss—I am not wishing to be evasive, Mr Chairman, but I think I had better respond to that by saying that that is a matter of policy which is one for the Treasurer.

Senator SHERRY—But isn't it a matter of fact that existing Federal Court judges will be exempt, new Federal Court judges will not be exempt and there is a question mark over state judges and all general state government employees at the present, because this legislation does not go to that area?

Mr Moss—That is true, Senator, yes.

Senator ALLISON—What kind of mechanism is required for state judges and others who will be affected?

Mr Witynski—There are constitutional issues which arise in relation to the application of the legislation to state schemes and to state judges. I understand that no decision has been made as to how that problem should be addressed.

Mr Moss—I add to that by saying that the department has provided quite complex advice on that issue on the question of the constitutional validity or otherwise of any legislation which sought to impose or purported to impose a surcharge on state employees, including state judges.

CHAIR—So we could be faced with further amending legislation in relation to the surcharge to cover the situation of the states?

Mr Moss—As I say, Mr Chairman, I cannot answer that. I just simply do not know. That is a matter for the Treasurer and the government.

Senator SHERRY—As I understand it, the Treasurer has clearly stated on a number of occasions that the states are expected to legislate themselves. That is a clear public statement. When, we do not know. I have not heard any more about it.

Mr Moss—I am aware of the statement, Senator.

CHAIR—Are you aware of the response from the states, if any?

Mr Moss—No.

Mr Witynski—I understood it was discussed at the last Premiers Conference, but I do not know what the outcome was.

Senator SHERRY—Has your department had any meetings or discussions with the states or your state counterparts on this issue?

Mr Moss—As I understand it, Senator, it has been raised in the Standing Committee of Attorneys-General, yes. There was a general discussion about it.

Senator SHERRY—But there is no agreement on how to proceed in respect of judges?

Mr Moss—Not that I am aware of, Senator, no.

CHAIR—In relation to the removal of clause 34, it has been submitted to the committee that the legislation may be invalid because of a lack of subject matter. Would you like to comment on that?

Mr Witynski—I am not sure that I understand the issue raised by that comment. Clause 34 was viewed as a collection mechanism. With its removal, the surcharge continues to apply, but its collection will not be specifically addressed by the legislation. That will be left to the trustees and managers of the legislation.

CHAIR—It is based on the premise that there is no such thing as a notional contribution. Of course there is no existing Australian actuarial practice in relation to contribution to the judges' pension scheme. That is why we asked the question. Would you take that on notice?

Mr Moss—Perhaps we could take that on notice and have a look at the issue and let you have a response.

CHAIR—We would appreciate that. What would be the implication from a constitutional point of view, particularly with section 72 of the constitution, if the judges' pension scheme was altered?

Mr Moss—If the alteration was such as to involve a reduction in the remuneration of the judges, then it would be contrary to section 72 of the constitution. That is a simplistic answer.

CHAIR—So if we introduced some benefits at an earlier age or changed the age structure or lowered the age eligibility criteria, it would not impinge in any way on any aspects of the constitution?

Mr Moss—It would not seem so. If those measures had the effect of increasing or improving the benefits or remuneration available to judges, that would not clearly be contrary to the constitution.

Senator SHERRY—But it could adversely affect any existing judge?

Mr Witynski—That is right. This is on the basis that pension entitlements are part of remuneration for the purposes of section 72(iii) and therefore cannot be diminished during the continuance in office of the judge.

CHAIR—The issue of independence of the judiciary is a very strong thrust that has come through in all the submissions. Judges draw a connection between adequate remuneration and independence and include their pension in such a remuneration. I would like your views on whether there is a real relationship between remuneration and independence.

Mr Moss—Clearly we would agree with the judges' view in that regard. I think it is a well-established proposition that there is or could be a direct relationship between remuneration and independence, in two senses. Firstly, it is considered appropriate, and

has for a long time, that judges should be paid a remuneration both in respect of their working lives and their retirement lives which is sufficient to make them independent within the generally accepted meaning of the word. Secondly, any ability of government to affect adversely a judge's remuneration—again either during their working life or their retirement—may be either actually or be perceived to be a means of influencing judges.

Senator SHERRY—Does that prohibition in the federal constitution apply to state judges?

Mr Moss—No.

Senator SHERRY—Each state has a constitution. Are you aware whether any of the state constitutions have a prohibition on reducing the remuneration of judges?

Mr Witynski—So far as I know they do not, but I cannot tell the committee—

Senator SHERRY—What about where a state judge does work in the federal jurisdiction? Does that not happen from time to time?

Mr Moss—Yes, it does, but that does not mean that the constitution applies to them because it applies to federal judges only.

Senator SHERRY—What is their status? If they are working in the federal jurisdiction they are not employees of the Commonwealth presumably; they are state government employees, but they are doing the work in the federal jurisdiction?

Mr Moss—They are state judges exercising federal jurisdiction under arrangements.

Senator SHERRY—So you do not believe in that case that they fall under the federal constitution prohibition?

Mr Moss—No.

Mr Witynski—I do not know what the precise arrangements are in relation to those judges. Section 72 of the constitution deals with the justices of the High Court and of other courts created by the parliament. I do not know whether or not state judges thereby become judges of federal courts.

Mr Moss—I think the answer to that is that they do not. They are not members of a court created by the parliament in that they do not receive commissions in the Federal Court. They remain judges of the state court but they exercise federal jurisdiction under arrangements.

Senator SHERRY—I have had my attention drawn to the issue of the Cable case. I have to say that I am not a lawyer and I am not familiar with it. Would state judges have an implied constitutional protection against the reduction of their remuneration?

Mr Witynski—As a result of the Cable case?

Senator SHERRY—Yes.

Mr Moss—I think I would like to take that question on notice.

Senator SHERRY—It does seem to me absurd where you have state judges on occasions doing federal work, whatever it may be, with a different set of protections and entitlements to federal judges.

Mr Witynski—That does not make much sense.

Senator SHERRY—I would have to say that it is not an insignificant absurdity but it is one of the least absurd things about the whole legislation. But that is another set of issues.

CHAIR—In the papers this morning Sir Anthony Mason was reported as warning of a growing difficulty in getting top barristers to accept appointments as judges and that as a result there were reasons for anxiety about the quality of the judiciary in the years that lie ahead. In light of pending legislation, would you like to comment?

Mr Moss—In the light of?

CHAIR—In light of the surcharge and in the light of reasonable benefit limitations and other issues affecting retirement pensions.

Mr Moss—It is true that experience demonstrates that salary and remuneration generally and pension entitlements are important in the attraction of suitable people. There have been instances of difficulty in getting appropriate appointees to agree to be appointed where the gap between their current earnings and their earnings as a judge is very great. Traditionally, in that context, the pension entitlement has been a significant amelioration of that problem. I do not have any personal evidence that it is getting worse.

CHAIR—If you were going to take several hundred thousand dollars off an element commuted for the purpose of paying a surcharge you are going to have a significant reduction in the final pension benefit, aren't you?

Mr Moss—There will certainly be a reduction. In so far as there is a reduction there will be a reduction in the ability of the pension entitlement to ameliorate the effect of the reduction in salary, but I think the effect on the overall ability to attract suitable

people remains to be seen.

CHAIR—Given that judges cannot salary sacrifice, they are not really in a position to protect what their pension entitlements might be in the same sense that a person in private enterprise may.

Mr Moss—That is true.

CHAIR—Have you been given figures by the Actuary to indicate the lump sum commutation amount that would be payable to the Commonwealth in discharge of the surcharge obligation for a serving judge who had completed, say, 12 years?

Mr Moss—No.

CHAIR—What sort of figures are we looking at?

Mr Moss—I would have to take that on notice. We have not done such a calculation.

CHAIR—I think you will find they are quite considerable. Have you discussed the question of future recruitment to the judiciary with the Attorney-General, in the light of surcharge legislation?

Mr Moss—Of course. The question of recruiting judges is a quite frequent topic of conversation with the Attorney-General.

CHAIR—Have you undertaken any studies of patterns of post-retirement work or employment of judges, and whether such activity is desirable or undesirable?

Mr Moss—No, we have not undertaken any studies.

CHAIR—Are you aware of any studies that have been undertaken by other groups?

Mr Moss—No, I am not. We obviously have anecdotal evidence of various kinds of post-retirement employment that some judges have engaged in—

CHAIR—Would you like to make those available to the committee?

Mr Moss—I am not suggesting this is written down anywhere. I was merely referring to personal experience.

CHAIR—What are some of those anecdotal memories that you have?

Mr Moss—Obviously, an activity that judges sometimes engage in is the undertaking of what might be referred to as quasi-judicial activity, especially in the alternative dispute resolution field. Several well-known retired judges engage in that sort of work. I think our view, and the general view, of that would be that it is entirely unobjectionable and that there is no problem with it.

On the other side, as you are probably aware, various bars have rules about retired judges engaging in practice in the particular courts in which they were judges, for varying periods after their retirement. Obviously, there appears to be a general view that that is undesirable, at least for some period after retirement. That period may vary according to the length of service of the judge. Beyond that, I would not like to venture an opinion.

Senator ALLISON—We heard this morning from a number of judges who felt the qualifying age of 60 and the 10-year service period raised a lot of anomalies and inequities. Could you perhaps give the committee some idea of the background behind those qualifying requirements?

Mr Moss—I am not sure of the background, Senator. All I can say about that is that those requirements have been there for many years. What I can say is that it would seem undesirable, or at least risky, to enable retirement prior to age 60. That could encourage active and able judges to retire earlier than they do now, when the aim of the government clearly would be to keep experienced, able and active judges on the bench for as long as possible. So I would think that any proposal to enable judges to retire prior to age 60 would have to be examined very carefully from that point of view.

Senator ALLISON—You would agree, however, that judges who do retire before the age of 60 are at some disadvantage financially? They do not have the same opportunity to build superannuation contributions.

Mr Moss—Yes.

Senator ALLISON—So do you not see that it might be reasonable to have a review?

Mrs Jackson—I think there is another aspect to what Mr Moss was saying about retaining judges on the bench. That is that if the judiciary were to become merely a stepping stone in a person's career, there is a risk that judicial independence would be infringed because of a concern that people are, perhaps, making decisions which are favourable to their future career prospects in business, in industry, as politicians or whatever. I think the view really is that expertise should be retained and independence secured by retaining people within the court system so that there is not that concern that they are in fact building a future career for themselves elsewhere.

Mr Moss—I think that is absolutely right and that is part of the view of a judicial

appointment as being the pinnacle of a person's career and not something that is merely a staging post on to some further career. In general—although of course there are occasional exceptions—a judicial career should be seen as the pinnacle and the end of the career, with a guaranteed retirement income after that, so that there can be no question of there being any lack of independence.

Senator ALLISON—I think I understand the arguments, but I am wondering whether the formula needs to be revisited, whether you are satisfied that 10 years and age 60 is still appropriate, given that you suggest there is no recent background to explain why those figures apply. Is it worth while looking at alternatives?

Mr Moss—I guess that is certainly the case, Senator. Nothing is ever perfect. It may be that there are aspects of the pension scheme which need to be revisited. Perhaps it could be made more flexible to allow particularly for people who are perhaps appointed at a younger age and therefore have a long service but are still under the age of 60. I can perhaps see a case for looking at that. In that regard, obviously, we will be looking closely at any recommendations this committee might make.

Senator ALLISON—But you have not considered that and made any recommendations in your submission?

Mr Moss—No, we have not, Senator. I have to say that, with our current workload, judges' pensions have not been a high priority issue for us because the Attorney-General and the government have not asked us to examine it in terms of some sort of general review. That may be the case, particularly having regard to the report of this committee, but up to date it has not been a high priority issue.

Senator ALLISON—The chair might want to add to this, but I think that might be useful to the committee, seeing that it is a fairly big issue in this work for us to have a view from you as to whether some adjustments ought to be made. Perhaps through you, Chair, we could ask if the department could look at that question.

Senator SHERRY—Taking into consideration the evidence that you have given, and the clear emergence of two classes of retirement incomes for judges—those who are currently federal judges and those who will be federal judges—because of the surcharge, for example, it would seem to me that if there are problems in attracting people to the judiciary at the moment it is going to be made worse. I would not have thought that it is going to improve because of the surcharge.

Mr Moss—The only response I can make to your request, Senator, would be that we would have to consult the Attorney-General as to whether we should lift this issue to a higher priority and develop some view on possible reforms. That would be a matter for the Attorney-General to determine.

Senator SHERRY—On this general theme, is it a problem for Attorney-General's to attract and maintain legal expertise of sufficient calibre?

Mr Moss—You mean in the judiciary, Senator?

Senator SHERRY—No, I'm talking about in the department.

Mr Moss—I would have to say that it varies, obviously, but in very broad terms no, we have not had a particular problem in attracting high quality people at the bottom end, if I can put it that way. While we have over time lost, as any organisation does, some high quality people, we've always been lucky enough to have sufficient high quality people to replace them. I'd have to say generally the answer to your question is no, we haven't had a particular problem in that regard.

Mr Witynski—I would say that many people are attracted by the sheer interest of working in public law, especially constitutional law. Until recently, the Attorney-General's Department offered one of the few avenues for working in those areas. That, of course, may change in the future.

Senator SHERRY—Do you think that enthusiasm will continue at the same level if people at that level are required to pay the surcharge as well?

Mr Witynski—I couldn't venture a view on that.

Mr Moss—I guess the answer to that, Senator, is that they will be in no different position from their private sector counterparts in that regard.

Senator SHERRY—We are not quite sure about that because you've got a defined benefit fund and a lot of legal practitioners in the private sector don't have a defined benefit fund and we're not sure of the effect of the surcharge on defined benefit funds because the actuaries can't tell us. But, given that remuneration in the public sector is generally lower than in the private sector, any diminution of remuneration in the public sector must inevitably put pressure on people to consider career alternatives.

Mr Moss—I guess that's generally true, Senator, but there are so many variables in that equation that it is difficult to give you a precise answer. Obviously, as Mr Witynski has implied, remuneration has never been one of the major attractions to lawyers working in the public sector. It's generally been a matter of work satisfaction and interest in the policy and constitutional areas, et cetera. I guess the other factor in all of that is that the government is moving towards reformed Public Service industrial relations arrangements, the results of which we are yet to see.

Senator SHERRY—Are you suggesting that you'll end up with more pay and conditions?

Mr Moss—One can always hope, Senator.

Senator SHERRY—I admire your optimism. I wouldn't share it. When the budget allocations of the total department have been reduced, it would be somewhat difficult.

CHAIR—It has been suggested that further legislation may be required to obtain a standard method in terms of the commutation of a pension to a lump sum for the purpose of paying the surcharge. Have you had any discussions with the Commonwealth Actuary in relation to the requirements for such legislation in relation to judges?

Mr Moss—No, Senator, but as I've said previously, because it isn't our legislation there is no reason why we would. That doesn't mean to say the Treasury, whose legislation it is, has not had such discussions. They may have. I'm not aware of that. But we have not been involved in such discussions.

CHAIR—Let me put it another way: is there a need for legislation to enable a portion of a pension to be commuted to a lump sum for the purpose of meeting the surcharge?

Mr Moss—I do not know the answer to that.

Mr Witynski—This is in relation to those judges to which the legislation could constitutionally apply?

CHAIR—Future judges.

Mr Witynski—I think there is an issue in relation to the discretion as to how benefits are reduced in accordance with the legislation which deals with the reduction of benefits under Commonwealth schemes; that is, how it will be done. I understand that this also is an outstanding issue for the government. I understand that consideration is being given to additional legislation, but I am not aware of any decision in relation to that.

CHAIR—Could you outline the scope of that proposed legislation to deal with the reduction of benefits arising from the payment of the surcharge as it applies to judges?

Mr Witynski—I understand that no legislation has been drafted in relation to judges as yet, so I cannot—

CHAIR—Can you tell us something of the sorts of issues that we as a committee may have to look at?

Mr Witynski—We have not been involved in the development of the legislation, so I am not able to tell the committee what the particular issues might be in relation to that legislation. I think it is primarily a matter for the Department of the Treasury and the

Department of Finance.

CHAIR—So you are suggesting that, perhaps before we conclude our evaluation on the impact of the surcharge and our terms of reference in relation to judges, we should pull in representatives from Treasury and the ISC, particularly the Actuary?

Mr Moss—If you wanted to discuss the policy of that legislation, you would need to discuss it with the Department of the Treasury.

CHAIR—I do not necessarily wish to discuss the policy. As a committee, we want to ensure that there is a consistent policy applying federally and within the states in terms of how the commutation for the purpose of meeting the surcharge obligation is going to be made and in terms of consistency from year to year.

Mr Moss—As I have said, that is not a matter for the Attorney-General's Department. That is a matter for the department whose legislation it is—the Department of the Treasury. It is not a matter for the Attorney-General's Department. It is not our legislation.

CHAIR—I accept that. Should the judicial pension scheme be made contributory for judges appointed in the future, would it then be unconstitutional to pay judges different levels of salary depending on whether or not they made a contribution to their pension scheme?

Mr Witynski—Are you adverting to the problem of different remuneration for different judges?

CHAIR—Yes.

Mr Witynski—I do not believe that would raise a constitutional problem.

CHAIR—Could you give us any cases that would support that?

Mr Witynski—I am not aware of the issue having been discussed in any cases.

CHAIR—So constitutionally it is possible to have judges having different effective remuneration levels?

Mr Witynski—I believe so. I believe the sole restriction is that contained in section 72(iii), which merely prevents the remuneration that applies to a judge on his or her appointment from being diminished during their continuance in office.

CHAIR—Do you think it is likely to cause some frictional problems, morale problems, amongst judges? Should such differentiations be around?

Mr Moss—It would depend, I would suggest, on the degree of the differentiation and how it was applied, but I would surmise that the judges would not welcome it.

Mr Witynski—Presumably they would also accept the appointment with their eyes open.

Senator SHERRY—But if two people are doing the same work and one is earning considerably less than the other, that does cause problems. It is human nature. They might do it with eyes open but it is still human nature, I would have thought.

Mr Moss—As I said, I am sure they would not welcome it.

CHAIR—Particularly as it would be an after-tax payment. As there are no further questions, I thank you very much. Sorry if we have put some difficult questions your way, but I think you have opened one or two more doors that we might have to pursue to conclude our inquiry.

Mr Moss—We will let you have information on the matters we took on notice as soon as we can.

Committee adjourned at 2.30 p.m.